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CALIFORNIA REPORTER

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SECOND SERIES

31 Cal.2d 30

MANN v. BOARD OF MEDICAL EXAMINERS OF THE STATE et al.

S. F. 17526.

Supreme Court of California, in Bank.
Dec. 2, 1947.

1. Physicians and surgeons 🔑4

The granting of reciprocity certificates for practice of medicine over 25-year period to nine graduates of medical school which had been disapproved by Board of Medical Examiners did not constitute de facto or qualified approval of school, so as to entitle graduate of school, who had been admitted to practice of medicine in three other states to a reciprocity certificate without an examination, particularly where seven of the nine had taken an examination. Business and Professions Code, §§ 2000 et seq., 2168.5, 2171.

2. Physicians and surgeons 🔑4

The formal and deliberate action of Board of Medical Examiners in disapproving a medical school could not be nullified by less formal or deliberate action, nor could nullification be established except by strongest kind of showing, clear, convincing and unequivocal. Business and Professions Code, § 2000 et seq.

3. Mandamus 🔑168(2)

In mandate proceeding to compel issuance of reciprocity certificate to practice medicine to applicant who was graduated from an unapproved medical school, applicant had burden of proving his eligibility under statute. Business and Professions Code, §§ 2310, 2320.

4. Physicians and surgeons 🔑5(1)

Even if administrative practice of Board of Medical Examiners of admitting graduates of unapproved schools to examinations in cases of showing of exceptional circumstances was not discontinued in 1940, denial of reciprocity certificate to graduate of unapproved school was not an abuse of discretion where there was no showing that denied applications of 1940 and 1941 of such graduate contained a statement of exceptional qualifications or circumstances. Business and Professions Code, §§ 2000 et seq., 2168.5, 2171.

5. Physicians and surgeons 🔑1

The state has plenary power to regulate the practice of medicine.

6. Action 🔑36

Where at time of filing of mandate proceeding to compel issuance of reciprocity certificate to practice medicine to applicant who was graduated from an unapproved medical school, only course open to petitioner was an action in superior court to compel board to approve such school, proceeding would be continued as an action under such statute, petitioner being permitted to amend his pleadings accordingly. Business and Professions Code, §§ 2168.5, 2174, 2316.5.

◆

Appeal from Superior Court City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandate proceeding by Nathan Mann against the Board of Medical Examiners of the State of California to compel the board to issue a reciprocity certificate entitling him to practice medicine and surgery. From a judgment for the petitioner, the respondents appeal.

Reversed with directions.

Prior opinion 176 P.2d 708.

Robert W. Kenny, of San Francisco, Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Lloyd W. Dinkelspiel, Louis Heilbron and Heller, Ehrman, White & McAuliffe, all of San Francisco, for petitioner-respondent.

CARTER, Justice.

Defendants, the Board of Medical Examiners of the State of California, and the members thereof, appeal from a decree in mandamus directing the annulment of an order made by the board denying petitioner's application for a direct reciprocity license to practice medicine and surgery in this state.

Petitioner studied medicine in the Chicago Medical School from 1932 to 1936, and graduated with the degree of Doctor of Medicine in 1936. He served for a year as an interne in a Chicago hospital, and was admitted to practice in Illinois in 1937. The same year, after a written and practical examination he was admitted in Massachusetts, and in 1940, after a written examination, he was admitted in Texas. In 1940 he applied unsuccessfully in this State for a direct reciprocity certificate; in 1941 he applied to take an examination but his application was denied.

In April, 1945, he filed a second application in this state for a direct reciprocity certificate based upon his Illinois license. The board granted his request for a hearing, but thereafter denied his application upon the ground that he had not "shown to the satisfaction" of the board compliance with section 2171 of the Business and Professions Code, in that he had "failed to establish that he completed a resident course of professional instruction at a school approved by" the board.

On September 13, 1945, petitioner instituted the present proceeding in the superior court, seeking a peremptory writ of mandate to compel his admission to practice in this state by direct reciprocity, or such other and further relief as might be meet and proper in the premises. He alleged, in addition to the facts above stated, that his credentials showed good moral character; that in March, 1944, he was commissioned as an officer in the Army Medical Corps; that on September 15, 1938, he had been appointed to active duty as an acting Assistant Surgeon with the United States Public Health Service and served as such until about July 1, 1940. He further alleged that up to and including the time of his graduation from the Chicago Medical School, and thereafter, and at the present time, both that college and its graduates fully complied with the standards set by law in this state, and that many of the graduates had been admitted to practice in this state under direct reciprocity, without being required to take any written or oral examination for licensure. Issue was joined on these allegations and a full hearing was had.

The court found that petitioner's allegations were true; that the Chicago School at the time of petitioner's attendance and graduation was approved by the board, and that at the time he was admitted in Illinois, Massachusetts, and Texas, the requirements of the medical licensing authorities of those states were "not in any degree or particular less than those required for the issuance of a similar certificate" in this state. The court concluded that defendants were without jurisdiction to deny petitioner a direct reciprocity license to practice medicine and surgery in this state, and that their failure to do so was arbitrary, discriminatory, and constituted an abuse of official discretion. Upon these conclusions a decree was entered directing issuance of a peremptory writ of mandate as prayed.

The main question is that concerning approval of the Chicago Medical School, from which petitioner graduated. Concededly there was never an express approval of that school. Petitioner's theory, shown by his pleadings and adhered to on the trial of the cause, is that there was an implied or de facto approval of the school by reason of the fact that during the years subsequent to 1920 a number of its graduates were admitted to practice in this state. Stating the contention another way, it is claimed that the administrative practice of the board in admitting graduates of unapproved schools related back and gave a qualified approval to such schools and that this administrative practice was within the authority conferred upon the board by statute.

There are a number of pertinent statutory provisions found in Chapter 5 of the Business and Professions Code dealing with the subject of "Medicine".

Among the general provisions of Article 1 are found section 2010: "Whenever any requirement is provided for any certificate, it shall be satisfied in a manner satisfactory to the board," and section 2012: "Whenever any requirement is provided for any certificate relating to a school or hospital, the school and hospital shall be ones approved by the board."

Section 2118 of Article 2, entitled "Administration", empowers the board to enter into contracts of reciprocity with other states wherein the standards are not "in any degree or particular less than are the standards of this State."

Article 4, dealing with "Applications Generally" contains, among others, the following provisions:

Section 2168: *"All applications,* except one that is based upon a diplomate certificate issued by the National Board of Medical Examiners of the United States, shall contain * * *

"(a) Testimonials of good moral character satisfactory to the board.

"(b) Each diploma issued by some legally chartered school approved by the board. The requirements of the school shall have been at the time of granting the diploma in no degree less than those required under this chapter or by any preceding medical practice act at the time that the diploma was granted."

Section 2171: *"All applicants for any certificate* shall file evidence satisfactory to the board, showing each legally chartered school, approved by the board, in which a resident course of professional instruction was pursued covering the minimum requirements provided for the particular certificate for which the application is filed."

Section 2173: "The board shall approve every school which complies with the requirements of this chapter for resident courses of professional instruction and shall admit every applicant to the examination who complies with the requirements provided for the particular certificate for which his application is filed. Nothing in this chapter prohibits the board from considering the quality of the resident courses of professional instruction required."

Section 2174: "If any school is disapproved by the board or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court against the board to compel it to approve the school or to admit the applicant to examination or for any other appropriate relief. In such an action, the court has full power *to investigate and decide all facts anew without regard to any previous determination by the board.* * * * " [Emphasis added.]

In Article 5, dealing with "The Physician's and Surgeon's Application" is section 2190, providing that: "Every applicant for a physician's and surgeon's certificate shall comply with all the provisions of this article, in addition to the requirements of Article 4, unless the requirement is one applicable to a particular class of applicant for this certificate"; and section 2192, providing that: "Each applicant shall show by evidence satisfactory to the board that he has attended four resident courses of professional instruction in a school or schools of the United States or Canada, approved by the board, * * *."

Article 11, entitled "Reciprocity", provides in section 2310 that: "The board shall issue a reciprocity certificate to an applicant to practice a system or mode of treating the sick or afflicted in this State that he is authorized to practice in any other State if it is a system or mode that is recognized by this chapter or any preceding practice act. Subject to the provisions of sections 2320 and 2321, no examination for any reciprocity certificate shall be required."

Section 2315 requires that the certificate upon which the reciprocity application is based shall have been issued to the applicant within a period of 10 years immediately preceding the filing of his application.

Section 2316 requires the applicant to inform the board of all institutions at which he has studied and from which he has graduated, and provides: "The requirements of the college from which he has graduated and the requirements of the medical licensing authority shall not have been at the time his certificate was issued in any degree or particular less than those which were required for the issuance of a similar certificate to practice a system or mode of treating the sick or afflicted in this State at the same time."

Section 2320 provides that: "The board may make an independent investigation of the educational qualifications and the character, ability and standing of the applicant. If, after this investigation and any other or further examination or investigation which the board may see fit to make on its own part, it is found that the requirements of the medical licensing authority issuing his certificate were in any degree or particular less than the requirements provided by the law of this State at the date of the issuance of his certificate, * * * he will not be entitled to practice in this State without examination."

Section 2321 requires an applicant whose application is based on a certificate of another state issued more than 10 years previously and who has met all other statutory requirements, to take an oral examination.

In 1943 two new sections were added to the Code. Section 2168.5, added to the article on "Applications Generally", provides that: "Every applicant shall prove that diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the board has been issued to him." Section 2316.5, added to the article on "Reciprocity", provides that: "An applicant for a reciprocity certificate shall prove that a diploma or other evidence of final, successful and entire completion of instruction and training required by a school approved by the board was a condition precedent to his admission to the examination for the license upon which his application for a certificate in this State is based."

From these statutes it will be noted that an applicant, who within the 10 years immediately preceding his application, has been admitted to practice in another state, may apply in this state for a direct reciprocity certificate without requirement of examination; that an applicant whose admission in another state is more than 10 years old may apply in this state for a reciprocity certificate, but will be subjected to oral examination; and that an applicant who has had schooling but not admission in another state may apply to qualify for a written examination. Petitioner seeks a direct reciprocity certificate but also expresses his willingness to take an examination if that course is open to him.

It may also be noted that the several articles dealing with applications in general, for examination, and for reciprocity are consistent in requiring all applicants to present a diploma from some legally chartered school, the requirements of which at the time of granting the diploma were in no degree less than those of this state, and which had been approved by the board. Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319.

The board, in granting petitioner's request for a hearing, gave him opportunity to present the issue whether the Chicago Medical School had been approved. That school was organized in 1919 as successor to the Affiliated Colleges, Chicago Hospital College of Medicine, and Jenner Medical School. In 1924 there was some reorganization and the name became Chicago Medical School.

During the trial the board attempted to place in evidence certain of its records which had not been introduced at the hearing before it. This data, after being marked for identification, was rejected. The board showed, however, that in February, 1924, it passed a motion, based on reports on file, that no credentials of any nature should be accepted from certain schools, including the "Chicago Hospital College of Medicine."

The board's medical directory for the year 1945 lists existing, merged, and extinct schools under a key table. Existing recognized schools appear in black face type. The Chicago Medical School is listed in light face type, with two asterisks which denote that it is under the classification, "Reported not acceptable for licensure by many of the State licensing Boards, or not approved as a medical school by the Council on Medical Education of the American Medical Association." The board's annual directories have at all times similarly classified the school. The board has never expressly approved it.

The additional proof offered by the board and rejected by the trial court, showed further acts by it in disapproval of the school, its disapproval by the American Medical Association, and data indicating the justification therefor; also board minutes of June 20, 1927, wherein the board by resolution apparently disapproved the school for the second time. The general objection to this evidence was that it had not been introduced at the informal hearing which the board accorded petitioner, and the objection was sustained. To the admission of certain documents was added the objection that they were hearsay, and that the school mentioned in the resolution of 1927 was not identified as the school of petitioner's graduation. As against the general objection the ruling appears at least in part to have been erroneous. For example, the resolution contained in the board's minutes was certainly within its knowledge and tended to disprove petitioner's allegations. Despite the general limitation upon the utilization by the board before the superior court of material not offered in evidence at the board hearing (see, 42 Am.Jur. pp. 464-466, sec 130), there were some matters of which knowledge might be taken. McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 168 P.2d 65; Rich v. McClure, 78 Cal.App. 209, 213, 248 P. 275; Benton v. Industrial Accident Commission, 74 Cal.App. 411, 415, 240 P. 1021; Anderson v. Board of Dental Examiners, 27 Cal.App. 336, 339, 149 P. 1006. However, it is unnecessary here to pass upon the admissibility of each item of the rejected proof as against the general and specific objections, because even without such data, the express disapproval of the school by the board was established.

In support of the contention that despite the express disapproval of the school by the board its acts showed a de facto or qualified approval, petitioner testified, as did other applicants, to their opinion that the school maintained a standard which required its acceptance by the board, that students had been led by school bulletins to believe that a diploma would qualify them to seek reciprocity in this state, and that the 1920 rules of the board were applicable and provided for approval of extra state schools when all the educational requirements of the California law were fulfilled.

Petitioner claimed that in the medical directory there were listed over a thousand graduates of non-approved, extinct, or merged schools, who had been admitted to practice in this state. However, the circumstances of these admissions were not shown, so the mere fact of listing is of little help.

Strongest reliance was placed by petitioner upon the fact that nine graduates of his school had been admitted to practice in this state, as shown by case histories placed before the court. He asserts that these nine admissions establish a de facto or qualified approval of the school, sufficient to support the trial court's finding of approval. The case histories are as follows:

A Jenner graduate of 1912 was granted a reciprocity certificate in 1927, after his application had been once denied. He was required to take an examination, not because his out-of-state license was too old, but because the board found his qualifications did not conform to California requirements. The minutes of the board showed: "Dr. R. when informed of the denial of his application, signified his intention of filing a new application, outlining his additional work, and coming under the oral provisions of the law."

A 1917 graduate was admitted after oral examination in 1922, 16 months before the

1924 resolution disapproving the school. The board minutes show "that reciprocity certificate be issued [to the graduate] based upon his certificate issued by the Illinois Board, when considered in conjunction with the granting of a First Lieutenant's commission in the Medical Corps of the United States Army after an oral examination, followed by service in the A. E. F."

A 1916 graduate who applied for a reciprocity certificate in 1923 was rejected because of the "low standard" of his school. In 1929 he again applied, showing he was an Army captain on duty in a government hospital at San Fernando and filing "various documents to supplement his application. One document was listed as Complete Military Record, including Citation for Bravery under a heavy gas bombardment in St. Mihiel Sector." He was granted a certificate after taking an oral examination.

A graduate of 1927 applied for admission that year and his application was denied. On reconsideration he was permitted to take a written examination which he failed to pass. In 1934 he was admitted after examination.

A graduate of 1934 was admitted in 1935 after written examination.

A graduate of 1928 was granted a reciprocity certificate in 1941, after a written examination required because of deficient grounding.

A 1926 graduate applied in 1943 to take an examination looking to issuance of a reciprocity certificate. His application was denied, but in 1944 he was successful in a mandamus proceeding to compel the board to permit him to be examined.

A graduate of 1916 was denied a reciprocity certificate in 1920 on the ground that his school "did not appear on the list of schools as qualifying [him] for a license to practice in the State of California." Twenty four years later, in 1944, he sought writ of mandate in the superior court, and had judgment declaring that the board was without jurisdiction in 1920 to deny his application, and ordering correction of the error.

A graduate of 1923 was admitted in 1925 without examination.

It will be noted that only in the case last cited was there an admission by direct reciprocity, without examination, and counsel for petitioner concede that "the admission of one or two applicants from the school might be subject to the contention that the Board was guilty of an error in slighting its statutory obligation." Six of the graduates were admitted after examination, and in three instances exceptional circumstances were shown. The other two admissions were under compulsion of writ of mandate, one of them to correct an error made in 1920.

[1-3] It is apparent that the action of the board over the 25 years from 1920 to 1945 does not show such a consistent course of admission of graduates of the school as to establish a de facto or qualified approval. It shows only isolated cases of admission, for the most part under exceptional circumstances. The formal and deliberate action of the board in disapproving the school could not be nullified by less formal or deliberate action, nor could nullification be established except by the strongest kind of showing, clear, convincing, and unequivocal. There was no such proof in this case; there was no substantial evidence to sustain the findings that the school had been approved, or that the requirements of Illinois, Massachusetts, and Texas equalled those of California. The only substantial showing was that the school had been definitely disapproved. In other words, petitioner failed to sustain the burden resting upon him to prove compliance with the requirements fixed by statute as conditions precedent to the issuance of a reciprocity certificate. Arwine v. Board of Medical Examiners, supra.

It will be noted that section 2168, already quoted, specifies the two major requirements of (1) good moral character testimonials "satisfactory to the board", and (2) graduation from an approved school. Section 2310 provides for the issuance of direct reciprocity certificates and states that "subject to the provisions" of section 2320 no examination shall be required. Said section 2320 permits the board to "make an independent investigation of the educational qualifications and the character, ability and standing of the applicant", and states that "if, after this investigation or any other or further examination or investigation which the board may see fit to make on its own part, it is found that the requirements of the medical licensing authority issuing his certificate were in any degree or particular less than the requirements provided by the law of this State at the date of the issuance of his certificate * * * he will not be entitled to practice in this State without examination."

It appears from the record in this case that prior to 1940, and particularly prior to the amendments of 1943 adding sections 2168.5 and 2316.5 to the code, it was the administrative practice of the board, and it construed section 2320 and companion statutes, as empowering it to make an independent investigation of the qualifications of any applicant and if exceptional circumstances or qualifications were shown, to permit the applicant to take a written or oral examination without regard to the requirement of graduation from an approved school. This practice accounts for the nine admissions above listed and probably for others shown by the directory. It is mentioned in the concurring opinion of Mr. Justice Conrey in Herzig v. Board of Medical Examiners, 135 Cal.App. 41, 26 P.2d 513, where a writ of mandate was denied an applicant because his school had been disapproved by the same resolution of 1924 which disapproved the Chicago Medical School.

[4] This administrative practice of admitting graduates of unapproved schools to examination in cases of a showing of exceptional circumstances which in the opinion of the board justified such action was apparently discontinued about the year 1940. At least the board states that after 1940, unless under compulsion of writ of mandate, no applications were accepted from graduates of the Chicago Medical School and petitioner makes no claim to the contrary. Moreover, even if it be assumed that the administrative practice was not discontinued in 1940, there is no showing that petitioner's applications of 1940 and 1941 contained a statement of such exceptional qualifications or circumstances that their denial constituted an abuse of discretion on the part of the board.

Petitioner's application of 1945, upon which the present proceeding is based gave rise to a showing of additional qualifications growing out of government work. The board claimed that this further showing also indicated that petitioner was practicing medicine in this state without a license in violation of law, and upon that ground alone he might be denied a license. The point, however, is immaterial because the license was actually denied on the sole ground of failure to prove graduation from an approved school.

[5] No denial of any constitutional right or discrimination or arbitrary action against petitioner is shown. The plenary power of the state to regulate the practice of medicine is not denied. 41 Am.Jur. sec. 37, p. 166; In re Investigation of Conduct of Examination for Admission to Practice Law, 1 Cal.2d 61, 67, 33 P.2d 829; Rosenblatt v. California State Board of Pharmacy, 69 Cal.App.2d 69, 158 P.2d 199. In the year 1945, even if the board had not theretofore changed its administrative practice, it would have been powerless to admit a graduate of an unapproved school by reciprocity, with or without examination. This is the unmistakable import of the statutes added to the code in 1943 (secs. 2168.5, 2316.5, supra), and the board has so construed and followed them. Section 2168.5 requires "every applicant" to prove completion of instruction in an approved school, and section 2316.5 declares that such instruction must not only be proved but it must also be shown to have been a "condition precedent" to the applicant's admission to examination for the license upon which his reciprocity application in this state is based. Petitioner's Illinois license, upon which he based his application for reciprocity, was not procured upon a showing of graduation from an approved school.

In 1945, therefore, the only course left open to petitioner was that afforded by section 2174, an action in the superior court to compel the board to approve the school from which he graduated. The present proceeding was not instituted under that statute, although it should have been. In an action under section 2174 the court "has full power to investigate and decide all facts *anew* without regard to any previous determination by the board." Therefore had this proceeding been brought under section 2174 the court would have had power to receive evidence regardless whether it had been introduced at any prior board hearing and to determine whether the school had or had not been approved or should or should not be approved as of 1936, the year of petitioner's graduation. Both parties would have been afforded greater latitude than that embraced in the procedure followed. See, McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983. The board would have been free to introduce the evidence here rejected unless it was barred on other grounds such as insufficient certification, hearsay, or the like.

Furthermore, if successful in securing an adjudication of approval of the school under section 2174, petitioner could also have litigated under that section the question presented by section 2320 whether "the requirements of the medical licensing authority issuing his certificate were in any degree or particular less than the requirements provided by the law of this State at the date of the issuance of his certificate, * * *", thus determining his claimed right to a direct reciprocity certificate without examination.

[6] There is no reason why the present proceeding should not be continued as an action under section 2174, petitioner being permitted, if so advised, to amend his pleadings. If, after a full hearing under section 2174, the court should adjudge the school approved as of 1936, and the standard of the Illinois licensing authority in no degree or particular less than that of this state, then upon further proceedings before the board there would remain for it to determine only the issue of petitioner's good moral character (sec.2168).

The judgment is reversed and the trial court is directed to entertain further proceedings in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

* * *

31 Cal.2d 863

Zelwyn A. AARONS, petitioner and respondent, v. BOARD OF MEDICAL EXAMINERS OF THE STATE of California, Herbert S. Chapman, Percival Dolman, Anthony Diepenbrock, Richard Bullis, Ebon B. McGregor, Frank Otto, Frederick N. Scatena, John R. Walker, Joe Zeller and George Thomason, the members thereof, respondents and appellants.

S. F. 17525.

Supreme Court of California, in Bank.

Dec. 2, 1947.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge

Prior opinion 176 P.2d 706.

Robert W. Kenny, of San Francisco, Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Lionel Browne, of San Francisco, for petitioner-respondent.

CARTER, Justice.

This is a companion case to Mann v. Board of Medical Examiners, 187 P.2d 1, and also to Burroughs v. Board of Medical Examiners, 187 P.2d 9. All three cases were tried together and resulted in judgments in favor of the respective petitioners. The appeals were presented on a single record and the disposition of this appeal is controlled by the disposition of the Mann appeal. For reasons stated in the opinion in the Mann case, the judgment is reversed and the trial court is directed to entertain further proceedings in accordance with the views expressed in said opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

31 Cal.2d 864

Oscar J. BURROUGHS, petitioner and respondent, v. BOARD OF MEDICAL EXAMINERS OF THE STATE of California, Herbert S. Chapman, Percival Dolman, Anthony Diepenbrock, Richard Bullis, Ebon B. McGregor, Frank Otto, Frederick N. Scatena, John R. Walker, Joe Zeiler and George Thomason, the members thereof, respondents and appellants.

S. F. 17527.

Supreme Court of California, in Bank.
Dec. 2, 1947.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Prior opinion 176 P.2d 715.

Robert W. Kenny, of San Francisco, Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Richard M. Lyman, Jr., of San Francisco, for petitioner-respondent.

CARTER, Justice.

This is a companion case to Mann v. Board of Medical Examiners, 187 P.2d 1, and also to Aarons v. Board of Medical Examiners, 187 P.2d 8. All three cases were tried together and resulted in judgments in favor of the respective petitioners. The appeals were presented on a single record and the disposition of this appeal is controlled by the disposition of the Mann appeal. For reasons stated in the opinion in the Mann case, the judgment is reversed

and the trial court is directed to entertain further proceedings in accordance with the views expressed in said opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

30 Cal.2d 914

LANE et al. v. PACIFIC GREYHOUND LINES et al.

S. F. 17446–7.

Supreme Court of California, in Bank.
Dec. 1, 1947.
Rehearing Denied Dec. 30, 1947.

1. Appeal and error 🔑781(4)

Appeal from order refusing to strike defendants' motion to be permitted to file motion to tax costs on appeal was rendered moot, where defendants, with plaintiffs' consent, withdrew the motion.

2. Appeal and error 🔑78(7), 873(1)

Order granting relief from default and permitting defendants to file second motion to tax costs on appeal did not finally dispose of cost proceeding and was not appealable, but propriety of such intermediate order could be reviewed on appeal from the final order taxing cost.

3. Judgment 🔑363
Motions 🔑59(1)

Under statute authorizing court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, court may relieve a party from effect of a delay in taking procedural steps which do not involve pleadings. Code Civ.Proc. § 473.

4. Costs 🔑264

Under statute authorizing court to relieve party from judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, relief could be afforded defendants from default in failing to file their motion to tax costs on appeal within required time. Code Civ.Proc. §§ 473, 1033, 1034.

5. Judgment ⚷363
Motions ⚷59(2)

The granting of relief under statute authorizing court to relieve a party from judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect rests primarily within discretion of trial court. Code Civ.Proc. § 473.

6. Costs ⚷264

Relieving defendants from their default in failing to file motion to tax costs on appeal within required time was not an abuse of discretion, where four day delay beyond time limited for filing motion to tax costs was caused by inadvertent entry of wrong date by an inexperienced employee of counsel. Code Civ.Proc. § 473.

7. Costs ⚷258

Petition for hearing in Supreme Court, opinion of District Court of Appeal as a part of such petition, and plaintiffs' answer to defendants' petition for rehearing in Supreme Court were "briefs" within court rule limiting recovery for cost of printing briefs to $100, so that once the $100 for briefs was claimed in cost bill, costs for printing such petition, opinion and answer could not be claimed. Code Civ.Proc. § 1034; Rules on Appeal, rule 26.

See Words and Phrases, Permanent Edition, for all other definitions of "Brief".

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by Naomi Gae Lane and others, against Pacific Greyhound Lines and another, for death of John Harold Lane resulting from collision between automobile driven by plaintiffs' decedent and bus owned by named defendant. Plaintiffs' appeal secured a reversal of a judgment for defendants, 26 Cal.2d 575, 160 P.2d 21, and plaintiffs became entitled to costs on appeal. From order refusing to strike motion to tax costs on appeal and from order granting relief from default and permitting defendants to file a second motion to tax costs on appeal, and from order taxing costs on appeal, the plaintiffs appeal.

Appeals from first two orders dismissed, and third order affirmed.

Prior opinion, 174 P.2d 635.

F. H. Dam, of San Francisco, for appellants.

Cooley, Crowley & Supple and Cooley, Crowley, Gaither & Dana, all of San Francisco, and T. H. DeLap, of Martinez, for respondents.

GIBSON, Chief Justice.

This court reversed a judgment for defendants in Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21, and plaintiffs appeal from certain orders in the proceedings taxing costs on the prior appeal.

Plaintiffs filed their bill for costs on appeal the day following the filing of the remittitur in Lane v. Pacific Greyhound Lines, supra, 26 Cal.2d 575, 160 P.2d 21. The bill, in addition to a charge of $100 for the cost of printing briefs on appeal, included, as separate items, charges for printing plaintiffs' petition for hearing in the Supreme Court, the opinion of the District Court of Appeal as a part of such petition, and the plaintiffs' answer to defendants' petition for rehearing in the Supreme Court. Upon receipt of this bill defendants' attorney wrote a letter to plaintiffs questioning the three items, and four days after the time provided for making objections to such a bill had expired (Code Civ.Proc. § 1034), defendants filed a motion to tax costs, seeking to eliminate those charges. Then, 17 days later, defendants filed a motion under section 473 of the Code of Civil Procedure for relief from default in failing to file objections on time and for permission to file a second motion. A showing was made by affidavit that the delay was caused by a mistake made by an inexperienced employee of defendants' attorney in calendaring the due date of the motion to tax. Thereafter plaintiffs moved to strike the first motion to tax costs which had been filed four days late. At the hearing on defendants' motion for relief from default and plaintiffs' motion to strike, the court granted the defendants' motion and denied that of plaintiffs. Upon the hearing of the objections to the cost bill on their merits, the court struck the three items in excess of $100 for the cost of printing briefs.

Plaintiffs appealed from these three orders: (1) the order refusing to strike the motion to tax costs on appeal, (2) the order granting relief from default and permitting defendants to file a second motion to tax costs on appeal, and (3) the order taxing costs on appeal.

[1, 2] A preliminary question has been raised as to the appealability of the two orders prior to the final order taxing costs. As to the first order, the appeal therefrom was rendered moot when defendants, with the consent of plaintiffs, withdrew the motion, and the appeal should be dismissed in any event. The second order did not affect the judgment to which it was collateral and did not finally dispose of the cost proceeding, but, instead, contemplated a further order on the merits. Therefore the second order was not the kind of special order after judgment which is appealable, and the appeal therefrom should also be dismissed. See Kaltschmidt v. Weber, 136 Cal. 675, 676, 69 P. 497.

[3, 4] The propriety of such an intermediate order may, however, be reviewed on the appeal from the final order taxing costs. It is plaintiffs' position that the trial court had no power to grant defendants relief from default and permit them to file the second motion to tax costs. They argue, first that section 473 of the Code of Civil Procedure can have no application to a motion to tax costs because such a motion is not a pleading within the language of the section which provides that application for relief "must be accompanied by a copy of the answer or other pleading proposed to be filed." It is settled, however, that, under the provisions of section 473, the court may relieve a party from the effect of a delay in taking procedural steps which do not involve pleadings. See Estate of Simmons, 168 Cal. 390, 394, 143 P. 697; Pollitz v. Wickersham, 150 Cal. 238, 243, 88 P. 911. Relief from default has been allowed under the provisions of section 473 where a party failed to file a cost bill within the times provided in sections 1033 and 1034 of the Code of Civil Procedure. Soda v. Marriott, 130 Cal.App. 589, 594, 20 P.2d 758; Potter v. City of Compton, 15 Cal.App.2d 238, 59 P.2d 540; Kallmeyer v. Poore, 52 Cal.App.2d 142, 153, 125 P.2d 924: Insofar as granting relief from default in filing is concerned, there appears to be no reason for making a distinction between a cost bill and a motion to tax costs.

Plaintiffs nevertheless contend that the courts are without power to grant relief from default, claiming that section 1034 constitutes a limitation upon the right of the court to grant such relief under section 473. They rely upon the provision in section 1034 which states that after the time for taxing costs "has expired" execution may issue therefor as on a judgment. It is asserted that the situation is analogous to the limitation on the power of the court to extend the time for filing a notice of intention to move for a new trial. The situations, however, are not similar. Section 659 of the Code of Civil Procedure expressly provides that the time for serving a notice of intention to move for a new trial may not be extended by order or stipulation. On the other hand, section 1054 states that, unless otherwise expressly provided, the time allowed for the service of notices other than notices of appeal or of intention to move for a new trial may be extended for good cause shown. There is nothing in section 1034 or in the use of the word "expired" which indicates any intention to limit the power of the court to extend the time for filing a motion to tax costs or to grant relief from default in case of a delay in filing. The obvious purpose of the quoted provision was merely to fix the time when "execution may issue." In the absence of any express provision to the contrary, the court has power to grant relief from such a default under the broad provisions of section 473.

[5, 6] The contention that the showing made to excuse the default was insufficient to justify the exercise of the trial court's discretion in relieving the defendants from its effect needs no extended discussion. The granting of relief under section 473 rests primarily within the discretion of the trial court. Manning v. Gavin, 14 Cal.2d 44, 46, 92 P.2d 795. Moreover, the inadvertent

entry of an erroneous date in a journal of proceedings kept by an attorney has been held to justify relief where, as here, the defaulting party acted promptly. Manning v. Gavin, supra; Haviland v. Southern California Edison Co., 172 Cal. 601, 605, 158 P. 328.

[7] We turn now to the merits of the appeal from the order striking from plaintiffs' cost bill all items in excess of $100 for the cost of printing briefs. It is apparently plaintiffs' position that the allowance of more than $100 is discretionary with the trial court, and that additional costs for printing may be allowed for documents such as petitions for hearing and rehearing if they are not merely "a reiteration of matter previously printed." Plaintiffs call attention to the statement in the record that the trial court would have allowed the items in excess of $100 if it had considered that it had the discretion to do so.

Rule 26 of the Rules on Appeal provides that the party to whom costs are awarded may recover "only" the items expressly provided for therein. Included as allowable items when actually incurred is "the cost of printing or other reproductions of briefs, not exceeding $100 to any one party." The language is clear and leaves no room for the exercise of any discretion. The limitation is in substance the same as that formerly contained in that portion of section 1034 which was superseded by Rule 26. (Judicial Council Ann.Rules, p. 50.) In interpreting that section it was held that "briefs" included petitions for hearing, rehearing and answers thereto. Haydel v. Morton, 18 Cal.App.2d 695, 696, 64 P.2d 954; Witkin, New California Rules on Appeal, 17 S.C.L.R. 232, 256. Accordingly, the trial court did not err in striking the items from the cost bill.

The appeals from the orders denying plaintiffs' motion to strike and granting defendants' motion for relief from default are dismissed, and the order taxing costs is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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31 Cal.2d 59

PEOPLE v. SCHWARTZ et al.

L. A. 20128.

Supreme Court of California.

Dec. 5, 1947.

1. Licenses ©⇒32(2)

Certificate of sales tax delinquency carries with it presumption that delinquency assessment of the State Board of Equalization is correct. Revenue and Taxation Code, § 6714.

2. Licenses ©⇒32(2)

Substitution of word "determination" for "levy", in statute requiring that a certificate of State Board of Equalization showing a sales tax delinquency shall be prima facie evidence of determination of the tax, has not reduced scope of proof attributable to the certificate of delinquency. Revenue and Taxation Code, §§ 6714, 6757.

See Words and Phrases, Permanent Edition, for all other definitions of "Determination" and "Levy".

3. Licenses ©⇒30

Under provisions in Retail Sales Tax Act requiring all retailers to keep records and authorizing State Board of Equalization to examine books and records to verify accuracy of tax returns, state is not bound to accept statements of taxpayer, unsupported by any record, which are contrary to entries in taxpayer's books, and taxpayer has burden of proving not only that board's determination, based upon such records, is incorrect, but also of producing evidence from which another and proper determination may be made. Revenue and Taxation Code, §§ 6091, 6714, 7051–7054.

4. Licenses ©⇒32(2)

Evidence presented by taxpayer was insufficient to overcome presumptively correct jeopardy assessment by State Board of Equalization for sales tax delinquency based upon taxpayer's records showing a discrepancy in amount of taxpayer's bank deposits and gross receipts from sales as recorded in sales journal. Revenue and Taxation Code, §§ 6091, 6714, 6757, 7051–7054.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the People of the State of California against Abe Schwartz and Fred Schwartz, individually and as copartners doing business as Central Tire Company, and Central Tire Company, a copartnership, to recover alleged delinquent sales tax. From judgment in favor of the defendant Fred Schwartz, the plaintiff appeals.

Reversed.

Fred N. Howser, Atty. Gen., and James E. Sabine and Daniel N. Stevens, Deputy Attys. Gen., for appellant.

Pearlson & Singer and Herbert D. Pearlson, all of Los Angeles, for respondent.

EDMONDS, Justice.

In the administration of the Retail Sales Act of 1933 (Deering's Gen.Laws, 1939 Supp., Act 8493 [since 1943 codified in the Revenue and Taxation Code as the Sales and Use Tax Law, secs. 6001–7176]), the State Board of Equalization levied a jeopardy assessment upon Fred Schwartz and sued to collect it. The principal question presented for decision upon the appeal by the State concerns the sufficiency of the evidence to support the judgment in favor of Schwartz.

The complaint alleged that from October 1, 1939, to and including June 30, 1942, Schwartz was a copartner with Abe Schwartz. Doing business under the name of Central Tire Co., they sold at retail tangible personal property. Quarterly returns were filed with the State Board of Equalization for that period. Being dissatisfied with the returns filed, and upon information in its possession, the board levied a jeopardy assessment which, with interest and penalties at the date of filing the complaint, amounted to $1,435.51.

By answer, Schwartz denied generally these allegations and pleaded an affirmative defense which, upon motion, was stricken out.

At the time the action came on for trial, it was stipulated that Schwartz was a partner in Central Tire Co. Counsel for the State thereupon offered in evidence the Certificate of Delinquency of the State Board of Equalization, pursuant to section 6714 of the Revenue and Taxation Code, certifying to his liability for the amount assessed. The State then rested.

Schwartz testified that, as a partner in the tire business, he filed sales tax returns with the State Board of Equalization. He stated that upon the board's audit of the books of the company, he was asked to explain why his bank deposits amounted to more than the gross receipts from his sales as recorded in his sales journal. According to the testimony of Schwartz, he told the auditor that merchandise for the business was principally obtained from various municipal, county, state and federal agencies; that the goods were sold on a competitive bid basis and it was necessary to forward with the bid a deposit as evidence of good faith. In some cases, his firm did not obtain the tires for which its bid was made and the deposit was returned. These refunds were redeposited in the bank account of the company. Upon this explanation, said Schwartz, the auditor gave a credit of $15,000 upon the total amount of gross receipts.

Schwartz also testified that, customarily, before making trips to purchase tires, he withdrew cash from the bank account. Upon his return, he redeposited the amount which had not been paid for merchandise. Defendant's Exhibit "A," consisting of a list of United States Treasury refund vouchers issued on account of unsuccessful bids, was admitted in evidence, and Schwartz testified that the amounts shown upon it were deposited in the firm's bank account. Defendant's Exhibit "B" is the record purporting to show the operations of the tire company and Schwartz testified that the data for the sales tax reports were taken from the sales journal, which is a part of this record.

By way of impeachment, upon cross-examination, Schwartz admitted that, on a plea of nolo contendere, he had been convicted in the Federal District Court of making false and fraudulent statements in applications to the Office of Price Administration, a felony.

The only other person to testify was the auditor of the board, who was called by Schwartz. The witness stated that the audit disclosed disbursements in a greater amount than is shown by the taxpayer's reports as gross receipts from sales. He also declared that "the difference between the amount of sales reported and the amounts disbursed by cash and by check was deemed to be additional taxable sales since no proof was offered of any other source of income."

The auditor's testimony was that for 1941, the cash receipts journal showed a total of $1,328.86 as refunds upon bids but that he could not determine from any available records whether the money was redeposited in the bank account. He explained that he checked the individual items which Schwartz had told him represented amounts redeposited in the bank account, but "could not find one place that they had been redeposited and not shown as receipts and so there was no proof." Accordingly, the auditor concluded, to determine the additional taxable gross receipts not reported by Schwartz, he totaled the amounts disbursed by check and cash, as shown by the books, and deducted from this amount the total of recorded cash receipts. To this net figure, the savings account deposits of the taxpayer, otherwise unaccounted for, were added.

From this computation, it was determined that Schwartz had understated the taxable gross receipts for the period in controversy by $37,427.11. Credit for resales, and labor understated, reduced this amount to $37,288.01, which is the basis of the additional levy.

The judgment for Schwartz rests primarily upon the court's finding that "the method employed by said Board in auditing the books and records of the [defendant] * * * did not disclose that said [defendant] * * * made any sales, the gross receipts of which were not included in the amounts reported in the Sales Tax Returns filed by the taxpayer. * * *" Challenging this judgment, the State contends that it is not supported by the evidence and that the certificate of delinquency established the liability of Schwartz and the amount of the indebtedness. It asks that the judgment be reversed with directions to enter judgment against Schwartz. The taxpayer asserts that the certificate of delinquency is but prima facie evidence of the levy of the tax and does not prove that he is liable for the amount claimed to be due. He characterizes the method used in computing the gross receipts as unfair and uncertain and insists that the evidence clearly supports the judgment in his favor.

More specifically, Schwartz complains of the method used by the board in computing the deficiency assessment because it "did not take into consideration the cash on hand, or the stock on hand at the beginning and close of the audit period." He argues that if the taxpayer had cash on hand at the beginning of the tax period, it should be taken into consideration in the audit procedure and might account for some of the difference between receipts and disbursements. However, there is no indication in the record that such was the fact, and Schwartz has never claimed, nor attempted to show by his records, that on October 1, 1939, there was cash on hand which would account for the difference between receipts and disbursements.

[1, 2] The certificate of delinquency carries with it the presumption that the assessment of the board is correct. People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029; Rev. & Tax. Code, sec. 6714. The decision in the Mahoney case holding that the certificate of delinquency establishes, prima facie, the essential proof of the State's case was based upon the interpretation of section 30 of the Retail Sales Act of 1933 (supra). In 1941, section 30, with some change in language, was codified as section 6714 of the Revenue and Taxation Code. Section 30 declared that "a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the tax." As re-enacted, it provides that the certificate "shall be prima facie evidence of the determination of the tax." The substitution of the word "determination" for "levy" has not, as is claimed by the taxpayer, changed the meaning of the section to reduce the scope of proof attributable to the certificate of delinquency. In the codification of section 26 of the statute, which enumerated the required recitals of the certificate of delinquency, the word "determination" was likewise substituted for the word "levy." Sec. 6757, Rev. & Tax. Code. The enactment now provides that the certificate shall specify "the

amount, interest, and penalty due, the name and address as it appears on the records of the board of the person liable for the same, and the fact that the board has complied with all provisions of this part in the determination of the amount required to be paid." It is the statement of these facts in the certificate which constitutes prima facie proof of the taxpayer's liability for the amount found to be due.

There is nothing inherently incorrect in the method used by the auditor of the board in determining the deficiency. The taxpayer's records disclose that, during the period in question, he received in cash from sales (or otherwise accounted for and adjusted) an amount substantially smaller than he had paid out in cash and by check. In the absence of explanation by the taxpayer, and accepting his statement that the partnership had no income except from sales, it reasonably may be concluded that the total of money received, after giving credits as mentioned, is the amount of the additional taxable sales. Contrary to the taxpayer's contention, inventory at the beginning and close of the taxable period has no connection with the computation to show taxable retail sales. The disbursements reflect the additions to inventory, just as the cash receipts reflect the disposal of stock on hand. The auditor for the board was concerned only with the amount of retail sales and not the purposes for which disbursements were made.

[3] Sections 7051–7054, Revenue and Taxation Code, require all retailers to keep records and authorize the board to examine the books and records to verify the accuracy of the returns. The State is not bound to accept the statements of the taxpayer, unsupported by any record, which are contrary to entries in his books of transactions pointing to a larger sum as the true total. Schwartz has the burden of proving not only that the board's determination, based upon his records, is incorrect, but also of producing evidence from which another and proper determination may be made. See Rev. & Tax. Code, secs. 6091, 6714. Moreover, the "certificate showed the delinquency of the defendant and the statute by its terms then made the certificate prima facie evidence of such delinquency, of the levy of the tax and of compliance by the board with all provisions of the act in relation to the computation and levy of the tax." People v. Mahoney, supra, 13 Cal.2d page 733, 91 P.2d 1031.

[4] The evidence presented by Schwartz did not negative the fact that, as shown by the audit, his disbursements by check and by cash, as taken from his records, exceeded his reported gross receipts from sales. His explanation of the difference was that it represents the redeposit of amounts previously withdrawn from the bank account. But the total amount of the refund vouchers is $1,800.59. Of this amount $772.19 appears in the cash receipts journal; it is, therefore, not a part of the more than $37,000 which constitutes the excess of disbursements over receipts. Giving the testimony of Schwartz and the documentary evidence full credence, the discrepancy has been explained or accounted for only in the amount of $1,028.40. True, he declared that upon his return from buying trips, the money not utilized for purchases was deposited in the bank. He also stated that all of these amounts were not entered in his books. However, he made no attempt to show the number of such trips, the actual or estimated amount of purchases made by him or the amount of redeposits not shown in the cash receipts journal.

In his examination of the board's auditor, Schwartz questioned him as to certain items in the check register which were amounts claimed to have been paid out as bid deposits, or loans to individuals subsequently refunded or repaid and redeposited. Some of these items are duplicates of those shown in defendant's Exhibit "A" and others are reflected in the cash receipts journal. But the total of them is less than $15,000, and if the trial judge determined that this proof was sufficient to account, to that extent, for the discrepancy relied upon by State, and he also allowed the amount of the refund vouchers, there still remains about $12,000 unaccounted for.

Under these circumstances, the evidence does not support the findings and judgment. The Revenue and Taxation Code provides that "to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established." Sec. 6091. If Schwartz had records to show that there were redeposits, other than those which he mentioned, which were not entered in his books, it was his duty to present that evidence. If he had no such records, he has failed to overcome the presumption created by the statute in favor of the State. See Rathjen Bros. v. Collins, 50 Cal.App.2d 765, 772, 773, 123 P.2d 925. His testimony is not a substitute for the records required by statute and does not overcome the presumptively correct assessment of the State which is based upon the taxpayer's records.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

31 Cal.2d 92

PEOPLE v. TUTHILL.

Cr. 4807.

Supreme Court of California.

Dec. 9, 1947.

Rehearing Denied Dec. 30, 1947.

1. Homicide 🔑253(1)

Evidence sustained first-degree murder conviction.

2. Criminal law 🔑661

In murder prosecution, prosecution was not required to make test of gun barrel for fingerprints or paraffin test of defendant's hands after shooting to determine whether he had shot the gun, and to introduce evidence concerning such test.

3. Criminal law 🔑661, 666(1)

Prosecution is not compelled to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial.

4. Criminal law 🔑1166½(6)

In murder prosecution, questioning of prospective jurors on voir dire concerning their understanding of various legal principles was not prejudicial to the defendant.

5. Criminal law 🔑720(9)

In murder prosecution, prosecuting attorney's reference in argument to jury concerning defendant's "irresponsibility" and "plain worthlessness" in business venture with deceased was not error in view of defendant's own testimony.

6. Criminal law 🔑720(9)

In murder prosecution, statement of prosecuting attorney in argument to jury that defendant was attempting to induce deceased to take him back, and that defendant became jealous and angry because deceased spurned him, was not error under evidence.

7. Witnesses 🔑277(4)

In murder prosecution, wherein defendant testified on direct examination relative to his occupation, his acquaintance with deceased, and his employments and residences thereafter, cross-examination as to matters relating to defendant's past, fact that he had a former wife, his business relations with deceased, and her plan to leave deceased, was proper as dealing with matters about which defendant had been examined in chief. Pen.Code, § 1323.

8. Homicide 🔑232

In murder prosecution, evidence was sufficient to sustain finding of premeditation.

9. Homicide 🔑22(2)

Defendant was "lying in wait" within meaning of statute making homicide committed by "lying in wait" first degree murder, where defendant went to deceased's cabin and lay down on bed with concealed gun though defendant fell asleep before deceased appeared, deceased turned on light and discovered defendant's presence, then fled from cabin, and was shot only when she returned a few seconds later. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Lying in Wait".

10. Criminal law 🔑1172(6)

The giving of an instruction outside the issues or beyond the applicable facts, is not reversible error unless it can be said to have been prejudicial.

11. Criminal law ⟹814(16), 1172(6)

In murder prosecution, giving of abstract instruction as to the effect of an accusatory statement, was improper, in absence of any evidence of any accusatory statement, but was not reversible error where there was clear and convincing proof of defendant's guilt, and it was obvious that omission of instruction would not have altered jury's conclusion in any way.

12. Criminal law ⟹808½, 823(6)

In murder prosecution, giving of instruction in language of statute concerning proof of mitigating circumstances, without explaining meaning of statute, was error, but was not prejudicial error on ground of mitigating circumstances because of defendant's alleged unconsciousness or intoxication, where jury was fully instructed that an act committed by one who is unconscious is not a crime, and that if he is so intoxicated as to be incapable of forming malice, he can be convicted of no offense higher than manslaughter. Pen.Code, § 1105.

13. Homicide 270

In murder prosecution, question of effect of defendant's alleged intoxication was for jury.

◆

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

Marvin James Tuthill was convicted of murder in the first degree, and he appeals.

Judgment and order affirmed.

R. T. Sullivan, Jr., of Riverside, and Robert Sikes, of Indio, for appellant.

Paul E. Sloane, of San Francisco, amicus curiae on behalf of appellant.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

SHENK, Justice.

Defendant was found guilty of the crime of murder of the first degree and sentenced to pay the extreme penalty. His motion for a new trial was denied. His appeal concerns alleged insufficiency of the evidence to support the verdict, alleged misconduct of the district attorney, and alleged errors in rulings on evidence and in charging the jury.

[1] A review of the record reveals evidence which is amply sufficient and which shows the following:

In the year 1945, defendant, a divorced man of 41 years, and Mrs. Charlotte Beverly, a divorcee, commenced living together. In January, 1946, Mrs. Beverly set up a plumbing business for defendant and herself in Cathedral City. She was custodian of the partnership funds and made monthly remittances to defendant's divorced wife in San Diego for the support of his three children. Defendant was addicted to drink, and the business was unsuccessful. In June, 1946, it was discontinued. Mrs. Beverly then left with her daughter for the Yosemite National Park. Defendant drifted from town to town. In November Mrs. Beverly returned to Cathedral City and she and the defendant resumed their former relations, occupying a cabin of the Sun Haven auto court. After six weeks they again separated. On December 21st defendant moved to the Cathedral City Motel where he registered under an assumed name. Mrs. Beverly remained in the auto court cabin. She told defendant that she planned to join her sister in Boston shortly after Christmas.

A few days before the year ended Mrs. Beverly took a position as a nurse in a home at Cathedral City. She invited a Mrs. Beavers, also a nurse, to spend the evening of December 31st with her and to stay with her that night in the auto court cabin. The two women went from that cabin, across the highway, to the Knotty Pine Inn, where there was a restaurant, bar and living room. Soon after they had taken seats at the bar defendant entered and sat down next to Mrs. Beverly. He had stopped work at 4:30 in the afternoon, had drawn on his pay, and had spent the intervening time visiting and planning for the evening. He asked Mrs. Beverly to see him alone. She refused and he left the bar.

Mrs. Beverly and Mrs. Beavers spent the remainder of the evening at the Knotty Pine. Defendant returned to that place and conversed with Mrs. Beverly. About midnight she went into a booth, put her head on her arm, and went to sleep. About two o'clock in the morning, January first, the two women left Knotty Pine for the auto court cabin. A Mr. Pickell accompanied them as far as the edge of the patio in front of their cabin. He then returned to Knotty Pine.

As Mrs. Beverly unlocked the door of the cabin, Mrs. Beavers noticed that a light was on in the front room. The women entered and Mrs. Beverly crossed the room and sat down on the bed opposite the door. Mrs. Beavers turned and saw defendant lying on the other bed near the door. She touched Mrs. Beverly, saying: "There's your husband, Charlotte, let's get out of here," and moved toward the door. Mrs. Beverly walked over to the bed, shook defendant, and said, "Marvin, what are you doing here in bed with your clothes on?" Defendant raised up and lifted a rifle which had been concealed by his body. The rifle belonged to the son of Mrs. Beverly and customarily hung on a nail over the kitchen doorway. Shells were kept in a nearby drawer.

Defendant aimed the rifle at Mrs. Beverly. She said, "You are not going to shoot me with that gun," and then quickly followed Mrs. Beavers out of the front door. A few feet from the cabin she hesitated; then despite urgings of Mrs. Beavers to come away, she turned and stepped back into the cabin doorway. Mrs. Beavers immediately heard the discharge of the rifle and saw Mrs. Beverly fall just inside the door. Mrs. Beavers ran toward Knotty Pine and when halfway to the highway, she saw the light go out in the cabin.

People from Knotty Pine rushed to the cabin and found it dark. After one woman called several times, defendant responded, asking what she wanted. She inquired for Mrs. Beverly and defendant replied: "Charlotte is all right. She is here." He also said he could not turn on the light. One of the group finally stepped partly in the room and turned the electric bulb in the socket. Glancing down she saw the body of Mrs. Beverly, with a rug or blanket over the head. An autopsy disclosed that death resulted from a brain laceration caused by a bullet which entered the head approximately two inches above and forward of the upper edge of the right ear, and proceeded downward. The shot was fired from the rifle which defendant had concealed in the bed.

As the women from Knotty Pine questioned whether Mrs. Beverly was really dead, defendant walked up and slipped his arms underneath the body and said, "See, there is nothing wrong," and then let the body fall. He also said, "Oh, she is all right." Still holding the rifle, he then proceeded to leave by the back door. As he crossed the highway, two men circled behind him and relieved him of the rifle. Officers were called and soon arrived at the scene. About 4 a.m. two of them entered defendant's room at the Cathedral City Motel. The room was dark and defendant was in bed in his underwear, with his outer clothing on a nearby chair. The officers took him to Knotty Pine. He maintained that he had practically no recollection of anything that had occurred between the time he left Knotty Pine about midnight and the time the officers arrived.

As defendant walked with the officers to the Knotty Pine, and within half an hour of his arrest, he complained of a pain in the side of his head. His head was not examined. At Knotty Pine he was given a glass of water and two cups of coffee. As an officer started for the kitchen to bring in the second cup, defendant said, "Did I ku——?" The officer turned and asked defendant what he said but defendant would not repeat it. Defendant testified that his lapse of memory from midnight to 4 a.m. was due to large quantities of liquor which he had consumed after leaving work in the afternoon. He described in detail where and when he had had these drinks. The record shows at most a conflict of evidence on the issue whether he became intoxicated, with but slight corroboration of his own testimony. A friend whom defendant saw about 7:30 in the evening and met again later at a night club testified that defendant drank heavily and was flushed and flighty in his talk. One of the owners of Knotty Pine stated that defendant was around her kitchen and living room; that she saw on her kitchen table a quart bottle of whiskey in a bag; and that as she did not allow drinking in the place she handed the bag to defendant and ordered him to leave. None of the many people who visited with defendant during the evening at Knotty Pine or observed him at the time of and after the commission of the crime testified that he was intoxicated. To the officers he appeared to be normal.

Defendant claims that it was physically impossible for the shooting to have occurred in the manner described by Mrs. Beavers. He argues that if he had shot Mrs. Beverly as she entered the doorway, the bullet would necessarily have penetrated her body on the left and not the right side, and that there was no way in which he could have aimed from a position above Mrs. Beverly which would have been required for a shot to penetrate her head at the downward angle.

Defendant's argument fails to give weight to the fact that between the time the women left the cabin and the shooting, Mrs. Beavers walked some ten feet from the door and, according to her estimate, one or two minutes elapsed. It may have been less. Even an interim of half a minute or less gave the defendant an opportunity to move about in the cabin. Also on her re-entry Mrs. Beverly may have assumed a position other than upright. A motion of her head downward or sideways would account for the angle of penetration of the bullet.

Since it was conclusively proved that the fatal shot was fired from the rifle held by the defendant, he cannot deny his participation in the shooting, but is relegated to arguing for a construction of the evidence which would indicate that the killing might have been accidental. All of these issues including the conflicting inferences to be drawn from the evidence were for the determination of the jury and were resolved against the defendant.

[2] The defendant argues that an examination of the gun barrel might have disclosed the finger prints of the deceased and support the theory of an accidental killing; that a paraffin test of defendant's hands within a few hours after the shooting might have determined whether he shot the gun; that proof of the presence or absence of powder marks on the head of the victim might have helped the defense; and that various other witnesses might have been produced by the prosecution and other tests might have been applied.

[3] There is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial. People v. Larrios, 220 Cal. 236, 251, 30 P.2d 404; People v. Simpson, 66 Cal.App.2d 319, 329, 152 P.2d 339.

[4] Exception is taken to the fact that on voir dire prospective jurors were questioned concerning their understanding of various legal principles. No authority is cited to the effect that such questioning is prejudicially erroneous. But it is asserted that despite admonition by the court and the sustaining of some objections, the prosecuting attorney persisted in instructing the jurors as to the law, often incorrectly, and that this was misconduct because it preceded the testimony and left the jurors with the impression that certain matters were in issue which never subsequently arose. An examination of the record reveals nothing in this respect to support the claim of prejudice or to serve as a foundation for a charge of misconduct. See People v. Bennett, 79 Cal.App. 76, 90, 91, 247 P. 20, and cases there cited.

[5] Certain statements made by the prosecuting attorney in his argument to the jury are assigned as misconduct. For example, he referred to the "irresponsibility of this defendant, his plain worthlessness * * *." This was said in connection with comments upon the business venture of defendant and the deceased. In view of defendant's own testimony as to his drinking habits and other activities, the statement cannot be said to be without justification.

[6] Complaint is made that in his argument the prosecuting attorney stated that defendant was attempting to induce the deceased to take him back, and ascribed to defendant motives of jealousy and anger caused by the fact that the deceased spurned him. These statements were justified in view of the evidence of defendant's repeated attempts to talk to the deceased alone, and of her preparations for a return to Boston. It is unnecessary to review each of the remarks to which objection is made. There

was some justification for all of them and if any could be said to constitute misconduct, none would justify a reversal.

[7] It is charged that the court committed prejudicial error in allowing the prosecution, over objection, to cross-examine defendant as to matters about which he had not been examined in chief. Penal Code, section 1323. These matters related to defendant's past, the fact that he had a former wife, his business relations with the deceased, her plan to go away, and the like. To one of the questions objection was sustained; to several others it was overruled. On direct examination defendant had been interrogated relative to his occupation as a plumber for twenty years, his acquaintance with the deceased dating from the year 1943, and his employments and residences thereafter. The cross-examination for the most part was directed to bringing out all facts concerning the matters touched upon in direct examination. People v. Mammilato, 168 Cal. 207, 213, 142 P. 58.

It is contended that the court should have instructed the jury that there was no evidence of premeditation or "lying in wait." It is argued that mere possession of a gun does not show premeditation; that there was no showing of a plan or design on the part of the defendant to kill anyone; that he simply went to the room where he had lived, and taking the gun for some purpose, lay down in a drunken stupor. In connection with the suggestion of self-defense, mention is made of a head injury allegedly suffered by defendant. The record contains no evidence of any head injury at the time of the killing. When defendant was arrested in his own room some hours after the shooting, he complained of a throbbing pain or splitting headache over his right ear. He asked the officer if he had hit him and the officer replied in the negative. That he may have suffered from a headache is not unlikely in view of the events of the night.

[8] If the crime was committed by lying in wait it was by statute murder of the first degree (section 189, Penal Code) and the question of premeditation was not further involved. However, the issue of premeditation, if necessary to a determination of the case, went to the jury with correct instructions and there is sufficient evidence to support the verdict thereon.

But it is contended that the question of lying in wait was erroneously submitted to the jury and that the two instructions given on the subject were incorrect and prejudicial. The first was: "Murder which is perpetrated by lying in wait is declared by our law to be murder of the first degree, and if you should find that the defendant committed that crime, you will have no choice but to designate the offense as murder in the first degree." The second was a modification of an instruction proposed by defendant: "You are instructed that 'lying in wait' consists of concealment for the purpose of taking a victim unawares. It means hiding in ambush or concealment. It does not necessarily refer to the position of the person, but rather to his location, and the purpose of taking the person attacked unawares." Defendant contends that in order to commit a murder "by means of * * * lying in wait * * *" (Penal Code, sec. 189), the lying in wait must be the "means," method or proximate cause by which the defendant is enabled to kill his victim before he can escape; that the killing must be accompanied by surprise and concealment, and must not be disconnected from them; that the evidence must show a shot from ambush upon a victim unaware of his danger, and without chance to escape; that discovery of the physical presence of the aggressor is not the vital element, but that the danger and the lack of chance to escape are controlling. See definitions of term found in 25 Words and Phrases, Perm.Ed., Lying In Wait; 40 C.J.S., Homicide, § 31; 2 Bouv.Law Dict., Rawle's 3d Revision, 2058.

Here, defendant argues, there could be no lying in wait because the evidence established that there was no element of surprise or concealment, no shot from ambush, but instead a clear escape by the victim. How, defendant asks, could he be lying in wait when he was asleep? Mrs. Beverly was so little surprised, he asserts, that she went over to the bed, and said, "Marvin, what are you doing here in bed with your clothes on?" He contends that even if he were lying in wait originally, the ambush ended and the lying in wait ceased when Mrs. Beverly went out of the door, and was not in existence when she reappeared in the doorway and the shooting occurred.

This argument is not convincing. Although there appears to be no California case precisely defining the phrase "lying in wait", it has been applied in other jurisdictions to a number of factual situations wherein the victim has been aware of the physical presence of the aggressor. It is said in 26 Am.Jur. p. 165, sec. 16, "As a general rule to constitute lying in wait to commit murder the perpetrator must be in ambush, or concealment for the purpose of taking his victim unawares. In some cases, however, the term has been applied to facts other than a concealment in ambush. For instance, it has been applied where it appeared that the victim was induced by the wife of the accused to come to their home, and that the accused, who had stayed there for the purpose of killing him, did so as the victim was leaving the premises after having talked to the accused and his wife for a short time."

A review of authority for the statement that the term "lying in wait" may be applied to facts other than a concealment in ambush is found in Ann.Cases, 1916C, at p. 971. See also Jackson v. State, 180 Tenn. 158, 172 S.W.2d 821; State v. Jackson, 71 Mont. 421, 230 P. 370, 373; Williams v. State, 130 Ala. 107, 30 So. 484; State v. Walker, 170 N.C. 716, 86 S.E. 1055; State v. Dooley, 89 Iowa 584, 57 N.W. 414.

[9] When defendant entered the cabin surreptitiously, after Mrs. Beverly's repeated refusals to see him alone, took the gun from the wall, loaded it, and lay down on the bed concealing it, he was literally "lying in wait". The elements of waiting, watching, and secrecy all were present. The fact that the light was put on in the cabin did not destroy the secrecy of defendant's presence. The fact that he may have fallen asleep did not terminate the lying in wait, any more than did the fact that when he aimed the gun at Mrs. Beverly, she fled beyond the doorway, only to return to it in a few seconds. Defendant's presence in the cabin was unexpected, and obviously she was unaware of her danger, of the tenacity of defendant's grim objective and of his purpose to kill her. Her actions in the unexpected situation were not unnatural. The fact that she was shot on her return to the doorway indicates that defendant's action was not hasty, and that his watch to kill was continuous and unbroken. This lying in wait was the "means" through which defendant accomplished his purpose. The evidence justified the submission of the issue to the jury and was sufficient to support the inference that the lying in wait was a part of the defendant's plan to kill and the means by which he carried out the plan.

[10, 11] Defendant contends that prejudicial error was committed in the giving of an instruction as to the effect of an accusatory statement. The correctness of the instruction in the abstract is not questioned but it is argued that the jury might have been misled for the reason that there was no evidence in the record of any accusatory statement, and that the error was accentuated by the fact that the subject of accusatory statements had been brought before at least three of the jurors on voir dire examination. In the absence of any facts to which the instruction might apply it should not have been given. However, the giving of an instruction outside the issues or beyond the applicable facts is not reversible error unless it can be said to have been prejudicial. People v. Silver, 16 Cal.2d 714, 722, 723, 108 P.2d 4; People v. Boggs, 12 Cal.2d 27, 37, 82 P.2d 368; People v. Shellenberger, 25 Cal.App.2d 402, 407, 77 P.2d 506; People v. Russell, 59 Cal.App.2d 660, 664, 139 P.2d 661. Here there is no indication of prejudice. The jurors were presented with clear and convincing proof of defendant's guilt, and within an hour of submission of the cause to them returned their verdict of guilty. It is obvious that the omission of the instruction would not have altered their conclusion in any way.

[12] The court instructed the jury in the language of section 1105, Penal Code, concerning proof of mitigating circumstances, without explaining the meaning of the statute. Such an instruction has been disapproved in recent cases. People v. Valentine, 28 Cal.2d 121, 132, 133, 169 P.2d 1; People v. Lindley, 26 Cal.2d 780,

793, 794, 161 P.2d 227; People v. Thomas, 25 Cal.2d 880, 895, 896, 156 P.2d 7. But the error in giving the instruction has frequently been held non-prejudicial under varying factual situations, as where the evidence of guilt is convincing, where there is little if any evidence of mitigating circumstances, where other instructions sufficiently clarify the subject, or where it is improbable that a reasonable jury otherwise correctly instructed would have rendered a different verdict. People v. Bernard, 28 Cal.2d 207, 214, 169 P.2d 636; People v. Lindley, supra, 26 Cal.2d 780, 793, 161 P.2d 227; People v. Kelso, 25 Cal. 2d 848, 853, 155 P.2d 819; People v. Madison, 3 Cal.2d 668, 677, 46 P.2d 159; People v. Diaz, 61 Cal.App.2d 748, 753, 755, 143 P.2d 747; People v. Perez, 19 Cal.App.2d 472, 476, 478, 65 P.2d 1319.

It is contended that here the error was prejudicial because of many asserted mitigating circumstances, such as accidental shooting in self-defense, alcoholic narcosis, stupor, lapse of memory, distraction from head injury. As above stated the record contains no evidence of any head injury at the time of the killing. The claim of accidental shooting in self-defense is without substantial support in the evidence.

The mitigating circumstances principally stressed by defendant was that of his claimed unconsciousness or intoxication. The jury was fully instructed to the effect that an act committed without being conscious thereof is not a crime; also that if the defendant was so deeply under the influence of intoxicating liquor as to have been incapable of forming in his mind the malice which is an essential element of murder he could not be convicted of any offense higher than manslaughter. Both of these instructions were given at defendant's request. In addition the jury was instructed that if by virtue of his mental condition or his use of intoxicating liquor the defendant was unable to form an intent, then the verdict must be in his favor. With these specific instructions, two in the language proposed by defendant, it is apparent that the jury could not have been misled by the instruction in the language of section 1105. From the evidence it might well be inferred that at the time of the killing he was not in such a state of intoxication and stupor as to be unable to know what he was doing.

It is significant that despite defendant's asserted continuous drinking from 4:30 in the afternoon, he showed a complete knowledge and memory of his actions until about midnight, recalling the number and brand of his drinks. Shortly thereafter he entered the cabin of Mrs. Beverly, whereupon his mind is asserted to have promptly become a blank. However, he was sufficiently rational after the killing to return to his own room, place his shirt and trousers neatly on a chair by his bed, and his shoes and socks nearby on the floor, and go to bed; also to dress again without delay or fumbling when aroused by the officers. As said by this court in People v. Murphy, 1 Cal.2d 37, 40, 32 P.2d 635; in sustaining a death penalty conviction against the claim of unconsciousness from voluntary intoxication: "It is significant that defendant when on the stand testified in detail as to what transpired immediately before and immediately subsequent to the wrongful assault on the decedent. As to these events his recollection was reasonably vivid. His memory was faulty only as to the period during which the fatal injuries were being inflicted."

[13] The question of the effect of defendant's asserted intoxication was one for the jury under adequate instructions, which were given. The evidence warrants the inference, as it did in People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698, that during the afternoon preceding the killing the defendant might deliberately have resorted to the use of intoxicants with the object of dulling any compunctions he thought might otherwise hamper him in effecting his purpose. Under any rational view of the evidence and the instructions as a whole the verdict cannot be set aside.

The judgment and order are affirmed

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, SPENCE, JJ., concur.

82 Cal.App.2d 867

COX v. COX et al.
Civ. No. 13525.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1947.

1. Appeal and error ⟹989

In passing on the sufficiency of evidence to support finding of trial court, appellate court has jurisdiction only to determine whether there is any substantial evidence, direct or indirect, to support challenged finding and may not reverse on ground that evidence preponderates in favor of appellant.

2. Evidence ⟹461(1)

Where realty is conveyed to either or both spouses, regardless of whether the deed purports to vest title in one as his separate property or in both as community property, tenancy in common, or joint tenancy, parol evidence is admissible to show the true intention of parties and such evidence may controvert the apparent effect of the character of ownership provided for in the deed.

3. Appeal and error ⟹1008(1)

That title to realty was taken in the name of husband and wife as joint tenants established prima facie, that realty was in fact held in joint tenancy, raising an inference that, even though money paid therefor was husband's separate property, a gift to wife was intended, there being no presumption of undue influence, since the gift was from husband to wife, and whether husband's explanation that title was taken in joint tenancy only because of his ill health and uncertainty as to imminence of death was sufficient to rebut the inference of a gift was for trial court.

4. Husband and wife ⟹14(3)

Evidence that husband and wife since before their marriage had held all their property in joint tenancy and that separate funds of both went into joint bank account from which both made withdrawals together with form of deed by which realty was conveyed to husband and wife as joint tenants supported finding that realty and proceeds of sale thereof were held in joint tenancy.

◆

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Action by Willard S. Cox against Opal G. Cox and San Mateo County Title Company to quiet plaintiff's title against claims of individual defendant, his wife, to money on deposit with defendant title company, wherein the individual defendant filed a cross-complaint asking for equal partition of the money as a joint tenancy fund. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Wayne R. Millington, of Redwood City, for appellant.

Norman S. Menifee, of Redwood City, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action to quiet his title against the claims of defendant, his wife, to the sum of $16,797.13 on deposit with defendant title company, he claiming the money as his separate property. Defendant wife denied that plaintiff was the sole owner of the money, alleged that each owned an undivided interest in the fund, and by cross-complaint prayed for an equal partition of the joint tenancy fund. The trial court determined that the parties owned the money as joint tenants and that each was entitled to one-half thereof. From a judgment predicated upon this finding plaintiff appeals, the sole contention being that the basic findings are unsupported by the evidence.

The parties are husband and wife, having been married May 27, 1943. Prior to that time the defendant had been the secretary of plaintiff, who operated a tire company, and, for some period not clearly defined and prior to the marriage, the parties lived together as husband and wife. At the time of trial (March, 1947) a divorce action was pending between them. The money here involved is the proceeds from the sale of a piece of real property referred to as the "Southgate" property. The parties have stipulated that the fund bears the same character as joint or separate property as the "Southgate" property from which it was derived. Thus the basic issue presented to the trial court was whether the "Southgate" property was joint property or the separate property of plaintiff.

The "Southgate" property was purchased by Mr. and Mrs. Cox in May, 1945, at a time when plaintiff was having some financial difficulties with a prior wife. Admittedly title was taken in the name of plaintiff and defendant as joint tenants. It is the contention of plaintiff, however, that the property was his sole and separate property, his argument being that "the preponderance of the evidence" shows that the money used in the purchase of the "Southgate" property was his separate property, and that he did not intend to create a true joint tenancy when he took the deed in his name and that of his wife.

[1] The contention that the "preponderance" of the evidence favors plaintiff, even if correct, which it is not, could have no effect on this appeal. It is elementary that, in passing on the sufficiency of the evidence, the power of an appellate court is to determine whether there is any substantial evidence, direct or indirect, to support the challenged finding, and that an appellate court has no power to reverse on the ground that the evidence "preponderates" in favor of appellant. (Rinker v. McKinley, 65 Cal.App.2d 109, 149 P.2d 859; Hughes v. Grandy, 78 Cal.App.2d 555, 177 P.2d 939.) This being so, the only question presented is whether there is any substantial evidence to support the finding that the property was joint tenancy property.

As already pointed out, the deed to the "Southgate" property named Mr. and Mrs. Cox as grantees as joint tenants. That property was purchased in May, 1945, for $10,600. Plaintiff testified that the money used to purchase the property was his separate property, being, so he claimed, money he had received when he sold his tire business in February, 1945, and savings made over a period of 30 years. Admittedly he owned this tire business prior to his marriage to defendant. He testified that defendant contributed nothing to the purchase of the "Southgate" property.

He testified that in March, 1943, about two months before his marriage to defendant, he purchased a parcel of realty referred to as the "Altamont" property with money earned in the tire business, and took title in his name and that of defendant as joint tenants. This property was sold in October, 1945, for $8,950 less expenses.

Plaintiff also testified that when he sold his tire business in February, 1945, the selling price was $20,000; that he received $10,000 in cash, two houses in Oakland which were valued in the deal at $7,000, and the balance in installments; that he sold these houses in July, 1945, for $9,000 less expenses; that title to these houses was in his name alone. Defendant testified that "all" of the properties—the "Southgate" property, the "Altamont" property and the two houses in Oakland—were held in joint tenancy. The deeds were not produced.

Plaintiff also testified that while still operating the tire company, and apparently before the marriage of the parties but while they apparently were living together, he established a bank account on which both could draw checks, in order that she could pay the household expenses; that when he sold out, because of ill health, he allowed the money from the sales above described to go into this joint account "because I did not know at what time I might drop out or drop off, as the fellow said, and I thought it was best to do it that way." He admitted that the money used to purchase the "Southgate" property came from that joint account, and stated that defendant could draw on that account "just as he could," but only for "household purposes." He contended that he had had the "Southgate" property put in joint tenancy for the same reason that he had put the bank account into that form of deposit, that is, he was ill and "I did not know what time that the Old Reaper might call. I felt that she would take care of me." He then testified that defendant had encouraged him to put the property into joint tenancy.

Defendant contradicted much of this evidence. She testified that she had worked as plaintiff's secretary most of her married life and that she had deposited her money in the joint account; that she had deposited and withdrawn money from that account just as did plaintiff; that the money for the "Southgate" property came from the joint account, and the check given them when they sold that property was made out in both their names; that everything she and her husband had, both cash and real property, was held in joint tenancy; that she at no time urged him to do this.

[2, 3] On this evidence the court has found that the "Southgate" property and the fund derived from it were true joint tenancies. It is undoubtedly the law that, regardless of the character of the deed taken by either or both spouses to property, that is, regardless of whether the deed shows it to be separate, community, tenancy in common or joint tenancy, the true intention of the parties may be shown by parol, and such evidence may controvert the apparent effect of the character of ownership provided for in the instrument of transfer. (Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Luminoso v. Luminoso, 75 Cal.App.2d 472, 171 P.2d 516.) It seems to be plaintiff's theory that when he testified that the money for all these properties came from his separately owned tire company, the trial court was compelled to find that all property bought with that money remained separate property. That, of course, is not the law. In the first place, the form of the deed cannot be so lightly disregarded. The fact that the deed to the "Southgate" property was taken in joint tenancy established a prima facie case that the property was in fact held in joint tenancy. It raised an inference, even if the money used was separate property, that a gift was intended, there being no presumption of undue influence where the gift is from the husband to the wife. If it be conceded that the testimony of plaintiff tended to rebut the inference of a gift, whether it did in fact so rebut it was a question of fact for the trial court. Obviously, the trial court was not required to accept defendant's explanation. The deeds themselves created a conflict and support the finding. This was the precise holding in Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 38 P.2d 790. (See, also, Olson v. Olson, 4 Cal.2d 434, 49 P.2d 827.) The three cases cited above, and relied upon by plaintiff, do not suggest, far less compel, a contrary conclusion. The Huber and Luminoso cases were affirmances. In those cases the trial courts, on sufficient evidence, found that the prima facie cases established by the deeds had been rebutted, not as a matter of law, but as a matter of fact. The trial courts believed the evidence offered to controvert the inference or presumption created by the forms of the deed. The appellate courts affirmed. Here the trial court was not convinced by the controverting testimony. The two cases cited in no way support the theory advanced by plaintiff, but in fact support the holding here made that the question involved is one of fact and not of law, and that the deed alone supports the finding. The Tomaier case, the third case relied upon, was a reversal on the ground that the trial court had excluded evidence of the true intent of the parties. Such problem is not here involved.

[4] In the present case we are not compelled to rely solely upon the joint tenancy deed to the "Southgate" property as establishing a true joint tenancy. In addition, the evidence shows that these parties engaged in a course of conduct, starting before their marriage and continuing until they separated, by which all their property was held in joint tenancy. Their bank account, the "Southgate" property, the "Altamont" property, and the Oakland properties, according to defendant, were all in joint tenancy. The defendant testified that her separate funds, as well as plaintiff's, went into the joint account. Admittedly both could and did draw from the joint account. This evidence, when coupled with the form of the deed, amply supports the finding that when the joint tenancy in the "Southgate" property was created plaintiff intended that defendant should have an interest in the properties equal to his own. It is a reasonable inference that plaintiff's desire to deprive defendant of her interest developed only after differences arose between them leading to the pending divorce.

From the foregoing it is quite clear that the finding that a true joint tenancy was created in the "Southgate" property, and therefore in the fund in dispute, is amply supported. This being so, the judgment must be and is affirmed.

WARD and BRAY, JJ., concur.

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82 Cal.App.2d 795

PEOPLE v. HERRIN.

Cr. 4161.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1947.

Larceny 🔑65

Evidence that defendant took a wallet from pocket of victim, and that money was in victim's pockets before the crime and not afterwards, and that other persons participating in the crime presumably received the money, sustained the conviction of grand theft, since the removal of the wallet constituted the offense and the value of the property was immaterial.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Berlee Herrin was convicted of grand theft and of having been previously convicted of a felony, and he appeals.

Affirmed.

Gordon, Ragland & Porter, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with the crime of grand theft from the person and with having been previously convicted of a felony. He was found guilty as charged in the information. He has appealed from the judgment contending that the evidence is insufficient to sustain the conviction.

The undisputed evidence shows that on the evening of the crime the complaining witness had $60 in his front trouser pockets and a wallet worth 59 cents in his back pocket. As he was walking along the street he was approached by two men and was struck so hard as to lose consciousness. The next thing he remembered was that he was lying in a parking lot. He was struck again and remembered nothing thereafter until he heard his name called and saw a police officer holding his wallet.

The arresting officer testified that he noticed the victim lying on the ground and that two or three men were bending over him and "going through" his pockets. He observed appellant take the wallet out of the victim's left rear pocket and put it into his own coat pocket. Appellant ran away but the officer caught him and took him back to the scene of the crime, removed the wallet from appellant's coat pocket and observed that the identification cards therein bore the name of the victim. The victim at that time was drunk and was sitting on the ground leaning against the building. There was no money in the victim's pockets.

While the money was not found in appellant's possession the undisputed evidence shows that it was removed from the victim's pockets. Since two other men were engaged with appellant in the commission of the crime it may be presumed that one or both of them took the money. The evidence of the police officer that he saw appellant take the wallet from the pocket of the victim and put it into his own pocket, and the evidence that the money was in the victim's pockets before the commission of the crime and was not in his possession afterwards, are sufficient to sustain the conviction. Appellant did not testify.

The removal of the wallet from the person of the victim constitutes the offense charged in the information and the value of the property is immaterial. People v. Crenshaw, 63 Cal.App.2d 395, 397, 146 P.2d 690.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 654

PEOPLE v. ROBERTS.

Cr. 2469.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1947.

1. Incest 🔑14

Evidence established that prosecutrix was daughter of defendant, notwithstanding that she was born about four months after defendant married prosecutrix' mother, so as to warrant conviction of incest. Code Civ.Proc. § 1963, subd. 31.

2. Incest 🔑15

If daughter consented to incestuous intercourse with father her testimony must be corroborated to authorize father's conviction of incest, but, if she was victim of force or undue influence so that she did not willingly join in incestuous acts, corroboration would not be necessary.

3. Criminal law 🔑507(7)

In incest prosecution against father, prosecutrix daughter was not an "accomplice" so as to require corroboration of her testimony where it was shown that daughter yielded to father under constraint of his threats.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

4. Incest 🔑14

Evidence was sufficient to support conviction of father for incest and assault with intent to commit incest with his daughter.

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Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

William Henry Roberts was convicted of incest and assault with intent to commit incest with his daughter, and he appeals.

Affirmed.

J. Francis Hoey, of Martinez, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was found guilty by a jury of the crimes of incest and assault with intent to commit incest with his daughter Ruby.

[1] It is argued on appeal that the relationship of father and daughter was not proved. The record shows that appellant married Ruby's mother on October 8, 1923, and that Ruby was born on February 23, 1924. Appellant testified that he met Ruby's mother only thirty days before their marriage, that she was then pregnant and that Ruby is not his daughter. There is ample evidence that appellant and Ruby are father and daughter. Her birth in wedlock raises a rebuttable presumption of legitimacy. Code Civ.Proc. § 1963, subd. 31. Appellant introduced her to others as his daughter and addressed her by that term. He procured a policy of life insurance with Ruby as beneficiary in which she was described as daughter. He cooperated with her in securing a birth certificate by court procedure in which he is named as father. After his arrest he stated to police officers when asked if he had had intercourse with Ruby: "That is my own daughter, my own flesh and blood, how could I do a thing like that?"

[2, 3] It is further claimed that Ruby was an accomplice and her testimony was not corroborated. The evidence shows a course of sexual relations between father and daughter extending over a period of months. It further shows threats by appellant that if she did not yield to him he would have her marriage annulled and take her baby from her, and that on one occasion he twisted her arm and on another threatened to kill her with a knife. The court correctly instructed the jury that if Ruby consented to the incestuous intercourse her testimony must be corroborated, but if she was the victim of force or undue influence so that she did not willingly join in the incestuous act corroboration is not necessary. The jury must be presumed to have found that Ruby yielded to appellant under the constraint of his prior threats in which event she would not be an accomplice. People v. Stratton, 141 Cal. 604, 609, 75 P. 166; People v. Featherstone, 67 Cal.App.2d 793, 155 P.2d 685.

[4] Appellant attempted to prove an alibi to the incest charge which was alleged to have occurred on or about February 8, 1945. The complaining witness fixed the date and hour of the offense as February 8 at about midnight. Appellant produced a witness from his place of employment who testified from the records that on February 8 appellant was at work by 11:30 p. m. This presented no more than the ordinary conflict of evidence for resolution by the jury. Furthermore the witness Mrs. Crandall, who was with appellant and Ruby on the night that this offense is claimed to have occurred, fixed the time that she left them at 10:45 p. m. while the complaining witness fixed her time of departure at about midnight. Mrs. Crandall's testimony also fixed the day of the week as Tuesday which fell on February 6. The jury may have concluded that the complaining witness was mistaken as to date or hour or both.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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82 Cal.App.2d 682

HILL v. HILL.

Civ. 15925.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1947.

1. Divorce 🔑130

Evidence as to persistent course of conduct of wife toward husband and his daughter by former marriage and son-in-law which was calculated to and did adversely affect mental and physical health of husband who, as wife knew, suffered from acute hypertension, sustained interlocutory decree of divorce granted husband on ground of extreme mental cruelty.

2. Divorce 🔑147

Whether wife's conduct caused husband to suffer grievously so as to constitute extreme mental cruelty as ground for divorce was a question of fact to be determined from all the circumstances and not from a portion of them.

3. Divorce 🔑184(4)

On appeal from interlocutory decree of divorce, appellate court must view the evidence in the light most favorable to respondent.

4. Divorce 🔑184(10)

Where trial court's findings of fact were in favor of husband upon his allegations and against wife on hers and were sustained by substantial evidence, appellate court could not disturb them on appeal from interlocutory decree of divorce granted husband.

5. Divorce 🔑109

Injured party need not prove that course of conduct of spouse was inspired by malevolent motives in order to establish extreme mental cruelty as ground for divorce.

6. Divorce 🔑27(1)

That wife, knowing husband suffered from acute hypertension and the detrimental effect of worry or domestic discord upon the health of a person so afflicted, persisted in a deliberately hostile and provoking attitude and course of conduct toward him and his daughter by former marriage and son-in-law, materially disturbing the domestic life and conjugal relations between husband and wife established her malevolent intent as respects husband's right to divorce on ground of extreme cruelty.

7. Divorce 🔑184(12)

Any error in sustaining objections to questions propounded to husband on cross-examination in divorce action was cured by subsequent withdrawal of objections and offer to answer such questions, though objections were not withdrawn until after wife's motion for nonsuit had been denied.

8. Appeal and error 🔑971(3)
Witnesses 🔑267

The control of cross-examination is within the sound discretion of trial court whose rulings will not be reviewed unless discretion has been abused.

9. Appeal and error ⚿971(3)
Evidence ⚿471(1)
Witnesses ⚿275(1, 6), 282½

Sustaining objections to questions propounded to plaintiff husband on cross-examination in divorce action which were on subjects that had been covered categorically or in substance by answers to other questions or were objectionable as being immaterial or calling for conclusions or were improper for other reasons was not abuse of discretion and did not disclose reversible error in unduly limiting cross-examination.

10. Appeal and error ⚿1170(1)

A judgment will not be reversed on account of errors unless the entire record shows that such errors have resulted in a miscarriage of justice. Const. art. 6, § 4½.

11. Appeal and error ⚿1032(1)

Appellant has the burden of showing that alleged errors are sufficiently prejudicial to justify a reversal.

12. Divorce ⚿252

Where husband is granted a divorce on ground of extreme cruelty, court may refuse to award any part of community property to wife. Civ. Code, § 146.

13. Divorce ⚿286

Where divorce is granted on ground of extreme cruelty, division of community property and trial court's action in making certain deductions from community earnings of husband before division are reviewable only to the extent of determining whether trial court abused its discretion. Civ. Code, § 146.

14. Divorce ⚿249(3)
Husband and wife ⚿248½

Property possessed by husband at time of marriage was his separate property and only income received by him during coverture was subject to division as community property when he obtained a divorce. Civ. Code, § 146.

15. Divorce ⚿249(3)

In determining community property subject to division upon divorce, community expenditures were properly charged against community funds though community funds had been commingled in bank account with husband's separate property, where accountant was able to trace funds into and out of the account and make up a statement therefrom showing source of the funds and purpose of expenditures. Civ.Code, § 146.

16. Divorce ⚿249(3)

In computing community funds subject to division upon divorce, husband was entitled to reimbursement out of community account when replenished for payment of community debts out of his separate funds at a time when community funds had been exhausted. Civ.Code, § 146.

17. Divorce ⚿249(3)

Federal and state income taxes for year during which parties were married were properly allocated between community and separate earnings in determining community property subject to division upon divorce, charging taxes to the community in the proportion that community earnings bore to the entire income of husband for that year. Civ.Code, § 146.

18. Divorce ⚿249(3)

Federal and state income taxes for year during the whole of which marriage existed were properly divided equally between community and separate earnings in determining community property subject to division upon divorce. Civ.Code, § 146.

19. Divorce ⚿249(3)

Charging estimated income taxes for current year against community funds in computing community property subject to division upon divorce was not objectionable in view of provision for an accounting from June 30 of that year to final decree of divorce whereby wife would be able to recoup any interest in community money applied on income tax on husband's separate income. Civ.Code, § 146.

20. Divorce ⚿249(3)

Deducting attorney's fees awarded to wife and costs of divorce action from community funds in computing community property subject to division upon divorce was not abuse of discretion. Civ.Code, § 146.

21. Divorce ⚷249(3)
Husband and wife ⚷248½

Realty purchased by husband before marriage was his separate property and not subject to division upon divorce, though note evidencing money borrowed before marriage to pay off purchase-money obligation incurred in connection with purchase of such realty was paid during coverture by partnership of which husband was a member and charged to his account, but not charged to the community. Civ. Code, § 146.

22. Husband and wife ⚷257

Wife was not entitled to a community interest in the profit on sale during coverture of husband's separate property. Civ. Code, § 146.

23. Husband and wife ⚷248½

Partnership earnings distributed to a member thereof before his marriage were earned prior thereto and were his separate property. Civ.Code, § 146.

24. Husband and wife ⚷248½

Corporate stock purchased by husband before marriage with money advanced by partnership of which he was a member out of partnership earnings received by partnership before marriage was husband's separate property. Civ.Code, § 146.

25. Husband and wife ⚷249

A partner's right in specific partnership property is not community property. Civ.Code, § 2419(2) (e).

26. Divorce ⚷249(3)

Partner's interest in office furniture and library or undistributed partnership property was not community property subject to division upon divorce, since his interest in partnership assets did not entitle him to any particular portion of such assets, his right thereto being only equitable. Civ.Code, §§ 146, 2419(2) (e).

27. Divorce ⚷249(3)

In dividing property incidental to granting a divorce, court is limited by the amount of property in its hands for division and a mere expectancy is not subject to division as community property. Civ.Code, § 146.

28. Divorce ⚷253

Obvious typographical error in stating in conclusion of law the date as of which the community property subject to division upon divorce was computed, did not sustain contention that findings as to community property did not sustain the conclusions of law and that conclusions did not support the judgment. Civ.Code, § 146.

29. Divorce ⚷286

Where trial court in computing community property subject to division upon divorce properly allocated income taxes as between husband's separate estate and the community property, any error in permitting certified public accountant to testify as an expert as to such allocation was harmless. Civ.Code, § 146.

30. Divorce ⚷252

Since division of community property was discretionary with trial court in granting husband a divorce for extreme cruelty, deductions from community income before division was made must be considered as a part of the division and allocation of the community property. Civ.Code, § 146.

31. Divorce ⚷286

Where husband did not appeal from judgment granting him a divorce and dividing the community property, his contention that additional amounts should have been deducted from community earnings before making the division could not be considered on wife's appeal. Civ.Code, § 146.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Divorce action by Alfred J. Hill against Bryan Houston Hill, wherein defendant filed a cross-complaint. From an interlocutory decree of divorce granted to plaintiff, defendant appeals.

Decree affirmed.

See also 180 P.2d 378.

Baldwin Robertson and Guy Richards Crump, both of Los Angeles, for appellant.

Hill, Morgan & Farrer, Charles P. McCarthy, William S. Scully and Elliott H. Pentz, all of Los Angeles, for respondent.

WILSON, Justice.

This is an appeal from an interlocutory decree of divorce granted to respondent on the ground of extreme mental cruelty.

The parties were married on December 12, 1944, and separated on December 23, 1945. At the time of the marriage respondent was 63 years old and appellant had reached the age of 54 years. Prior to 1927 appellant had been a client of respondent's law firm and in that year was employed by them as a secretary; later she became respondent's private secretary. Respondent's first wife had died about six years prior to the marriage. Respondent had one child of the previous marriage, a daughter, who was married to William H. Harvey, who was a lieutenant commander in the United States Navy. In the early part of October, 1945, Mr. Harvey received his discharge from the Navy. Due to the housing shortage Mr. and Mrs. Harvey were unable to find a home and respondent, with appellant's consent and approbation, invited them to reside in the Hill home until they could find an abode of their own.

1. *The facts as found by the court.* The events leading to the separation and divorce are related in the findings as follows:

(1) At the time of the marriage of respondent and appellant, and for approximately four years prior thereto, respondent was suffering from hypertension in an acute degree, a fact which was known by appellant before, at and during the time of marriage. Mental upset and domestic discord detrimentally affects the health of a person having such physical ailment, a fact also known by appellant before, at and during the time of the marriage.

(2) Respondent continued to suffer from his ailment from and after the date of the marriage and continuously until the commencement of the action, a fact within appellant's knowledge.

(3) Appellant, by her acts and course of conduct, treated respondent in an extremely cruel manner and wrongfully inflicted upon him grievous physical and mental suffering which materially and adversely affected his health and well-being.

(4) Between July 5 and August 1, 1945, a cousin of appellant visited at the home of the parties. During the night and early morning hours of July 31-August 1, the cousin, accompanied by a male companion whose name and identity was not known to her or to respondent or appellant, indulged in an orgy of drinking intoxicating beverages and sexual misconduct in the living room of the home of the parties to this action, causing a commotion and disturbance. Appellant, upon observing a substantial portion of her cousin's conduct, did not remonstrate with her or express objection to her conduct but was indifferent thereto.

(5) About October 5, 1945, Mr. and Mrs. Harvey, with appellant's prior knowledge, consent and approval, took up temporary residence in the home of the parties. Thereafter and continuously until the commencement of this action they, with the cooperation of respondent, endeavored without success to procure living accommodations for themselves commensurate with their financial ability. Commencing about November 1, appellant began and thereafter continued to exhibit a studied and deliberately hostile, unfriendly and provoking attitude and course of conduct toward Mr. and Mrs. Harvey and toward respondent whereby the domestic life and conjugal relations between respondent and appellant were substantially and materially disturbed, and she maintained a consistent state of confusion, turmoil and contention manifested by the following acts: (a) By marking the classified section of a daily newspaper relating to apartments for rent and leaving it where it would inevitably be seen and with intent that it should be seen by Mr. and Mrs. Harvey and which was seen by them and by respondent; (b) by complaining in the presence of respondent and Mr. and Mrs. Harvey on an average of three to four times a week at the evening meal that cooking plans and preparation of meals were disrupted because the Harveys required special food and dishes, when in fact such was not the case, but the Harveys on repeated occasions requested that their meals be prepared in any manner suitable to the desires and wishes of appellant except that Mr. Harvey

did not desire salads or fresh fruit to be served to him; (d) by instructing the house servant not to serve butter to respondent and appellant which had been provided for the use of all the household by the Harveys, and thereafter going into a hysterical rage and placing a ridiculously large and abnormal amount of butter on the plates for each of the four persons; (e) by refusing from about November 1, 1945, until the commencement of this action to associate with respondent and the Harveys around the home and by wilfully withdrawing to her bedroom and there remaining alone contrary to the express wishes and desires of respondent, although respondent requested her to join and be with them in the den; (g)* by failing and refusing to furnish the Harveys with adequate clean bed linen although there was an ample supply thereof in the house, all of which facts were known to respondent; (h) by unreasonably refusing to direct the household servant in the preparation of a steak dinner for which Mr. Harvey had provided the steaks, compelling respondent to assume direction and control of the servant for such purpose, and by withdrawing herself to a portion of the house other than that then being used by respondent and the Harveys, shunning their society until dinner was prepared; (i) by becoming enraged on one occasion without reason or justification upon entering the living room of the home where she found the Harveys eating their evening meal before the fireplace, although they had done so upon the express invitation of respondent; (j) by instructing, without justification, the household servant to do no work in the upstairs portion of the house for a period of three days with the design and intent of causing embarrassment and discomfort to respondent and the Harveys; (k) by frequently repeating in the presence of respondent and the Harveys that "no house is big enough for two families"; (m) by suggesting on several occasions between November 1 and December 23, 1945, in the presence of respondent and the Harveys, that Mrs. Harvey assume control and direction of the household, the planning of the meals and the direction of the servant; respondent, with the express concurrence of Mrs. Harvey, disagreed with the suggestion, and told appellant that she should control and direct such things; thereafter appellant repeated her previous suggestions and complying with her request respondent procured Mrs. Harvey's consent to the proposed arrangement; whereupon appellant stated, in substance, that she had no rights in the place and that everybody was given consideration except her. Upon respondent's statement to appellant that the latter's course of conduct toward him and the Harveys was embittering him so that he could not have the same feeling toward her she said "I am through, I am quitting and I am getting out"; (n) by stating in substance on December 23, 1945, immediately following the occurrence last above related, after respondent had requested her to take three or four days to think things over, "I don't want any time to think this over, I am through, I am quitting and am getting out tonight"; (o) by failing and refusing without justification between December 23, 1945, and February 15, 1946, to eat any meals in the home except on December 25, or to associate in any particular with respondent or the Harveys, although on several occasions respondent asked her to join with him and the Harveys at the evening meal; (p) by stating to respondent, on or before December 27, when the latter requested her to speak with the household servant and assist in composing his difficulties, unrest and dissatisfaction, "I am no Oriental, but I will do as you want me to do, but not through any affection for you, for that is past and gone and I'm through."

[1, 2] 2. *The facts and the evidence sustain the decree of divorce.* Appellant belittles the acts found by the court to have been committed by her and contends that they are so trivial and unimportant that neither one alone nor all together constitute extreme cruelty and are insufficient to sustain a decree of divorce on that ground. A trickle of water from a mountain spring is in itself incapable of causing damage but when joined by numerous

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* The lettered divisions follow the lettering of the court's findings which in turn are in accord with the subparagraphs of the complaint.

others they together create a raging torrent that carries ruin and devastation wherever it flows. So it is with appellant's acts and conduct. If it be conceded that any one of appellant's acts, taken singly, should be passed without notice, nevertheless all her acts together, considered in connection with her continuous general hostile attitude toward respondent and his daughter and son-in-law, created an unbearable situation to a man who, within appellant's knowledge, was suffering and for several years previously had suffered from hypertension to an acute degree. The court cannot determine whether grievous mental suffering has been inflicted on respondent by merely considering each act separately. Whether respondent suffered grievously is a question of fact to be determined from all the circumstances and not from a portion of them. Nason v. Nason, 48 Cal.App.2d 500, 506, 120 P.2d 37; Barnes v. Barnes, 95 Cal. 171, 177, 30 P. 298, 16 L.R.A. 660.

The court found that respondent's ailment was known by appellant before, at and during the time of the marriage and that she knew that a mental upset and domestic discord detrimentally affected the health of a person suffering with that ailment. Knowing that peace and tranquillity were necessary to respondent's health and well-being appellant continued her hostile attitude until respondent was led to say: "Don't you see that this course of conduct toward Marjorie and Bill and myself is embittering me where I can't feel the same toward you?"

[3] Appellant concedes the rule, as she must, that an appellate court must view the evidence in the light most favorable to respondent, but at the same time she quotes and asks us to rely on evidence given by her and her witnesses that is favorable to her claims and not to respondent's cause of action and is contradictory of the evidence sustaining respondent's allegations that have been found by the trial court to be true—in other words she wants us to reverse the rule and to view the evidence most favorably to her.

The court found that appellant's acts and conduct directly, proximately and substantially caused great humiliation, grief and mental anguish and physical suffering with the direct and proximate result that the ends and purposes of matrimony between the parties have been irreparably destroyed and made impossible of fulfillment and accomplishment; that the critical condition of respondent's health, as detrimentally affected by the acts and conduct of appellant and as would be thereafter detrimentally affected if the parties continued to live in the same house, was such as to require that appellant leave the home.

It would be useless to prolong this opinion with a synopsis of the evidence given at the trial consisting of nearly 1500 pages. It is sufficient to say that all the findings of the court to which we have referred are sustained by substantial evidence.

The Harveys arrived at the home of respondent and appellant on October 5, 1945. On the 7th and 8th Mr. Harvey began advertising in the newspapers and interviewing friends in an endeavor to find living quarters. Mrs. Harvey visited real estate offices, telephoned to friends and went from door to door trying to find an apartment, an extra room "or even chauffeur's accommodations in garages." From October 20 to November 1 respondent and appellant were absent from the home on a vacation trip. Immediately on their return appellant began the course of conduct related in the findings, which the court found to have been carried on with the intent and purpose of compelling respondent to eject his daughter and her husband from the home or of compelling them to leave, although they had no other place to which they could go and although they had been invited with appellant's consent and approval to remain until they could find lodgings of their own.

Invoking the Scriptural injunction that a man cleave only unto his wife and citing several cases to the effect that the first duty of a man is to his spouse, appellant argues that respondent did not fulfill that duty when he permitted his daughter and her husband to remain in the home. In our study of the Scriptures we have not encountered a suggestion that a father should turn his daughter from his door when she has not where to lay her head. Thousands of persons have given shelter to relatives upon their return from the service of their country in the late war at much greater inconvenience and sacrifice than is shown to have been suffered in this case and have borne the burden with a degree of graciousness and Christian fortitude evidently alien to appellant's mind.

The cases cited present more extreme situations than that found in the instant case. In Thomsen v. Thomsen, 118 Or. 614, 247 P. 808, the wife was brought to reside permanently in a home occupied by the husband's father, mother, two sisters, brother and sister-in-law. In Schuster v. Schuster, 88 Utah 257, 53 P.2d 428, where the husband's 16-year-old son abused and assaulted his stepmother, the court said that the act of the husband in permitting those under his authority so to conduct themselves toward his wife as to impair her health constituted cruelty. In the instant case there is no claim that the Harveys abused appellant or that her health had become impaired. In each of the cases of Kruschke v. Kruschke, 103 Or. 601, 205 P. 973; Day v. Day, 84 Iowa 221, 50 N.W. 979; Cormier v. Cormier, 193 La. 158, 190 So. 365; Dakin v. Dakin, 1 Neb. Unof. 457, 95 N.W. 781; Powell v. Powell, 29 Vt. 148, and Hutchins v. Hutchins, 93 Va. 68, 24 S.E. 903, the wife was required to live permanently in a home with the husband's relatives who insulted, abused and mistreated her. While there was not always harmony between appellant and Mrs. Harvey, their relationship was far from being such as is described in the cases last cited.

The Harveys expected to remain only temporarily. There was no intention of a permanent residence that would interfere with the household. But appellant's ill-feeling seems to have developed almost immediately after their arrival and to have grown in such intensity and at such a rapid pace that respondent's hysterical breakdown was brought on within three months.

[4] Since the trial court's findings of fact are in favor of respondent upon his allegations and against appellant on hers and since the findings are sustained by substantial evidence we cannot disturb them. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App. 2d 777, 779, 163 P.2d 756 and cases cited.

The incident of the drinking orgy and sexual misconduct between appellant's cousin and an unknown man occurred long before Mr. and Mrs. Harvey came to reside in the home of the parties. Respondent was shocked and amazed at the unconcern exhibited by appellant on account of this incident and by her failure to remonstrate with her cousin on account of the latter's behavior. It is true that respondent thereafter related the occurrence to some of appellant's relatives but appellant's indifference at the time of the occurrence and her later attempt to condone the act left respondent with a feeling of disgust and his physical condition was adversely affected.

Appellant contends that in order to constitute extreme cruelty the acts must be directed toward the other party with malevolent intent. "Malevolent" is defined as "disposed to injure; arising from, or indicative of, ill will." Webster's New International Dictionary, 1947 Ed. p. 1489. Synonyms are stated by the same authority to be "ill-disposed, spiteful, rancorous," and the antonym is "benignant." The acts related with detail in the findings are within the definition of "malevolent" and are well described by the synonyms. Appellant herself does not claim that they were "benignant." Appellant cites on this subject Dahnke v. Dahnke, 55 Cal.App. 12, 202 P. 894; Anso v. Anso, 72 Cal.App. 513, 237 P. 814; Schlecht v. Schlecht, 99 Cal.App. 163, 277 P. 1065; Nason v. Nason, 48 Cal. App.2d 500, 120 P.2d 37, and Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1. We find nothing in these cases justifying a reversal of the judgment or in any manner favoring appellant's case.

[5] It is not necessary that the injured party prove that the course of conduct of the other spouse was inspired by malevolent motives. Keener v. Keener, supra, and Barngrover v. Barngrover, 57 Cal.App. 43, 206 P. 461. In the Barngrover case the mental cruelty consisted of constant nagging by an ultrapuristic wife who from good motives was endeavoring to impose her ideas of morals on her husband although he was an earnest Christian man.

The court said that nagging from good motives may be just as hurtful as if prompted by any other motive.

We find nothing in the record to support appellant's argument that her acts were induced by respondent. The cases of Popescu v. Popescu, 46 Cal.App.2d 44, 115 P.2d 208; Annen v. Annen, 79 Cal.App. 626, 250 P. 580, and Truax v. Truax, 62 Cal.App.2d 441, 145 P.2d 88, are not applicable to the situation shown by the evidence in this case.

The finding that appellant had been guilty of extreme mental cruelty is sustained by the evidence. The effect of her acts on respondent was aggravated by the fact that he was afflicted with hypertension—high blood pressure. Respondent testified that the occurrence of December 23d was a shock to him; that he went to bed, broke down and wept and slept very little; the next morning he "was just emotionally all to pieces." Mr. Harvey testified that on the morning of December 24 he noticed that respondent was shaking violently and sobbing hysterically. Mrs. Harvey stated that when she came downstairs her father's eyes were red and that he was sobbing and shaking violently. Both Mr. and Mrs. Harvey did all that was possible to calm him, but he continued in an emotional state for a long period.

Two doctors testified concerning respondent's condition. Dr. Stevens testified respondent's hypertension existed prior to the marriage; that in March, 1946, his blood pressure was extremely high, that he was nervous, emotional, had headaches in the back of his head, ringing in his ears and definite symptoms of an increase in the hypertension; that emotion and nervous strain raise the blood pressure within a very short time, particularly where there is a history of previous high blood pressure; that such a condition would mean an eventual arteriosclerosis involving the heart and kidneys and probably an apoplectic stroke if the pressure continued to rise and to remain high. The witness considered respondent's condition to be so serious as to require the service of Dr. Barrow, an expert in the treatment of hypertension. Dr. Barrow testified that he made a careful physical examination of respondent and did the necessary laboratory work; that the medical profession knows no better cause for hypertension than the "effect of things on the nervous system, which causes a tenseness" of the blood vessels; that there can be a hypertension of varying degrees through different days; that respondent's kidneys were doing their work properly and it was therefore not a kidney hypertension; that hypertension may be caused by worry.

From the medical testimony it is manifest that surcease from the turmoil suffered by him is necessary to the end that his health be not further impaired.

[6] Because of the close relationship of a private secretary and her employer appellant must have known and in fact the court found that she did know of respondent's physical ailment long before the marriage, and she knew that worry or domestic discord had a detrimental effect upon the health of a person so afflicted. Her knowledge of the deteriorating influence of worry on a person who has high blood pressure and her continuance of her conduct remove from further consideration any claim of appellant that her acts were not done with a malevolent intent as that word is defined supra.

The intimation in appellant's brief that Mrs. Harvey was interested in breaking up the marriage so that she would inherit her father's entire estate is wholly without foundation. The court did not so find and there is no evidence to that effect and none from which such an inference may be drawn. We have mentioned the fact that respondent and appellant went on a trip shortly after the Harveys arrived and were absent from their home until November 1, 1945; yet appellant's course of conduct began immediately after their return, without allowing sufficient time for the Harveys to obtain a living place. The assertion that appellant's acts, as related in the findings, were directed toward the Harveys and not toward respondent is likewise without foundation. All the acts covered by the findings were either committed in respondent's presence or information concerning them was communicated to him shortly after their occurrence and the court made findings that they were calculated to and did have an adverse effect on his mental and physical health.

[7-11] 3. *Alleged errors in ruling on the admission of evidence.* Appellant complains of several rulings of the court sustaining objections to questions propounded to respondent on cross-examination. Her contention in this regard may be disposed of without extensive discussion: (1) Respondent withdrew his objections to a number of the questions and offered to answer them. Appellant's counsel declined the proposal, stating "I don't care to repeat the questions at this time." The offer cured any error that the court may have committed in sustaining the objections. It is of no consequence that the objections were not withdrawn until after appellant's motion for a nonsuit had been denied. (2) Many if not all the questions which gave rise to the rulings were on subjects that had been covered categorically or in substance by answers to other questions or were objectionable as being immaterial or calling for conclusions, or were improper for other reasons. It would serve no purpose to lengthen this opinion by repeating them. (3) The control of cross-examination is within the sound discretion of the court, and its rulings will not be reviewed unless discretion has been abused. Melvin v. Berendsen, 7 Cal.App.2d 389, 391, 46 P.2d 189. We have examined each specification of error and we do not find that the court abused its discretion in sustaining any of the objections. (4) Reversal of a judgment on account of errors will not be ordered unless the entire record shows that such errors have resulted in a miscarriage of justice. Const. Art. VI, sec. 4½; Mullanix v. Basich, 67 Cal.App.2d 675, 679, 155 P.2d 130; People v. Burch, 46 Cal.App. 391, 398, 189 P. 716; Neves v. Costa, 5 Cal.App. 111, 120, 89 P. 860. The record does not disclose that justice has miscarried. (5) Appellant's cross-examination of respondent covers a wide scope, occupying approximately 250 pages of the transcript. We do not find that the court placed an undue or improper restriction on appellant's efforts to bring out any evidence that might have been in her favor. The burden is on appellant to show that the alleged errors are sufficiently prejudicial to justify a reversal. Mullanix v. Basich, supra; Santina v. General Petroleum Co., 41 Cal.App.2d 74, 77, 106 P.2d 60; Murphy v. Retirement Board, 49 Cal.App.2d 58, 60, 121 P.2d 101; Arnett v. Nall, 51 Cal.App. 194, 195, 196 P. 291; Robertson v. Weingart, 91 Cal.App. 715, 726, 267 P. 741. She has not sustained that burden.

[12, 13] *Appellant's objections to the division of the community property.* In discussing this phase of the appeal it must be borne in mind that the divorce was granted to respondent on the ground of the extreme cruelty of appellant and that by virtue of the authority given by section 146 of the Civil Code the court might have refused any award whatsoever to appellant. After making deductions of several amounts from the community property the court assigned one half of the remainder to her, thus exercising the discretion given by the code provision after considering "all the facts of the case, and the condition of the parties." In view of the power of the court to have awarded the entire community property to respondent if it had refused any award to appellant our jurisdiction on appeal would have been limited to determining whether, giving consideration to all the facts and circumstances, the trial court had abused its discretion. Since our power to interfere with an order dividing community property where the ground of divorce is extreme cruelty is limited to a determination of whether discretion has been abused, our consideration of the objections to the deductions made from the community earnings of respondent before division was made between the parties will be limited in the same degree.

[14] Respondent's income was derived principally from his agreed share of the net profits of a partnership engaged in the practice of the law. Since his property was possessed by him at the time of the marriage it was his separate property and appellant was therefore entitled only to a division of such income as respondent had received during coverture.

By the agreement of the partners their net profits were divided on June 30 and December 31 of each year. If a partner received any payment other than on these dates, or if any money was paid out of the partnership funds on his account, the amount was charged to him and deducted from his share of the profits on the accounting date.

Appellant has presented seven objections to the computation of respondent's income and to allowances made by the court against the community property.

(a) Objection is made to what she designates as an "after-the-fact accounting" prepared during the trial allowing deductions for expenditures made from a bank account in which separate and community funds had been commingled.

The account from which the court derived its information regarding respondent's income was made up by a certified public accountant who is also a member of the bar, from respondent's books, bills, receipts and other memoranda, and from the books of original entry, bank statements, check books and stubs of the partnership, all of which were produced in court for examination by appellant and her counsel.

[15] It is sufficient to say, without setting up a debit and credit ledger account in this opinion, that the amounts allowed by the court were chargeable to the community funds. The fact that after the marriage respondent failed to open a new bank account but continued to deposit his community earnings in the old account, the funds in which at the date of the marriage were his separate property, and to draw checks against it furnishes no valid objection to the accounting.

The rule relating to community funds argued by appellant is applicable where it is not possible to trace the community and separate funds and to segregate one from the other. The accountant was able to trace funds into and out of the account and to make up a statement therefrom showing the source of the funds and the purpose of the expenditures. Community indebtedness was properly charged against the community funds whether the latter were in a community account or in an account in which respondent's separate funds had been deposited prior to the marriage.

The marriage was contracted only 19 days before the end of the year 1944. Although much, practically all, of the income of the last half of 1944 had been earned before marriage, the total amount received by respondent on December 31, 1944, was considered as and credited to community property. Funds earned by respondent and distributed to him by the partnership prior to the marriage were not community funds and were properly excluded from the accounting.

[16] Appellant states that on certain dates the amount of the expenditures for items claimed by respondent to have been for community debts exceeded the total of the amounts that were community funds and argues that the expenditures in excess of the community funds were chargeable to respondent's separate property. The fallacy of the argument is shown by the mere statement of it. If respondent paid community debts out of his separate funds at a time when the community funds had been exhausted he was entitled to reimbursement when the community account was replenished.

(b) Appellant contends that deductions as community expenses were erroneously allowed for purposes chargeable only to respondent's separate funds:

[17, 18] (i) The federal and state income taxes for 1944 were allocated by the court between the community and separate earnings, charging taxes to the community in the proportion that the community earnings bore to the entire income of respondent for that year. This was an equitable apportionment. There was no obligation on respondent to pay the community taxes out of his separate funds. The income tax for 1945 was properly divided in half since the marriage existed during the entire year and respondent's earnings for the year were community property.

[19] (ii) Objection is made to the charge of the estimated income tax for 1946 against the community funds, appellant claiming that unless the judgment is reversed she cannot recoup her interest in the community money that was applied on the income tax on respondent's separate in-

come. This objection is disposed of by the provision in the judgment which requires an accounting for the period from June 30, 1946, to the date of the final decree of divorce. If appellant is entitled to any recoupment she will receive it in the final accounting.

[20] (iii) Complaint is also made that the attorney's fees awarded to appellant and the costs of the present litigation were improperly made from community funds. First, such costs are a proper charge against the community property. In cases where the husband has no separate property the community estate is the only source from which the costs can be paid. Second, the order must be considered as within the discretion vested in the court in making a division of the community property as hereinbefore discussed.

(c) Error is asserted in that the court adjudged real property alleged to have been partially paid for out of community funds to be respondent's separate property. In 1925 respondent purchased a one-half interest in a tract of real property, paying part cash and giving a purchase-money obligation for the remainder. This obligation was paid in 1928 with money borrowed from the King estate. The King note was renewed from time to time and was paid June 27, 1945, by check of respondent's law firm and the amount was charged to his account.

[21] Respondent did not, as asserted in appellant's brief, use community money to purchase real estate and claim the property to be his separate estate. It was his separate property and was not paid for with community funds. He had purchased and paid for the property years before the marriage. The King note was not a purchase-money obligation. It was an ordinary indebtedness incurred by respondent, it was his separate obligation, and when paid it was not charged to the community.

[22] Appellant states in her brief that respondent's accounting furnished at the trial showed "his obligation to the funds in dollars rather than in real estate of an increased value." The fact that the property, separate when purchased, was sold for a profit after the marriage did not entitle appellant to a community interest in the profit. The case of Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093, is not in point since in that case separate and community property had been so commingled as to render it impossible to trace the funds. Such conditions do not exist in the instant case. The cases of In re Bauer, 79 Cal. 304, 21 P. 759, and Schuyler v. Broughton, 70 Cal. 282, 11 P. 719, are likewise inappropriately cited.

[23, 24] (d) Appellant asserts that shares of the capital stock of Central Investment Company are community property and that the court erred in declaring them to be the separate property of respondent. Respondent purchased the stock prior to his marriage to appellant with funds advanced to him by the partnership out of fees earned by the firm in 1944 before the marriage. All receipts of the partnership that were distributed to respondent previously to the marriage were earned prior thereto and were his separate property. Since the Central Investment stock was purchased before the marriage with money earned and received by the firm and advanced to respondent prior thereto it was the latter's separate property.

(e) Appellant contends that she is entitled to an adjudication that additions to the capital assets of the law partnership during the marriage are community property and that she should be awarded an interest therein. The evidence showed that there had been additions to the office furniture, carpets and library between the date of the marriage and the time of the trial. Appellant asserts that she did not claim the right to have any specific item of fixed assets to be declared to be community property but that the court should have taken into account the diversion of community cash into the purchase of the fixed assets. The court was correct in sustaining objections to questions addressed to that subject as well as to those seeking to ascertain whether the firm had acquired any new business after the marriage and whether the firm had moneys that would otherwise be distributable to respondent.

[25-27] A partner's right in specific partnership property is not community

property. Civil Code, sec. 2419(2)(e). Therefore respondent's interest in the office furniture and library and in the undistributed partnership property of any kind was not subject to division by the court. Respondent's interest in the partnership assets did not entitle him to any particular portion of such assets, his right thereto being only equitable and his claim enforceable only through an equitable action for an accounting. Clarke v. Fiedler, 44 Cal.App.2d 838, 848, 113 P.2d 275. A mere expectancy is not subject to division as community property. French v. French, 17 Cal.2d 775, 778, 112 P.2d 235, 134 A.L.R. 366. In dividing property incidental to the granting of a divorce decree the court is limited by the amount of property in its hands for division. That which does not exist cannot be divided. Secondo v. Secondo, 218 Cal. 453, 458, 23 P.2d 752. Since respondent had no enforceable interest in the partnership assets until his share should be determined by an accounting, with or without an action in court, appellant could acquire no right thereto in the absence of such accounting. Her right in the property could be no greater than her husband's.

[28] (f) It is claimed that the findings as to the community property do not sustain the conclusions of law and that the conclusions do not support the judgment. The finding of the amount of community property as of June 30, 1946, is followed by a conclusion of law as to the same amount but as of June 30, 1945. Clearly there is a typographical error in stating the year in the conclusions as 1945 instead of 1946. The case was tried in 1946, the accounting was made to June 30, 1946, and the judgment provided for an accounting from June 30, 1946, until one year after entry of the interlocutory decree.

[29] (g) Error is assigned in allowing the certified public accountant heretofore mentioned to testify as an expert as to the allocation of the income taxes as between respondent's separate estate and the community property. We have previously held that the court adopted the correct method in determining the amount of the income taxes to be charged against each class of property. If the court was in error in receiving the evidence, a question that we need not decide, the error was immaterial in view of the fact that the court properly allocated the taxes.

[30] We find no abuse of discretion in any part of the accounting as made by the trial court. The deductions from the community income before a division was made were proper. Furthermore, since it was within the power of the court to divide the property in such proportions as it deemed just (Civil Code, sec. 146), the deductions must be considered to be a part of the division and allocation of the community property.

[31] 5. *Respondent's claim for further deductions.* Respondent contends that several amounts should have been deducted from the community funds in addition to those allowed by the court before a division was made. He has not appealed from any portion of the judgment and his contention therefore cannot be considered.

Judgment affirmed.

MOORE, P. J., and McCOMB. J., concur.

82 Cal.App.2d 649

MERCHANTS FINANCE CORPORATION v. MAHOMED et ux.

Civ. 13454.

District Court of Appeal, First District, Division 2, California.
Dec. 1, 1947.

1. Taxation 🔑679(5)

Owners of realty who, 13 years after tax delinquincy, contracted to buy realty from tax collector, were thereafter precluded from acquiring title to realty at a tax sale.

2. Statutes 🔑195, 211

Where the Legislature enacted three chapters of tax legislation, but only one chapter was specially designated as curative in nature, the designation of the one chapter as curative indicated that the other two chapters were not curative statutes.

3. Taxation ⚷615, 679(5)

Statute providing that tax collector may sell all or any portion of tax deeded property and that any person, regardless of any prior existing lien on, claim to, or interest in such property, may purchase at such sale, does not embrace sales held prior to enactment of statute, and does not render inapplicable to them, the rule that an owner, after neglecting to pay taxes and allowing his property to be sold, cannot thereafter acquire title to it at a tax sale. Revenue and Taxation Code, § 3691.

4. Limitation of actions ⚷39(1)

Limitation statute providing that an action for relief "not hereinbefore provided for" must be commenced within four years after the cause of action shall have accrued was not applicable in suit for declaratory relief, wherein tax legislation having its own statute of limitations was involved. Code Civ.Proc. § 343; Revenue and Taxation Code, § 3725; Pol. Code, § 3897.

5. Appeal and error ⚷173(10)

Statutes of limitations, which were not pleaded, could not be urged on appeal.

6. Limitation of actions ⚷51(2)

Where defendant's contract to purchase realty from tax collector remained executory, and only seven installments had been paid at time of suit for declaratory judgment, no statute of limitations problem was presented.

7. Action ⚷6

Where owners of realty, on which taxes had been delinquent for 13 years, contracted to purchase the realty from the tax collector at a time when they were ineligible to purchase the realty, and while that contract remained executory and only seven installments had been paid by the owners, purchaser at foreclosure of street improvement bonds instituted suit for declaratory relief, suit was not barred by laches.

◆

Appeal from Superior Court, Contra Costa, County; A. F. Bray, Judge.

Suit for declaratory relief by the Merchants Finance Corporation, a corporation, against Peter Mahomed and Marie K. Mahomed, his wife. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

S. C. Masterson, of Richmond, for appellants.

Eugene K. Sturgis, of Oakland, for respondent.

GOODELL, Justice.

This is an appeal on the judgment roll in a suit for declaratory relief.

The property involved consists of lots 11, 12 and 13 in block 14 of Osborn's Addition in Richmond, California. Respondent was decreed to be the owner, its title arising out of the foreclosure of three street improvement bonds, each for $112.50, issued on November 22, 1928, one of which was a lien against lot 11, another against lot 12 and the third against lot 13. Respondent foreclosed in the Superior Court; on July 3, 1931 a certificate of sale issued and on February 9, 1933 a commissioner's deed was recorded.

Appellants became the owners of the three lots on February 2, 1920 and paid all taxes levied against them from 1920 until 1926. From 1926 until 1939 they paid none and on June 27, 1927 the lots were sold to the state for non-payment of taxes. A deed to the state was made on July 28, 1932.

On January 5, 1939 the tax collector held a sale at which appellants became the purchasers of the three lots for $150, under a contract calling for a down payment of 10% and the balance in nine annual installments of 10% each, and on this contract their claim herein is based. They have paid all installments falling due up to this litigation, all interests, and all taxes levied since 1939.

The decree adjudges that respondent's title is subject to the lien of all taxes against the property; it requires respondent to refund to appellants the $115.02 paid by them for taxes subsequent to January 5, 1939 and it orders the tax collector to refund all money received from appellants under their contract.

[1] The sale to the state was for taxes which appellants failed to pay while they owned the property. Consequently when, some thirteen years after their delinquency, they contracted to buy the property for the second time—in this instance from the tax collector—they brought themselves within the rule, settled by a long line of decisions, that an owner, after neglecting to pay taxes and allowing his property to be sold, cannot thereafter acquire title to it at a tax sale. This rule was reaffirmed in Garvey v. Byram, 18 Cal.2d 279, 115 P.2d 501, 136 A.L.R. 1137, where the earlier cases are collected.

Appellants recognize that under this rule they were disabled from purchasing the property, but claim that the 1943 amendment of section 3691 of the Revenue and Taxation Code was a curative statute which removed the disability. That section reads: "The tax collector may sell for lawful money of the United States all or any portion of tax-deeded property *as provided in this chapter.* * * * *Any person, regardless of any prior or existing lien on, claim to or interest in such property, may purchase at said sale.*" (Emphasis added).

Appellants' position is that the last sentence, added in 1943, changed the rule of Garvey v. Byram and validated *sales held prior to the enactment* which, but for the amendment, would have been subject to the rule.

[2] At the 1943 session several pieces of tax legislation were enacted. (Stats. 1943, Chapter 452, p. 1988; chapter 458, p. 1993; chapter 897, p. 2743. Appellants concede that of the three, chapter 458 is the only one "expressly designated as curative in nature" but they argue "that all three are a part of the legislative scheme outlined". Chapter 458 is entitled "An act to validate certain acts * * * relating to taxation of property." However, it was not by that chapter that section 3691 was amended, but by chapter 452 which changed four sections and repealed one. Chapter 897 simply added 23 new sections. The very fact that chapter 458 is avowedly a curative statute indicates by contrast that the other two are not.

If, as appears to be the case, the 1943 amendment changed the rule of Garvey v. Byram, still it does not follow that it was meant to embrace sales *held prior to its enactment,* and no good reason appears why it should do so.

Chapter 7, part 6, division 1 of the Revenue and Taxation Code (sections 3691 to to 3730) deals with "Sale to Private Parties After Deed to State." Section 3691 authorizes the sale of "tax-deeded property *as provided in this chapter*" (emphasis added). Section 3693, defines the "Kind of sale authorized" as follows: "The sale shall be at public auction for cash in lawful money of the United States or negotiable paper. * * *" At the time of the 1939 sale to appellants, section 3897 of the Political Code was in effect and it set up altogether different machinery for the sale of tax deeded property than that set up by chapter 7 of the new code. It provided for a private sale as well as one at public auction; it provided also for an installment sale spread over a ten year period, which, indeed, is the form of appellants' contract. When such provisions are compared with those of section 3693 requiring a sale only at public auction and for *cash* or negotiable paper, it is readily seen that there is no connection between the "kind of sale authorized" by section 3693 and the kind of sale at which appellants purchased.

[3] When, therefore, the 1943 amendment of section 3691 provides that "Any person, regardless of any prior or existing lien on, claim to or interest in such property, may purchase at *said* sale" (emphasis added), it must necessarily mean only a sale, spoken of earlier in the section, "*as provided in this chapter,*" which in turn means a sale *for cash or negotiable paper.* Such language cannot be expanded so as to take in a sale held two years before the new code went into effect, where payment, instead of for cash, was spread over a ten year period.

Retroactive legislation was recently considered in the Industrial Accident Commission cases, Aetna Casualty & Surety Co. v. Industrial Accident Commission, 30 Cal.2d 393, 182 P.2d 159, 161, where the court said, "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent [citations]."

There is nothing in the language of section 3691 as amended in 1943 to indicate that it was intended to apply otherwise than to the sales *as provided in chapter 7 of the new code.* Accordingly we must conclude (paraphrasing the language of the last-cited case, p. 30 Cal.2d 393, 182 P.2d 159) "that it does not clearly appear from the language of the amended statute, or by necessary implication, that the Legislature intended it to apply" to sales which "occcurred before the effective date of the enactment." Hence the rule of Garvey v. Byram continued to bar appellants from acquiring any rights at the sale of January 5, 1939.

Appellants pleaded three distinct statutes of limitation, namely, subd. 1 of sec. 337, subd. 1 of sec. 338 and sec. 343 of the Code of Civil Procedure.

In their opening brief appellants discuss only section 343 and apparently no longer rely on the other two statutes. Respondent points out that section 343 cannot possibly apply because of the existence of a specific statute covering such cases as this, namely sec. 3725, Revenue and Taxation Code. Appellants counter by saying that that section cannot be applicable because it was not in effect when the contract was made, adding that section 3897, Pol.Code (already discussed), then in effect, is the applicable statute. It provided that no action "to set aside, cancel, or question the validity of any proceedings instituted under the provisions of this section" could be maintained unless "commenced within six months after the date of the execution of the deed of the tax collector". Section 3725 of the present code enlarged this period from six months to one year *after such deed.*

[4, 5] We agree with respondent that section 343 does not touch this case for it reads, "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued," while here the tax legislation has its own statute of limitations. It is either sec. 3897, Pol. Code or sec. 3725, Revenue and Taxation Code, and it makes no difference which, because neither was pleaded, hence neither can now be urged. 16 Cal.Jur. p. 603, sec. 199.

[6] This case presents no statute of limitations problem. It is a suit for a declaratory judgment, brought while appellants' contract remains executory. Only seven installments have been paid, and respondent apparently timed its action so as to obtain a declaration of its rights long before the time arrived for the tax deed, and therefore before the approach of the period when the statute of limitations might become an issue.

[7] What has been just said answers also the appellants' argument respecting laches. They stress the fact that the contract remains executory, and we have just seen that the suit was brought well before the time for the deed. In such circumstances it is difficult to see how the respondent can be charged with delay, and still more difficult to discover how appellants have suffered any harm or prejudice. They entered into a contract to buy property which they had permitted to be sold for taxes, at a time when the law declared that such purchasers could acquire no title.

Respondent was clearly entitled to a judicial declaration that no rights were acquired at the sale, and in making that declaration the court took care of appellants' incidental rights by making just and proper provision for the return to them of all they have paid out on the property since the sale.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J. concur.

82 Cal.App.2d 540

HUNT v. MAHONEY et al.

Civ. 13503.

District Court of Appeal, First District, Division 1, California.

Nov. 24, 1947.

Hearing Denied Jan. 22, 1948.

1. Vendor and purchaser 🔑75

Though there was no express statement by vendors' agent that time for completion of contract for sale of realty was extended, conduct of agent and of vendors in having agent obtain from purchaser consent to withdrawal of $1,200 from purchaser's deposit, which was accepted by vendors after time for completion of contract had expired, showed conclusively that agent was exercising, with vendors' knowledge and consent, the right given agent by express terms of contract to extend time of payment for additional 30 days.

2. Principal and agent 🔑96

Vendors' agent had the right, in accordance with express terms of contract for sale of realty, to extend time of payment by purchaser of purchase price for additional 30 days, without the vendors' consent.

3. Vendor and purchaser 🔑93

Principle that where time is the essence of a contract for sale of realty, payment of final amount under contract is a condition precedent to purchaser's right to demand a conveyance, and on failure to make such payment, the vendor has right immediately to declare a forfeiture, was not applicable, where contract provided that time of payment could be extended for 30 days, and evidence showed, and court found in purchaser's suit for specific performance, that time had been so extended.

4. Vendor and purchaser 🔑95(2)

Where vendors requested and purchaser authorized withdrawal of $1,200 from deposit made by purchaser so that vendors could make payment of bills for materials which had gone into house constructed by vendors on realty and withdrawal was made after balance of purchase price was due, there was a "waiver" by vendors of right to declare a default because of purchaser's failure to pay balance of price within time specified by contract, and vendors could not contend in purchaser's suit for specific enforcement that they were entitled to the $1,200 as a forfeiture under the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Vendor and purchaser 🔑75

Statutes providing that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, did not render invalid oral extension by vendors' agent of time for payment of balance of purchase price for realty by purchaser, where extension was made pursuant to the terms of the contract itself. Civ.Code, § 1698.

6. Specific performance 🔑97(3)

Where purchaser and his banker met with vendors' agent at title company, and, though purchaser did not have balance of purchase price in cash at the time, banker stated that bank was ready, able and willing to pay balance, and that title company could draw on bank for balance at any time, and no objection was made by vendors' agent to form of tender, there was sufficient tender or offer of performance by purchaser so that purchaser could thereafter maintain action for specific performance.

7. Principal and agent 🔑105(4)

Where vendor handled details of sale for vendors from the beginning, and parties expected that receiving of final payment for realty was to be handled by agent, and vendors at no time claimed that agent did not have such authority, a tender to agent by purchaser of balance of purchase price was a tender to vendors so that purchaser could thereafter maintain action for specific performance.

8. Vendor and purchaser 🔑170

A failure by vendors' agent to object to the form of tender made by purchaser of balance of purchase price constituted a "waiver". Civ.Code, § 1501; Code Civ. Proc. § 2076.

9. Tender ⚷18

Statute requiring deposit of money tendered applies only where the object and purpose of tender is to extinguish obligation. Civ.Code, § 1500.

10. Specific performance ⚷97(3)

In action by purchaser for specific performance of written contract for sale of realty, including a house thereon which vendors had not finished, it was no defense that purchaser had not deposited tender of balance of purchase price in bank in accordance with statute, since statute was not applicable. Civ.Code, § 1500.

11. Vendor and purchaser ⚷130(1)

Where contract for sale of realty provided that if title to realty should not prove marketable and vendors should not perfect title within 90 days, purchaser should have option of demanding and receiving back his deposit, marketability of title was a condition precedent to payment of purchase price.

12. Specific performance ⚷97(1)

Purchaser was excused from making any tender of balance of purchase price before bringing action for specific performance of the contract, where vendors had placed a new trust deed on the property.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Welby L. Hunt against Oather Paul Mahoney and Helen Ruth Mahoney for specific performance of a written contract for sale of realty and for damages for use and occupancy and for partially incomplete construction. From a judgment for plaintiff, the defendants appeal.

Judgment affirmed.

James W. Harvey and Elmer C. Mower, both of San Francisco, for appellants.

Harry G. Henderson, of San Francisco, for respondent.

BRAY, Justice.

The trial court rendered judgment in favor of plaintiff against defendants, decreeing specific performance of a written contract for the sale of certain real property, including the home thereon, awarding damages in the sum of $300 for use and occupancy, and the sum of $75 to compensate for a partially incomplete bathroom.

The contract upon which this action is based was furnished and filled out by defendants' real estate agent, and is entitled "Deposit Receipt for Purchase of Real Property." The receipt portion is signed "William Nock Company Real Estate Broker By M. J. Scotto," is dated February 8, 1946, and recites that there is received from plaintiff $2,000 as deposit on account of purchase price of the described property; that the total purchase price is $16,000 "and the balance of the same is to be paid within thirty days from date hereof, as follows: Cash. House to be delivered completely finished. * * * That in the event said buyer shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the sellers, be retained as liquidated and agreed damages. That in the event the title to said property shall not prove marketable and said seller shall not perfect same within ninety (90) days from this date, the buyer shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder. That the evidence of title is to be in the form of a Policy of Title Insurance, issued through Marin Title Guaranty Company, and to be furnished and paid for by the Purchaser. * * * That the taxes for the current fiscal year, insurance premiums, if policies are acceptable to Purchaser, and rents, shall be pro rated from date of delivery of deed or final contract of sale. Time is the essence of this contract, but the time for any act required hereunder may for sufficient cause be extended not longer than thirty days by the agent signing this contract." We have omitted portions of the receipt not involved here. Following the receipt plaintiff signed the following statement: "I agree to purchase the above described property on the terms and conditions herein stated"; and then appears "I agree to sell the above described property on the terms and conditions herein stated, and agree to pay the above signed Broker as commission five (5) per cent of the above purchase price, or one half the deposit in case same is forfeited by the buyer, provided same shall not exceed the full amount of the commission," signed by defendants.

At the time of the signing of the contract the house still was not finished, and defendant Oather Mahoney admitted that on April 9th, the time to which the agent had authority to extend the time of payment, it was still not finished.

The house was being built by defendants, who, although it was not completely finished, occupied it. Mechanics' liens were filed against the property and demands for payment of bills incurred in building were being pressed against defendants. About two weeks after the signing of the contract Scotto, the agent of defendants, contacted plaintiff and asked him to permit $1,200 of the $2,000 deposit, which was in the hands of the real estate company, to be drawn out and used by defendants in the payment of certain bills for materials which had gone into the house. Plaintiff agreed, and on March 13th, four days after defendants now claim plaintiff became in default, signed a letter to the real estate agency authorizing the "advance up to $1,200, to the account of the seller, for the payment of material accounts previous to filing of notice of completion." Thereupon, the agency paid one and possibly two materials bills, and gave the balance to defendants who used it in paying other materials bills.

When the thirty days from the date of the contract had passed, the house was still unfinished and mechanics' liens were still against the property and in prospect. Scotto had requested the $1,200 advance, which a few days later was granted as above set forth, and from time to time the plaintiff came to the house where the defendants were living to observe the progress of the work. Nothing seems to have been done by either party or the agent to extend formally the time of payment. However, it is apparent that all parties assumed that the time of payment had been extended the additional thirty days.

On April 9th, the day the balance of the purchase price would have to be paid under the extended time, plaintiff, a Mr. Lethbridge representing the bank which had agreed to lend plaintiff the balance of the purchase price, and Scotto, met at the office of the title company mentioned in the contract and whom the real estate agent had instructed to "prepare a report and instructions for purposes of this sale." Neither defendant was present. The purpose of the meeting was to pay to the title company the balance of the purchase price, to be delivered to defendants as soon as good title could be vested in plaintiff and a deed of trust from plaintiff to the bank be made a valid first lien. Mr. Darrow, the title company representative, called attention to the fact that the title to the property was not clear because of the mechanics' liens already filed and the fact that the legal time after notice of completion in which to file additional liens had not yet expired. Lethbridge stated that the bank was prepared to advance the necessary moneys to pay the balance of the purchase price and that the title company could draw on the bank for it at any time. Darrow recommended that the money not be put up or drawn until the necessary time had expired after completion notice filed. Scotto, representing defendants, acquiesced in this. It was then suggested that the completion of the house would be expedited if some method were arrived at by which the plaintiff could put in escrow moneys to pay off the labor claims, without waiting for the expiration of the statutory period, and Scotto agreed to consult his principals in this respect. Scotto talked by phone to defendant Helen Mahoney, explained the situation and asked her to have defendant Oather Mahoney phone him. Despite repeated phone calls and messages by Scotto to Mrs. Mahoney, defendant Oather Mahoney would not or did not contact Scotto for a week or more. When he finally did contact Scotto, he informed the latter that he had resold the house.

The first contention made by defendants is that as time is expressly made of the essence of the contract, plaintiff's failure to pay the $14,000 in thirty days constituted a failure to comply with the contract.

There are four answers to this: first, the seller had failed to comply with his agreement to have the house finished; second, the seller was in no position to deliver marketable title; third, the time of payment was extended by, or its extension acquiesced in, by both the seller and his agent; and, fourth, the defendants waived the right to claim a default. The first two answers will be considered later.

[1, 2] As to the third, the evidence shows that while there was no express statement by the agent that the time was extended, his conduct, and that of the defendants in having him obtain from plaintiff consent to the withdrawal of $1,200 from the deposit, which amount they accepted after the thirty days had expired, shows conclusively that the agent was exercising, with their knowledge and consent (although he had the right to do it without their consent), the right given him by the express terms of the contract to extend the time of payment for an additional thirty days.

[3] Defendants cites Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Winter v. Kitto, 100 Cal.App. 302, 279 P. 1024; Kelso v. Ulrich, 67 Cal.App.2d 698, 155 P. 2d 407, and Martinelli v. Hogrefe, 123 Cal. App. 438, 11 P.2d 412, as authority for the proposition that where time is the essence of the contract, the payment of the final amount under the contract is a condition precedent to the right of the vendee to demand a conveyance, and upon failure to make such payment, as provided, the vendor has the right immediately to declare a forfeiture. There can be no quarrel with that principle of law. But it is not applicable here, for the reason that the contract itself provided that the time of payment could be extended for thirty days, and the evidence showed, and the court found, that it had been so extended.

[4] Fourth: Defendants accepted $1,200 of the deposit after the date when the $14,000 should have been paid, if, as contended by defendants, the time of payment was not extended. At argument, defendants contended that they were entitled to it as a forfeiture under the contract, which provided that in the event of failure by plaintiff to pay the balance of the purchase price the defendants were entitled to retain the deposit as liquidated damages. But it was not so taken by defendants. Defendant Oather testified that he requested that he "might be privileged to withdraw" this $1,200. The evidence clearly shows that this request was communicated to plaintiff by Scotto, and the withdrawal was made solely by reason of the letter which plaintiff signed authorizing it as an *advance*. There was no question of forfeiture at the time. That this withdrawal was a waiver of the right to declare a default is well shown by the following language from Boone v. Templeman, 158 Cal. 290, at page 294, 110 P. 947, 949, 139 Am.St.Rep. 126: "The general rule on the subject is thus stated by Mr. Pomeroy: 'A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore a defense.' Pomeroy on Contracts, sec. 337. 'The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default.' Pomeroy on Contracts, sec. 294. Mr. Sugden says: 'Although time may be made of the essence of the contract, yet the condition may be waived, * * *.'"

[5] Defendants' second contention is that there could be no extension of the time of payment by the agent unless such extension was in writing, citing section 1698, Civil Code, and Battaglia v. Winchester Dried Fruit Co., 32 Cal.App.2d 436, 90 P. 2d 111. But neither that section nor case applies here. The section reads: "A contract in writing may be *altered* by a contract in writing, or by an executed oral agreement, and not otherwise." (Emphasis added.) Here the contract was not being

altered. On the contrary, the extension was made pursuant to the very terms of the contract itself.

[6] Defendants' third contention is that there was no tender or sufficient offer of performance by plaintiff. The first answer to this contention is that the evidence shows such tender and offer of performance. Plaintiff and his banker met with defendants' agent at the title company. True, plaintiff did not have $14,000 in cash present. But after stating that they were there for the purpose of paying the balance of the purchase price, the banker stated that they were ready, able and willing to pay the balance of the purchase price, and the title company could draw on them for it at any time. No objection was made by defendants' agent to this form of tender. In fact, he seemed to consider it the proper method. Had the title been marketable and the house finished at that time, there can be no question but that the money would have been paid.

[7, 8] Scotto handled for defendants all the details of the transaction from the very beginning, and it is apparent from the evidence that all parties expected the matters connected with the receiving of the final payment to be handled by him. In fact, the defendants at no time have claimed that he did not have such authority. A tender to him under the circumstances of this case was a tender to the defendants. A failure to object to the form of the tender constituted a waiver. "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated." Sec. 1501, Civil Code. "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." Sec. 2076, Code Civ.Proc. "Objections held to be waived by the creditor when not stated at the time of the making of the tender include objections as to amount, the person making it, conditions accompanying it, and the medium of exchange in which the offer is made." 24 Cal.Jur. p. 531. "Further, if, because of a generally recognized business usage or because of the course of dealings between the parties, the obligor has reason to believe that tender in a medium other than that prescribed by law will be acceptable and the obligee refuses it, insisting on legal tender, the obligee must give the obligor a reasonable time in which to make a valid tender. * * * The more technical the objection to the tender, the more reasonable will be the inference from slight evidence that the objection is waived. * * *" Williston on Contracts, Rev.Ed., vol. 6, pp. 5157, 5159.

[9, 10] Defendants seem to contend that in order to bring this suit the tender of April 9th, if made, must be kept good by the deposit of the $14,000 in the bank for the account of defendants, and cites section 1500 of the Civil Code in support of this contention. But as said in Marshall v. Hilton, 209 Cal. 531, at page 534, 289 P. 165, 167: "This section has no application to a tender made in a case of this kind. It applies in cases where the object and purpose of the tender is to extinguish an obligation. Here no claim is made that the tender proven extinguishes the obligation of the respondents to pay to the appellant the amount due her under the agreement of sale, but was a preliminary step to be taken before an action could be instituted by the respondents against the appellant to specifically perform the contract. In such a case 'the law does not require the purchaser to keep the tender good or deposit the money in the vendor's name and thus place himself at the vendor's mercy, since the decree, if granted, will require the plaintiff to pay the purchase money before receiving the deed.' (23 Cal.Jur. 459.)"

A second answer to this contention is that the house was not finished. At that time, as well as at the expiration of the first thirty-day period, the defendants admit there was still much to be done to the house to finish it.

[11] A third answer to this contention is that defendants were in no position at this time to deliver a marketable title. The agreement provides "in the event the title to said property shall not prove marketable and said seller shall not perfect same within ninety (90) days from this date, the buyer shall have the option of demanding and receiving back *said deposit*" etc. (Emphasis added.) It is clear that the marketability of title was a condition precedent to the payment of the purchase price and that if the title was not marketable not only did the seller have ninety days to perfect it, but the time of payment likewise would be extended, for, if at the end of the ninety days the title had not been perfected, the buyer had the option of getting back his deposit. Had it been intended that the buyer must pay the balance of the purchase price and then wait for the seller to perfect title, this clause would have provided for the return of the *purchase price* rather than the *deposit.*

Defendants rely upon Bourdieu v. Baker, 6 Cal.App.2d 150, 44 P.2d 587, for their contention that plaintiff was obligated to pay the balance of $14,000, and then wait ninety days for defendants to perfect the title. But the situation in that case was entirely different from that here. There the contract acknowledged receipt of $10 on account of the purchase price of $25,000, and provided that the purchase price was to be paid: $3,000 on or before thirty days, and the balance to be paid on or before six months from date; title to be perfect and deed to be delivered on or before a date five months later, "Provided, however, that the payment of $3000.—is paid at said date, but if not paid * * * then this contract to be of no effect." It will be noted that there were two payments to be made, one of $3,000 in thirty days, and the other of $22,000 in six months. Within the thirty days, the buyer deposited the $3,000 with a title company in escrow to be paid to the seller when the title company had a deed of the property to the sellers. Moreover, the buyer instructed the title company to make certain payments, such as mortgage interest and taxes, out of the $3,000, none of which payments the seller had ordered. Notice was given the seller of this deposit. The court held that the agreement constituted only an option to purchase the land. Here, the agreement is definitely one of purchase and sale. There the court held that the offer to sell would not become binding until the payment of $3,000 within the thirty days, that such payment constituting acceptance must be made in accordance with the terms of the offer, that the buyer attempted to attach terms to his payment, and that "an acceptance based upon terms varying from those offered constitutes a rejection of the offer." Page 158 of 6 Cal.App.2d, page 590 of 44 P.2d. It also held that the contract did not provide for payment into escrow but to the owner. In our case, while the contract provided for the payment to the owner, the evidence shows that the seller's agent who handled the transaction from the time of entering into the contract, including the negotiations with the buyer concerning an advance payment of a part of the deposit, agreed that the payment was to be made at the title company's office. There, there was no requirement that the title be perfect at the time of the $3,000 payment. It merely had to be perfect at the time of the final payment. Here, there was no intermediate payment to be made. The $14,000 was a final payment and the title had to be marketable when that payment was made.

[12] Assuming that there was no tender on the due date, April 9th, defendants were in no position to accept the $14,000 were it tendered, as they themselves could not have complied with the contract, and conveyed to plaintiff a marketable title and a finished house. The law does not require an idle act. Williston on Contracts, Rev. Ed., vol. 3, sec. 698A, p. 2008. Before defendants were in a position to perform on their part, defendants notified plaintiff through their agent, Scotto, that they did not intend to perform the contract. In fact they claimed they had made it impossible to do so by selling the property to another. It appeared later that they had not sold, but had placed a new deed of trust on the property. This, of course, excused plaintiff from thereafter making any tender. Williston on Contracts, supra; Giarratano

v. McIlwain, 215 App.Div. 644, 214 N.Y.S. 582; Tatum v. Levi, 117 Cal.App. 83, 3 P.2d 963.

The position taken by defendants on this appeal shows that the sellers thought they saw an opportunity, through technicalities, to get their property back and to keep the deposit of the buyer, who at all times acted in the utmost good faith. The law does not look favorably upon such a situation.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

ROEHM v. ORANGE COUNTY et al. *

Civ. 3492.

District Court of Appeal, Fourth District, California.

Nov. 24, 1947.

Hearing Granted Jan. 22, 1948.

1. Intoxicating liquors 🔑10(2, 4)

Under the Constitution, power to license and regulate sale of liquor is a matter of state concern and is not entrusted to cities and counties for purpose of regulation and control. Const. art. 13, § 1; art. 20, § 22.

2. Intoxicating liquors 🔑10(4)

Constitutional provision giving state exclusive right and power to control license and regulate the manufacture, sale, etc., of intoxicating liquor within state took away from political subdivisions of the state right to impose license tax for purpose of revenue upon any such business. Const. art. 20, § 22.

3. Intoxicating liquors 🔑90(1), 99

Nature of license to carry on business of selling intoxicating liquors in California is a "privilege" and fee exacted therefor by state is a form of tax provided for and based upon that privilege or right. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege".

4. Intoxicating liquors 🔑101, 103

A liquor license is not transferable by operation of law and death of licensee terminates license.

5. Intoxicating liquors 🔑99

A liquor license is not "property" but is a mere temporary permit to do what otherwise would be illegal issued in exercise of police power.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

6. Intoxicating liquors 🔑10(4)

An on-sale liquor license issued by the State Board of Equalization is not subject to taxation by the county and city since the license is merely a privilege and not property, is not transferable by operation of law, or by act of the licensee, and since the purchaser at a tax sale could acquire no enforceable right to have the license transferred to him either by his own act or by operation of law. Gen.Laws, Act 3796, §§ 7, 7.2; Revenue and Taxation Code, § 103; Const. art. 13, § 1; art. 20, § 22.

7. Statutes 🔑245

Tax laws are strictly construed against taxing power and a statute will not be held to have imposed a tax unless clear and explicit.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by E. L. Roehm, individually and doing business as Marquis Cafe, against County of Orange, a political subdivision of State of California, and another, for recovery of tax paid. From an adverse judgment, plaintiff appeals.

Reversed.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

Joel E. Ogle, County Counsel of Orange County, Royal Hubbard, Deputy County Counsel of Orange County, and George E.

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* Subsequent opinion 196 P.2d 550.

Bradley, City Atty. of Santa Ana, all of Santa Ana, for respondents.

Irwin M. Fulop, Landon Morris, Frederick N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., Arthur C. Fisher, Holbrook & Tarr, Abert E. Isenberg, and W. Sumner Holbrook, Jr., all of Los Angeles, amici curiae for appellant.

Harold W. Kennedy, County Counsel of Los Angeles County, and Loton Wells, Deputy County Counsel of Los Angeles County, both of Los Angeles, amici curiae for respondent.

GRIFFIN, Justice.

Plaintiff alleged in his complaint that he was the owner of an on-sale general liquor license issued to him by the State Board of Equalization (hereinafter referred to as the Board), which license permitted him to conduct his business at a specified place in Santa Ana; that in the year 1946 the County Assessor of Orange County assessed the liquor license of plaintiff as taxable property and levied a tax on it in the sum of $432.62; that on July 24, 1946, plaintiff paid said tax involuntarily and under written protest. Plaintiff then alleged that the on-sale license was not personal property and was not taxable under any provision of the State Constitution or Revenue and Taxation Code of this state; that the assessment and levy was illegal. He prayed for a recovery of the tax paid. A general demurrer to the complaint was sustained without leave to amend. Plaintiff appealed from the adverse judgment.

The issue here squarely presented is whether such a license issued by the Board is property subject to taxation under section 1, Article XIII of the State Constitution, which provides in part: "All property in the State except as otherwise in this Constitution provided, * * * shall be taxed in proportion to its value, * * *. The word 'property' as used in this article and section, is hereby declared to include moneys, * * * franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; * * *.", and section 103 of the Revenue and Taxation Code contains a similar definition of property.

Article XX, section 22 of the Constitution of California, as adopted by the people in 1932, gave the State "exclusive right and power to control, licenses and regulate the manufacture, sale * * * and disposition of intoxicating liquor within the State." By an amendment, similarly adopted in 1934, it is provided that the Board shall have the "exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect *license fees* or *occupation taxes* on account thereof." In this same section it is further provided that "the *privilege* of * * * selling * * * intoxicating liquors * * * and the *privilege* of keeping * * * selling * * * and otherwise disposing of beers on any premises open to the general public shall be *licensed* and *regulated* under the applicable provisions of the so-called State Liquor Control Act" and the "license fee to be charged * * * for the *privilege* of * * * selling * * * intoxicating liquors * * * shall be $250.00 per year, or $62.50 per quarter-annum for seasonal businesses, subject to the power of the State Board of Equalization to change such fees." It then recites that the legislature shall provide for the apportionment of such "license fees or occupational taxes" between the State and the cities and counties as it may deem proper.

At the time of the levying of the tax here involved, the cities received one-half of such fees. Alcoholic Beverage Control Act, sec. 37, Deering's Gen. Laws 1944, Act 3796, Vol. 2 p. 1392, hereinafter referred to as the Act. The last legislature provided that such cities or counties shall receive the entire sum thus collected. Stats. 1947, chap. 712. Therefore, respondents have received 50 per cent of the moneys collected by the Board as an *occupational tax* or *license fee* for the issuance of the same license which it now claims is made the subject of a property tax by defendants.

In this connection it is argued by plaintiff's counsel that the license to sell intoxicating liquor is only a *privilege,* as thus described in the Act itself, and is not property subject to taxation under the Constitution and Revenue and Taxation Code, that the Constitution does not authorize or require, but forbids the double taxation of property. People ex rel. Burke v. Badlam, 57 Cal. 594; Flynn v. San Francisco, 18 Cal.2d 210, 115 P.2d 3; that the so-called property tax here levied on the liquor license of plaintiff is in fact and effect but another "occupational tax levied on account of a license to sell intoxicating liquors"; that such right is "within the exclusive power of the Board of Equalization under Article XX, section 22 of the Constitution"; and that this provision has deprived the county assessor of the "authority to impose a tax on the *privilege* of selling intoxicating liquors", citing such cases as L. A. Brewing Co. v. Los Angeles, 8 Cal.App.2d 391, 396, 48 P.2d 71; City of Los Angeles v. Los Angeles, etc., Co., 152 Cal. 765, 93 P. 1006; Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 P. 700; Flynn v. San Francisco, supra; Brunton v. Superior Court, 20 Cal.2d 202, 124 P.2d 831; People v. Schmitz, 7 Cal. App. 330, 366, 94 P. 407, 419, 15 L.R.A., N.S., 717; and Hevren v. Reed, 126 Cal. 219, 222, 58 P. 536.

[1] In Hevren v. Reed, supra, it was held that a liquor license, whether revocable in terms or not, is neither a contract nor *property* in any constitutional sense, but is subject at all times to the police power of the State government. In this connection, it should be noted that our State Constitution, Article XX, section 22, gives to the State the "exclusive right and power to license and regulate" the sale of liquor in the State which right, under the decisions, includes the power to tax for such licensing purpose. Therefore, the right and power to license and regulate the sale of liquor in the State is a matter of State concern and is not entrusted to cities and counties for the purpose of regulation and control. It was said in Re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 722, 167 A.L.R. 675: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." It was likewise held in that case that if a city may tax the privilege (or right) for revenue purposes, it may fix the rate of tax and thus *control at will* an activity in a field over which the legislature has assumed state-wide control. See also, Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767. This same reasoning could be applied in reference to taxation of liquor licenses by cities and counties.

[2] If the character and nature of the tax here imposed is similar to the license fee or occupational tax imposed by the State and is, in legal effect, but another and similar license fee or occupational tax imposed upon plaintiff by the City of Santa Ana and County of Orange, then such tax is invalid under the holding in L. A. Brewing Co. v. Los Angeles, supra. That case involved an ordinance passed by the City of Los Angeles imposing a license tax on the business of selling alcoholic liquor for revenue purposes, and requiring that a license fee or tax be paid, based upon the gross receipts of such business. It was there held that the provisions of section 22, Article XX of the State Constitution, giving the State the "exclusive right and power to control, license and regulate the manufacture, sale * * * and disposition of intoxicating liquor within the State" took away from the political subdivisions of the State the right to impose a license tax for the purpose of revenue upon any such business; that while the licensing of a liquor business was a municipal affair prior to the operative date of that section, the adoption of said amendment to the Constitution changed the power to impose a license tax for revenue upon those engaged in the liquor business from a municipal affair to one of general state-wide concern and, therefore, removed such power from the protection of section 6, Article XI of the Constitution. It was likewise there held, in reference to the State's powers, that the phrase "exclusive right and power to control, license and regulate" included the power of the State to impose and collect a license tax for revenue.

The case of Three-G Distillery Corporation v. County of Los Angeles, 46 Cal.App. 2d 498, 116 P.2d 143, hearing denied by the Supreme Court, is not opposed to this holding. This court merely held that Article XX, section 22 of the Constitution, reserving to the State the "exclusive power" to license and regulate the sale of intoxicating liquor, did not deprive the local taxing agencies of the right to levy personal property taxes on a distillery and warehouse containing a large amount of liquors owned by the licensee and located in the district where the levy was made.

The legislature, in section 5 of the Act, has described the types of licenses to be issued and has fixed the license fees to be charged therefor. Section 6 of the Act describes the "privileges granted" by the license which authorizes the "person *to whom* issued to exercise the * * * *rights and privileges* (therein described) and no others at the premises" specified "during the year for which issued". These retailers' on-sale licenses are issued on a calendar year basis and are renewable unless such licenses have been revoked.

In State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 42 P.2d 1076, hearing denied by the Supreme Court, the nature and character of the license here involved is described. The court said, at page 377, of 5 Cal.App.2d, at page 1077 of 42 P.2d, that: "Unlike the rule with respect to the right to deal in ordinary commodities considered in the numerous cases cited and relied upon by respondent, there is no inherent right in a citizen to sell intoxicants * * * and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution; * * * it is but a permit to do what would otherwise be unlawful, and consequently a statute authorizing its revocation does not violate the due process clause * * *."

In Irvine v. State Board of Equalization, 40 Cal.App.2d 280, 104 P.2d 847, the statement as to the nature and character of the license described in State Board of Equalization v. Superior Court, supra, was recognized.

In People v. Schmitz, supra, 7 Cal.App. at page 366, 94 P. at page 418, 15 L.R.A., N.S., 717, the court said: "A license to sell liquors is not property in the ordinary sense of the word, but a mere permission, and the license is but the evidence that the permission has been given by the proper authorities * * *." Citing cases. However, this declaration was followed by the statement that it was unnecessary to decide that question in that case for the reason that the indictment was otherwise insufficient. See, also, Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

It has been said in some cases, in referring to rights acquired under a license, such as a right to practice medicine, optometry and law, that such right was a *vested property right.* Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St. Rep. 315, 7 Ann.Cas. 750; Laisne v. California State Board of Optometry, 19 Cal. 2d 831, 123 P.2d 457.

On the other hand, a number of decisions of this state declare that vocational and professional privileges, while valuable, are not in the nature of *property* that can be sold or disposed of by act of the licensee or acquired by operation of law, such as attachment or sale under execution, but are a *"statutory privilege"*. See Cohen v. Wright, 22 Cal. 293; In re Investigation of Conduct of Examination for Admission to Practice Law, 1 Cal.2d 61, 33 P.2d 829; Rosenblatt v. Cal. State Board of Pharmacy, 69 Cal.App.2d 69, 74, 158 P.2d 199; State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 377, 42 P.2d 1076; Irvine v. State Board of Equalization, supra; Paladini v. Superior Court, 178 Cal. 369, 173 P. 588.

[3] We are convinced, from the authorities cited in this state, and from a consideration of the entire constitutional provision and the legislative acts here involved, regardless of holdings in other states that may appear contrary to this conclusion, that the nature of the license to carry on the business of selling intoxicating liquors in this state, particularly as between the State and the licensee, is but a *privilege* and that the fee exacted therefor by the State is a form of tax provided for and based upon that privilege or right.

As we analyze the contention of defendant and that of *amici curiæ* in support of defendant's claim it is this: that even though the license, as issued, is and has always been considered by the taxing authorities up to the present time to be but a *privilege* given to the licensee to carry on the occupation or business of selling intoxicating liquor, it now has, in the minds of the taxing authorities, changed its form and character from that of a privilege to that of "property taxable under Article XIII, section 1, of the Constitution", because it is transferable by the *act of the licensee* and *by operation of law,* and since a limitation has been placed on the number of licenses that may be issued, it now has a market value greatly in excess of the amount paid as a fee or tax for such license or privilege, citing the general rule stated in 51 American Jurisprudence, p. 444, sec. 424, reading: "The taxation of franchises, licenses, and privileges usually is by means of an excise tax rather than by a property tax, although a franchise, license, or privilege which may be made the subject of sale or mortgage, which may be sold on execution, and which passes as an asset to the owner's trustee in bankruptcy or to his executor or administrator is generally considered property for the purposes of taxation, even if it cannot be transferred without the consent of the legislature or of some other governmental body."

However, under this same general rule, cited by defendants, we find this language: "Since, however, a license to sell intoxicating liquor is not generally regarded as property or a vested right, a license to sell intoxicating liquor has been held not taxable as property, although there is authority otherwise." Rowe v. Colpoys, 78 U.S.App.D.C. 75, 137 F.2d 249, 148 A.L.R. 488, writ of certiorari denied in 320 U.S. 783, 64 S.Ct. 190, 88 L.Ed. 470, is cited in support of this general rule relied upon by defendants. It was there held that under the laws of the District of Columbia, a liquor license is considered property because it could be sold under a levy of execution. On the other hand, 30 American Jurisprudence, p. 326, sec. 134, recites: "Generally—A license to engage in the liquor traffic is not a grant, and confers no vested rights upon the licensee. It does not do so any more than the charter of a social club creates rights beyond revocation for violation of the liquor laws. Nor can any vested rights be created under a license by the acquisition and use of the instrumentalities necessary to the business." Sec. 135: "A liquor license is not a contract between the government and the licensee, within the protection of the constitutional guarantees, but is a privilege which may be revoked by the repeal of the law authorizing issuance of the license." Section 136: "Generally, it is held that a license to sell intoxicating liquor is not property, or a vested right. It is not property in any legal or constitutional sense or within the meaning of the tax laws * * *." Citing cases.

Some jurisdictions have held that where the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities, a liquor license has been regarded as property, and that in such case it is an asset of the estate of the licensee which passes to the trustee in bankruptcy, a receiver, or in case of the licensee's death, his personal representative. 30 American Jurisprudence p. 327, sec. 136. Other jurisdictions have held that the license, although assignable, is not property subject to levy and sale on execution. Deggender v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 P. 898, 4 L.R.A.,N.S., 626.

[4] It is the general rule that a liquor license is not transferable by operation of law and it is generally held that the death of a licensee terminates the license; that therefore it does not become an asset of the estate or give the personal representative of the licensee any right to conduct the business or to make sales under the license, nor can he exercise the statutory privilege of obtaining a renewal which could have been invoked by his decedent had he lived. This rule is generally recognized. A distinction is made in some jurisdictions holding that as between the licensing power and the licensee only, a personal privilege is created, but where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, as between the licensee and third parties, a different rule prevails and such license or right to do business becomes a valuable property right subject to barter and sale and is property with value and quality for the purpose of determining whether such license was an asset of an estate for the benefit of creditors. Deggender v. Seattle Brewing & Malting Co., 41 Wash. 385, 83

P. 898, 4 L.R.A.,N.S., 626. See, also, 30 American Jurisprudence p. 329, sec. 141; Ann.Cas.1915B, 526.

[5] In Fischer v. Cushman, 1 Cir., 103 F. 860, 864, 51 L.R.A. 292, such a tranferable license was held to be property under the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. In Jaffe v. Pacific Brewing & Malting Co., 69 Wash. 308, 124 P. 1122, the Washington Supreme Court held such licenses to be the subject of an action in trover, although as between the licensing agency and the licensee the license created no vested property rights. But see, Voight v. Board of Excise Commissioners of Newark, 59 N.J.L. 358, 36 A. 686, 687, 37 L.R.A. 292, which was an application for a writ of certiorari to review the action of the Excise Commissioners of the City of Newark in revoking a liquor license. The Supreme Court denied the application and said: "A license is in no sense property. It is a mere temporary permit to do what otherwise would be illegal, issued in the exercise of the police power. (Citing cases.) Counsel does not deny that this is the general rule, but argues that since the passage of the act of April 1, 1887, which authorizes boards of excise commissioners, in their discretion, to transfer any license granted by them * * * license to sell liquor is property. But why the fact that a license may now be transferred, in this state, converts it from a mere privilege into a property right he does not tell us, nor have I been able to perceive, and I have therefore concluded that the contention has nothing to rest upon."

The common law saw liquor licenses only as a mere personal privilege and accordingly did not regard them as a subject of levy or sale. Rowe v. Colpoys, 78 U.S.App.D.C. 75, 137 F.2d 249, 148 A.L.R. 488, 489.

Our research has not disclosed, nor has our attention been called to any case in California, in the exhaustive briefs submitted by able counsel for the parties, or of amici curiæ, where our courts of last resort have ever held that a general on-sale liquor license issued under our Act has ever been held subject to taxation by any taxing authority of this state under the Constitution or Revenue and Taxation Code. Nor has it been shown that such a license has ever been held subject to attachment, levy on execution, subject to sale in satisfaction of creditors' claims in a bankruptcy proceeding or for nonpayment of a delinquent property tax levied thereon. Opinions of the Attorney General, beginning in 1938 to June 9, 1947, have consistently held that such licenses as are here under consideration in this State, are not subject to garnishment or execution, are not property subject to inheritance, assignment, sale, mortgage, devolution through bankruptcy, or succession through community, joint tenancy or partnership ownership. Attorney General's Opinions, New Series, 1275, 1621, 2122, 3183, 3364 and Vol. 9, 47-103.

While the interpretation placed upon the character of these licenses generally may not be binding on this court, it clearly indicates that any other interpretation would be contrary to the long and uniform administrative interpretation of the constitutional provision, the Act, and other licensing statutes of the State, as interpreted by the licensing agencies and the Attorney General's office.

In the case of Lowenberg v. Greenebaum, 99 Cal. 162, 33 P. 794, 21 L.R.A. 399, 37 Am.St.Rep. 42, the Supreme Court of this state said that a "broker's seat" in the San Francisco stock and exchange board was not subject to levy and sale under execution because it could be voluntarily transferred only to a person the association might choose to elect as a member. This same conclusion was reached in a later case. San Francisco v. Anderson, 103 Cal. 69, 36 P. 1034, 42 Am.St. Rep. 98. The only question there presented was whether a "seat" on the same board was "taxable property" within the meaning of our statutes. Such right or privilege too, no doubt, was a valuable right. It was there stated: "It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said 'seat'. It is too impalpable to go into any category of taxable property."

It is true that in many states such a "seat" on an exchange board has been held, under the laws of that particular state, to be taxable property. Many of these cases were cited in San Francisco v. Anderson, supra, but our Supreme Court refused to follow the rule laid down by those jurisdictions.

In Lowenberg v. Greenebaum, supra, Pacific Bank v. Robinson, 57 Cal. 520, 523, 40 Am.Rep. 120, is cited, where the Supreme Court of this state expressly held that a *patent right* was not tangible property subject to seizure and sale on execution, and in commenting on that holding stated that [99 Cal. 162, 33 P. 796] "a seat on the stock board is certainly not more tangible than a patent right, for the latter can at least be sold and transferred by its owner at his own will, while the former cannot."

The Supreme Court of the United States in Citizens' National Bank of Cincinnati v. Durr, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149, held that the determination whether such a "seat" or membership was property taxable under the law of any particular state, was a question of state law and that the United States Supreme Court was controlled by the determination of the court of last resort of that state on the subject. See also, 61 Corpus Juris 203, sec. 179. In all of the United States Supreme Court cases cited upholding such a tax, the state courts had previously held that such a membership was taxable property under the law of that particular state.

In Harding v. Board of Equalization, 90 Neb. 232, 133 N.W. 191, 37 L.R.A.,N.S., 455, in holding that the privilege granted a licensee to sell intoxicating liquors is not subject to assessment for taxation, the court said: "Such licenses are but mere temporary permits to the licensee to do that which without it would be unlawful. The licensee does not thereby become vested with any property right, within the meaning of section 3, art. 1, of the Constitution, which provides: 'No person shall be deprived of life, liberty or property without due process of law.' (Citing cases.) The privilege is *purely personal;* it *may not be transferred by the act of the licensee or by operation of law;* it may be *canceled by a repeal of the statute authorizing the granting of licenses,* or by an amendment thereto, requiring the *payment of a greater sum than formerly;* and it may be *summarily revoked for any cause* provided by statute, or by the ordinance under which it was issued." (Italics ours.)

The case of San Francisco v. Anderson, supra, involving the right to a "seat" in a stock exchange, was there cited as authority for this conclusion.

Under the Act here involved, an application for the transfer must be made *by the transferor to the board.* The transferee must then make *"an original application* to the Board for a license of the same character and the applicant then proceeds" as upon *an original application.* In actual practice it is conceded, the former license is surrendered and a new license, containing a new serial number, is issued to the new applicant, if, in the *discretion of the Board,* all necessary prerequisites are met as to *nationality, character and fitness, location of premises* and many other *specified qualifications.* The Act does not provide that such licenses shall *inure to the benefit* of the *heirs or estate* of any *deceased licensee,* his guardian, partner, wife, or bankrupt estate. It merely provides that such administrator, executor, guardian, partner, trustee, or wife, as the case may be, may execute a transfer application the *same as though made by the licensee.*

In this connection, let us assume for the purpose of argument only, that such a license is property taxable under the Constitution and that the licensee is unable to pay the tax levied thereon. The only method prescribed by the Act providing for a transfer of the license is upon application of the *licensee* or in the case of his death or disability by the surviving partner, executor, administrator, guardian of the estate of the licensee, surviving spouse under certain conditions, a trustee in bankruptcy, or an assignee for the benefit of creditors of a licensee with the consent of the assignor. No provision is there made for an application to be made for such a transfer by a city or county tax collector or a purchaser under a tax or execution sale. Sec. 7 of the Act. Sec. 7.2 provides that no such license shall be *subject to transfer* unless at least seven days before the filing of the transfer application with the Board, the *licensee* or *intended transferee* records a notice of the intended transfer, setting forth certain specified requirements, and the *licensee* and *intended transferee* must establish an escrow, accompanied by a written agreement between them, and the full amount of the purchase price must be there deposited, to which creditors of the licensee have recourse. The only exception to these requirements is that the provisions of this last section (7.2) are not applicable to transfers, sought by an executor, administrator, guardian, trustee, receiver, or other person acting in the legal or proper discharge of an official duty or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment, statutory or otherwise, made for the benefit of creditors.

[6] There is no inherent right in the transferee to sell intoxicants, and a license to do so is not a proprietary right. It is but a permit to do what would otherwise be unlawful. In determining whether a new license should issue to the transferee, discretion rests in the Board. Tokaji v. State Board of Equalization, 20 Cal.App.2d 612, 67 P.2d 1082; Moore v. State Board, 76 Cal.App.2d 758, 764, 174 P.2d 323. The Constitution clearly authorizes the Board, and gives it "discretionary" power, to revoke or suspend any such license issued, and it has been held that such revocation does not violate the due process clause of the Constitution. State Board of Equalization v. Superior Court, supra; Moore v. State Board, supra; Reynolds v. State Board of Equalization, 29 Cal.2d 137, 174 P.2d 4.

It therefore appears that the licensee may not transfer, *by his own act,* his license which is issued to him each year, *to any person of his own choosing.* Any such contemplated transfer is *wholly conditional* and a *matter of discretion,* and the issuance of a new one to a new applicant is a *matter of discretion with the Board.* How, then, might it be said that an attaching creditor, an executor or administrator, tax collector or purchaser under tax or execution sale, etc., could acquire any enforceable right to have such license transferred to him, either by his own act or by *operation of law.* The license is, at all times, subject to revocation or cancellation by a repeal of the law authorizing the granting of licenses (Paladini v. Superior Court, supra), or the statute may be amended requiring the payment of a greater sum than was formerly required as a license tax. It appears to us that under these circumstances the facts come well within the holding announced in Harding v. Board of Equalization, supra, and the license is not transferable by the act of the licensee or by operation of law.

As the elements and characteristics of the privilege of a "seat" upon a stock exchange board are so similar to the elements and characteristics of a license to conduct a liquor business in this state, we are unable to specifically differentiate the reasoning and holding in the Anderson case from the facts and legal principles involved in the instant case.

Until our court of last resort holds otherwise, we are compelled to follow the precedent heretofore established in this state.

[7] In Hill v. City of Eureka, 35 Cal.App.2d 154, 94 P.2d 1025, 1027, this quotation is found: "Since tax proceedings are *in invitum,* tax laws are strictly construed and a statute will not be held to have imposed a tax unless clear and explicit. Courts will not extend by construction a tax law to include those not described in the statute. 24 Cal.Jur. p. 26 et seq."

We therefore must conclude that such State occupational license privileges given by the State are not *property* subject to taxation by cities and counties under the Constitution or Revenue and Taxation Code.

Judgment reversed.

BARNARD, P. J., and MARKS, J. concur.

82 Cal.App.2d 442

KLEINER v. GARRISON.

Civ. 15946.

District Court of Appeal, Second District,
Division 2, California.
Nov. 19, 1947.

Rehearing Denied Dec. 3, 1947.
Hearing Denied Jan. 15, 1948.

1. Pleading 🔑189, 214(1), 216(1)

A demurrer raises no question of fact and assumes the correctness and truth of the facts alleged in the pleading to which the demurrer is interposed, and on the hearing of a demurrer the court is bound by the facts as alleged in the pleading and may consider only such facts together with facts of which the court takes judicial notice.

2. Pleading 🔑216(2)

In ruling upon a demurrer, the court does not take judicial notice of the contents of records filed in the same case and not by appropriate reference made a part of the complaint or petition for the purpose of predicating its ruling on facts contrary to those alleged in the complaint or petition.

3. Mandamus 🔑163

The statute providing that record of proceedings before administrative board may be filed with petition for writ of mandate to review an order of board does not authorize court to take judicial notice of the record before board in ruling upon demurrer to petition unless the record has been filed as a part of the petition. Code Civ.Proc. § 1094.5(a).

4. Mandamus 🔑163, 187(9)

In ruling upon a general demurrer to petition for a writ of mandate to review an order of Insurance Commissioner denying plaintiff's application for a license to act as an insurance broker, court committed prejudicial error by considering the filed record of proceeding at hearing and disregarding allegations in petition which were contradicted by facts appearing in record, where record of proceedings before commissioner was not a part of petition or incorporated therein by reference. Code Civ.Proc. § 1094.5(a).

5. Mandamus 🔑163

Where record of the proceedings of an administrative agency is made a part of petition for a writ of mandate seeking to annul an order of agency and question is whether agency had jurisdiction to make order complained of, or whether evidence heard by agency was sufficient to sustain order, court in ruling on a demurrer to petition may consider contents of the record, since it is a part of pleading to which the demurrer is addressed. Code Civ.Proc. § 1094.5(a).

6. Pleading 🔑214(1), 216(2)

In ruling on a demurrer the court is bound by the facts alleged in the pleading against which the demurrer is directed and cannot consider facts presented in an affidavit accompanying the demurrer. Code Civ.Proc. § 1094.5(a).

7. Mandamus 🔑163

General demurrer to petition for writ of mandate to review an order of Insurance Commissioner denying plaintiff's application for license to act as an insurance broker was properly overruled, where petition alleged facts by reason of which plaintiff contended that defendant was estopped from denying a license to plaintiff as insurance broker and allegations were made which, if true, could result in a finding that applicant was induced to surrender a license previously held by him by reasons of unfulfilled promises made by deputy commissioner.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Petition by Phillip Kleiner against Maynard Garrison, as Insurance Commissioner of the State of California, for a writ of mandate to require defendant to issue to plaintiff an insurance broker's license. From an adverse judgment, plaintiff appeals.

Judgment reversed with directions.

Joseph Duchowny, of Los Angeles, and Neil Cunningham, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., T. A. Westphal, Jr., and Harold B. Haas, Deputies Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment predicated upon the sustaining of defendant's general demurrer to plaintiff's petition for a writ of mandate to review an order of defendant insurance commissioner which denied plaintiff's application for a license to act as an insurance broker, plaintiff appeals.

These are the facts:

Plaintiff filed a petition for a writ of mandate to require defendant to issue him an insurance broker's license which contained among others this allegation: "that on the ——— day of July, 1946, petitioner by written request to respondent ordered in accordance with the provisions of Section 11523 of the Government Code the complete record of said proceedings (Except the oral arguments at the conclusion thereof) to be prepared by the Agency and delivered to petitioner upon payment of the expense of such preparation and certification thereof; that in accordance with the provisions of Section 1094.5, Subdivision (a) petitioner hereby requests that the aforesaid record of proceedings before respondent be ordered to be filed by the Court."

The petition prayed, among other things, as follows: "That there be filed in this Court the complete record of the proceedings (Except the oral arguments of counsel at the close thereof) prepared by the respondent (Agency) and delivered to the petitioner for that purpose, together with true and exact copies or photostats of the original of all exhibits introduced into evidence at the said hearings."

The alternative writ directed defendant as follows: "within five days prior to the date here set for you to appear and show cause, you shall certify and return to this Court a full and complete transcript of the record and proceedings had before you as Insurance Commissioner of the State of California."

In response to the alternative writ defendant filed with the clerk of the court a transcript of the record and proceedings which had taken place before the insurance commissioner of the state of California. Defendant also filed a general demurrer to the petition which the trial court sustained and in so doing took into consideration the transcript of the record and proceedings on file in the clerk's office which was not otherwise presented to the trial court.

This is the sole question presented for our determination:

When in a petition for a writ of mandate seeking a review of a decision of an administrative agency after a hearing on an application for a license, which application is denied, (1) there is included a prayer that there be filed in the court a complete record of the administrative agency's proceedings; (2) the alternative writ orders the agency to certify and return to the court a full and complete record of the hearing before the agency; and (3) the record is certified to and deposited by the agency with the clerk of the court, may the court in ruling on a general demurrer to the petition consider the record of the administrative agency filed with the clerk and disregard allegations in the petition which are contradicted by facts appearing in such record?

This question must be answered in the negative and is governed by the following pertinent rules:

[1] First: A demurrer raises no question of fact and assumes the correctness and truth of the facts alleged in the pleading to which the demurrer is interposed, and on the hearing of a demurrer the court is bound by the facts as alleged in the pleading and may consider only such facts together with facts of which the court takes judicial notice. (Griffin v. County of Colusa, 44 Cal.App.2d 915, 918, 113 P.2d 270; Mackay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 54, 42 P.2d 341; Sheehan v. Vedder, 108 Cal.App. 419, 426, 292 P. 175.)

[2] Second: In ruling upon a demurrer the court does not take judicial notice of the contents of records filed in the same case not by appropriate reference made a part of the complaint or petition for the purpose of predicating its ruling on facts contrary to those alleged in the complaint or petition. (Mackay v. Clark Rig Bldg. Co., supra, 5 Cal.App.2d 44, 54 et seq., 42

P.2d 341; [Housman v. Board of Medical Examiners et al., Cal.App., 186 P.2d 187]).

[3] There is nothing in subdivision (a), section 1094.5 of the Code of Civil Procedure that authorizes the court to take judicial notice of the record of the proceedings before an agency unless the same has been filed as a part of the complaint or petition. That section merely provides as follows: "All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with the respondent's points and authorities or may be ordered to be filed by the court."

[4] In the instant case the record of the proceedings before respondent was not made a part of the petition nor incorporated therein by reference. Hence under rules First and Second above stated the trial court committed prejudicial error in considering the proceedings which had taken place before the board in ruling upon the general demurrer.

[5] The vice of defendant's argument is in his contention that the right to take judicial notice that the record of the commissioner's proceedings had been filed among the papers of the case and was a record of the court must be extended to include the right to take notice of the truth of the evidence produced at the hearing. Where the record of the proceedings of an administrative agency is made a part of the petition for a writ of mandate seeking to annul an order of the agency and the question presented is whether the agency had jurisdiction to make the order complained of or whether the evidence heard by the agency was sufficient to sustain the order, the court in ruling on a demurrer to the petition may consider the contents of the record since it is a part of the pleading to which the demurrer is addressed. (Sipper v. Urban, 22 Cal.2d 138, 141, 137 P.2d 425; Zemansky v. Board of Police Com'rs., 61 Cal.App.2d 450, 452, 143 P.2d 361; Vaughn v. Board of Police Com'rs., 59 Cal.App.2d 771, 781, 140 P.2d 130; Tobinski v. Board of Medical Examiners, 49 Cal.App.2d 591, 121 P.2d 861.)

In the instant case the record of the hearing before the commissioner was not included as a part of the petition for a writ of mandate nor was it made so by reference. It was merely a document filed in the action. In taking judicial notice of its records the court could go no further than to take notice that the record was in the file. Its contents were a concealed book insofar as the consideration of the demurrer was concerned.

[6] Defendant's contention that the record is within the court's judicial knowledge by reason of the provision in section 1094.5 of the Code of Civil Procedure that the record "may be filed with respondent's points and authorities" cannot be sustained. That provision does not inject the record into the petition for the writ as a part of it. In ruling on a demurrer the court is bound by the facts alleged in the pleading against which the demurrer is directed and cannot consider facts presented in an affidavit accompanying the demurrer. (Mackay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 55, 42 P.2d 341.)

The cases on which defendant relies are sufficiently discussed and distinguished in the opinion of Mr. Justice Bray in Housman v. Board of Medical Examiners, supra.

[7] An additional reason why the demurrer should have been overruled is that it contains allegations which, if denied, entitle plaintiff to introduce evidence to substantiate them. Facts are alleged by reason of which plaintiff contends that defendant is estopped from denying a license to him as an insurance broker, and allegations are made which, if true, may result in a finding that applicant was induced to surrender a license previously held by him by reason of promises made by a deputy commissioner that were not fulfilled.

In view of our conclusion it is unnecessary to discuss other points argued by counsel.

The judgment is reversed with directions to the trial court to overrule the demurrer and to permit defendant a reasonable time within which to answer if he be so advised.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

SILVA et al. v. MERCIER et al.

Civ. 13384, 13450.

District Court of Appeal, First District,
Division 1, California.
Dec. 2, 1947.
Rehearing Denied Dec. 31, 1947.
Hearing Granted Jan. 29, 1948.

1. Appeal and error 🔑123

Where court entered a minute order for preliminary injunction and there was nothing in minute entry directing that a written order be prepared, signed and filed, minute order was the appealable order notwithstanding subsequent entry of a formal written order. Rules on Appeal, rule 2(b) (2).

2. Appeal and error 🔑123

Under the Rules on Appeal, as an exception to rule that minute order is appealable and that entry thereof starts running of time to appeal, where findings are essential, minute order is a mere memorandum and the appealable order which starts time running is the final formal order. Rules on Appeal, rule 2(b) (2).

3. Appeal and error 🔑123

Since findings are not essential to validity of an order granting a temporary injunction after a hearing pursuant to an order to show cause, such an order is the appealable order and not the minute order. Rules on Appeal, rule 2(b) (2).

4. Motions 🔑24

An order to show cause is a notice of motion.

5. Appeal and error 🔑123

Where statutory provisions require a detailed formal order to be filed, the preliminary minute order is not the appealable order. Rules on Appeal, rule 2(b) (2).

6. Injunction 🔑60

An injunction lies to enforce the terms of a collective bargaining agreement. Labor Code, § 1126.

7. Appeal and error 🔑842(8), 1008(3)

Question of interpretation of collective bargaining contracts, no evidence of intent of parties having been introduced, was one of law and not of fact, and reviewing court was not bound by interpretation of trial court, even though reasonable, if it believed that there was a more reasonable interpretation.

8. Master and servant 🔑3(2)

Collective bargaining contract was construed as a union shop contract and as requiring employer to see that all non-union men employed should become members of union within specified time and to discharge those who failed to comply with such conditions.

9. Injunction 🔑57

An injunction normally will not issue to restrain breach of a contract which cannot be specifically enforced. Civ.Code, § 3423, subd. 5.

10. Injunction 🔑60

Where union shop contract was construed to be sufficiently clear and certain to be capable of specific enforcement, an injunction was available to union to enforce the terms of such contract. Civ.Code, § 3390, subd. 5; Labor Code, § 1126.

11. Master and servant 🔑3(2)

Employer could not escape injunction against breach of union shop contract on ground that contract had terminated under clause providing that contract should continue until six months after the "cessation of the present war", where trade board, created by contract to settle disputes relative to meaning, interpretation, or alleged violations of contract, had ruled that "cessation of the present war" within meaning of contract was six months after a joint declaration by Congress that the war was terminated and no such declaration had in fact, been made. Civ.Code, § 3423(5); Labor Code, § 1126.

12. Contracts 🔑215(1)

Where contract provides that it shall remain in force until "six months after the cessation of the present war", contract does not refer to cessation of hostilities, and there is no "cessation of the present war" within meaning of contract until treaties of peace are executed or until Congress, by joint resolution, sees fit to declare the war terminated.

See Words and Phrases, Permanent Edition, for all other definitions of "Cessation of Present War".

13. Contracts ⚷152

Where statutory language has been construed as expressing a certain intent by giving words used their natural, ordinary, and practical meaning, same language appearing in a contract will be given same construction.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by John I. Silva, individually and on behalf of Dairy and Creamery Employees Local Union No. 304, against Clem Mercier and others for an injunction to compel named defendant to abide by terms of a collective bargaining agreement and for other relief. From a minute order and from a subsequent formal order granting preliminary injunction, defendants appeal.

Appeal from minute order affirmed, and appeal from subsequent formal order dismissed.

Rogers and Clark, Webster V. Clark, and Bruce F. Allen, all of San Francisco, for appellants.

James F. Galliano and C. Paul Paduck, both of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiff John I. Silva is the secretary-treasurer of Dairy and Creamery Employees Local Union No. 304, while defendant Clem Mercier is the owner and operator of a dairy farm. Plaintiff, individually and on behalf of the union, brought this action for an injunction to compel defendant to abide by the terms of a collective bargaining agreement, and to prevent defendant from retaining in his employ two non-union workers in claimed violation of that contract. The issue was determined on a demurrer to the complaint. A preliminary injunction issued substantially as requested, and from two orders made in connection therewith these appeals have been taken.

[1] Before discussing the problems involved on these appeals on their merits some reference must be made to the state of the record. On August 29, 1946, the court made a minute order to the effect that the preliminary injunction issue as prayed for. There is no direction in that minute order that a formal order was later to be filed. Timely notice of appeal from that order was filed October 26, 1946. That is appeal No. 13,384. On January 23, 1947, the court made and filed a formal written order granting the preliminary injunction. Timely notice of appeal from that order was filed February 6, 1947. That is appeal No. 13,450. The only differences in the records of the two appeals is that affidavits of Joe Borges, business agent of the union, and of Zekie Smith, a member of the Trade Board set up under the contract to settle disputes, appear in the record of No. 13,450 and are not in the record of No. 13,384. Neither affidavit, however, is essential for the determination of the questions presented. Since the order granting a preliminary injunction is admittedly appealable, and since both appeals here involved were timely, from a practical standpoint, it is immaterial whether we review the correctness of the order of August 29, 1946, or the correctness of the formal order of January 23, 1947. However, in the interest of orderly procedure, and for the guidance of trial courts and of counsel, we deem it appropriate to call attention to certain changes in the Rules on Appeal that make it quite clear that in cases of this kind the appealable order is the minute order and not the subsequently entered formal order.

Rule 2(b) (2) provides that for the purpose of computing the sixty-day time limit within which to appeal "The date of entry of an order which is entered in the minutes shall be the date of its entry in the minutes, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order." This rule, adopted in 1943, substantially changed the prior law. This court had the following to say about this change in the recent case of Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279, 280:

"This rule was adopted to clarify a most uncertain and confusing condition of the law existing prior to the adoption of this rule in July, 1943. Prior to that date, when orders were made by the trial court and entered in the minutes, and subsequently a formal written order was prepared, signed and filed by the judge, it was practically impossible for the lawyers to know when the time for appeal started to run. This was caused by the delusive simplicity of the language of sec. 939 of the Code of Civil Procedure which then controlled and which provided that the time to appeal began to run from the 'entry of said judgment or order.' Under this section the courts announced the rule that where the minute order was intended to be a mere memorandum from which a proper written order was to be drafted then the time for appeal started to run from the date of the filing of the last order. From a practical standpoint the cases, prior to 1943, held that the determinative factor was what the judge had in mind when he announced his first decision. [Citing cases.] Such a subjective test, depending as it did upon the personal and frequently only partially disclosed intent of the trial judge, proved highly unsatisfactory. It was to rectify this condition that Rule 2(b) (2) was adopted. In his article discussing the new Rules, in 17 So.Cal.L.Rev. 79, the draftsman of the rules, after first discussing the complexities and ambiguities existing under the old statute, has this to say about the purposes of the new rule (p. 86): 'The rule proceeds upon the theory that under the statutes and practice the normal method of evidencing and authenticating an order is by entry in the minutes. Presumptively, therefore, the minute entry is the "entry of the order" for the purpose of fixing time to appeal, and the parties may rely upon it unless the contrary is indicated on the face of the minute entry itself. *It is immaterial that the court contemplates the filing of a formal order, and considers the oral pronouncement as preliminary and ineffective. The parties need not and cannot, speculate on such undisclosed intentions.* For them the minute entry starts the time running unless the court as part of its oral pronouncement directs that a written order be prepared and filed, and this direction is made a part of the minute entry.' (Italics added.)

"That this is the purpose and effect of the new rule is made crystal clear by its language. It provides that the date of entry of an order entered in the minutes 'shall be the date of its entry in the minutes, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed.' There is no room for interpretation. The language is clear and certain."

[2-4] To this rule there are certain exceptions. One such exception is that if findings are essential then the minute order, as a matter of law, is a mere memorandum, the appealable order is the final order, and Rule 2(b) (2) has no application. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182. It is quite apparent that findings are not essential to the validity of an order granting a temporary injunction after a hearing pursuant to an order to show cause. See Hunt v. Steese, 75 Cal. 620, 17 P. 920; Monterey Club v. Superior Court, 44 Cal.App.2d 351, 112 P.2d 321. The Pessarra case, supra, held that no findings are necessary in making an order based upon a motion. It is well settled that an order to show cause is a notice of motion. See discussion 18 Cal.Jur. p. 648, § 3; 8 Cal.Jur. 10 Yr. Supp. p. 117, § 3.

[5] Another situation in which Rule 2(b) (2) is not applicable is illustrated by Hirschberg v. Oser, 82 Cal.App.2d 282, 186 P.2d 53. It was there held that where statutory provisions require a detailed formal order to be filed, the preliminary minute order is not an appealable order. That exception has no application here.

In the instant case the parties have stipulated that the minute order was a mere preliminary memorandum of intention and not intended by the judge to be his final order, and for that reason, in their briefs, the parties agree that the order of January 23, 1947, is the proper one to review. However, on the oral argument, when the new rule was called to the attention of counsel it was stipulated that whichever order the court should find to be appealable should be reviewed. From what has been said it is obvious that the only appealable order properly before us is that of August 29, 1946, involved in appeal No. 13,384, that the order of January 23, 1947, is not appealable, and that appeal No. 13,450 must be dismissed.

[6] As heretofore mentioned, this proceeding was instituted to prevent the defendant, an employer, from continuing to keep in his employ certain employees in claimed violation of a contract between the union and the employer. There can be no doubt, and no contention is made to the contrary, that in this state, in a proper case, the terms of a collective bargaining agreement may be enforced by injunction. § 1126, Labor Code.

The contract here involved was entered into between the union and the defendant on July 17, 1943, and by its terms it is provided that it "shall remain in full force and effect thereafter until six months after the cessation of the present war."

The clauses of the contract in dispute are Section I and II, Particularly § II. They provide:

"Section I. Recognition of the Union: The Employer hereby recognizes the Union as the sole collective bargaining agency for all employees working for the Employer and within the jurisdiction of the Union, who are, at the time of the signing of this agreement, or thereafter become members of the Union.

"Section II. Employment: All non-union milkers presently employed or hereafter hired by the Employer shall make application for membership into the Union within seven (7) days from the date of the signing of this agreement, or from the date of hiring by the Employer (whichever the case may be), and each shall become a member of the Union in good standing within thirty (30) days from the date of said hiring unless the Union's action is delayed beyond said 30-day period. Whenever the Union is unable to furnish a milker in emergencies the Employer shall be free to provide his own emergency milker for the emergency but such milker must be replaced by a Union milker when one is available.

"Any employee suspended or expelled by the Union for violation of the Constitution and By-Laws of the Union shall, upon seven (7) days written notice being given by the Union, be laid off until such time as he shall have become reinstated in the Union."

It is charged in the complaint, and defendant by his demurrer admits that, at the time of filing the complaint and at the time the minute order was entered, defendant had in his employ two non-emergency non-union workers who failed to complete their membership in the union within the thirty-day period specified in § II of the contract. All notices required to be given by the union were served on the employer.

The trial court interpreted § II as requiring the employer to see to it that all non-union men hired by him should apply for membership in the union within seven days of the date of hiring, and should become members within thirty days of such date, and further, as requiring the employer to discharge non-union men who failed to comply with these conditions. Defendant contends that literally and properly interpreted § II does not make membership in the union a condition of hiring his milkers (which is undoubtedly correct), and he further contends that the section does not place upon him the duty to discharge employees who do not apply for, secure, and maintain union membership, except in the cases of expelled or suspended union members, or emergency employees as defined in the last paragraph of the section.

[7] It is quite clear that the question of interpretation here presented, no evidence of the intent of the parties having been introduced, is one of law and not of fact, and that this court is not bound by the interpretation of the trial court, even though reasonable, if it believes that there is a more reasonable interpretation. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910; In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182; Briggs v. Superior Court, 81 Cal.App.2d 240, 183 P.2d 758. However, exercising an independent judgment as to the proper interpretation of the clause in question, and giving no weight to the interpretation of the trial court, we are of the opin-

ion that the trial court gave the clause the only reasonable interpretation possible.

[8] We are here dealing with a union shop agreement, not a closed shop agreement. Fundamentally a closed shop contract requires the employer to hire only union members and to discharge non-union members. Employees, as a condition of employment, must remain union members. That is not the present contract. The union shop contract gives the employer a free hand in hiring, but requires that within a specified time, the non-union employees hired must join the union, and maintenance of such membership is a condition of continued employment. It is quite obvious that the present contract was intended to fall within this category. While it is true that § II does not expressly provide that if the non-union employees fail, within thirty days of hiring, to join the union, the employer must discharge them, such a provision must be implied from the very nature and purpose of the contract. Otherwise § II might just as well not have been included within the contract. The agreement gave the employer an unlimited right of hiring. He could hire union or non-union employees as he in his uncontrolled discretion determined. But once hired, except in circumstances not involved here, the employer was required to see to it that the employees joined the union within the prescribed period, and, if they did not, to discharge them. The disputed provisions of § II could have been inserted for no other purpose. To contend, as does defendant, that such clause was inserted only to induce action on the part of non-union employees, with no duty on the employer to require such employees to comply as a condition of employment, is to disregard the fact that this contract is between the union and the employer, and the non-union employees are not parties to it. Obviously, the contract imposes obligations on the union and the employer, and not on persons who are not parties. If § II was not intended to impose an obligation on the employer it would serve no purpose at all.

Defendant, in an attempt to interpret § II out of the contract, points out that § I provides that the union shall be the sole bargaining agent for those employees "within the jurisdiction of the Union, who are, at the time of signing this agreement, or thereafter become members of the Union," and that § II provides for discharge only in cases of suspended, expelled or emergency workers, and contends that the contract contemplates that he would have employees not within the jurisdiction of the union, who, so he urges, would be those who did not comply with the provisions of § II. Of course the contract contemplated that the defendant would have non-union workers not within the jurisdiction of the union. As already pointed out, the employer could hire all the non-union men he might desire, and for thirty days these employees would not be subject to the jurisdiction of the union. This period might be extended if the union delayed action. Moreover, the "emergency workers" provision of § II contemplated the possibility of the hiring of non-union men. It is apparent, therefore, that § I is entirely consistent with § II as here interpreted, and that § I by no means suggests, far less compels, a construction that the employer could retain in his employ non-emergency non-union workers beyond the thirty-day period.

[9, 10] Defendant correctly points out that an injunction will normally not issue to restrain the breach of a contract which cannot be specifically enforced (§ 3423(5) of the Civ. Code) and urges that the terms of this contract are so obscure and uncertain with respect to the duties of defendant that they could not be specifically enforced. This contention is inseparably connected with the point in reference to interpretation. We find no uncertainty in the language of § II. The contract is clear and certain and capable of specific enforcement.

Defendant also makes another contention inseparably connected with his forced and unnatural interpretation of § II. He points out that an obligation to procure action on the part of a third person not a party to the contract cannot be specifically enforced (§ 3390(5) of the Civ. Code) and contends, therefore, that an injunction will not issue to prevent its breach (§ 3423(5) of the Civ. Code). As already pointed out, the obligations of § II are not upon the non-union employees, but upon defendant as employer. Under that section it is the duty of defendant, after thirty days, not to retain in his employ non-union workers. The fact that to perform this obligation he would have to persuade non-union employees to join the union is only incidental to his main obligation.

[11] The last contention of defendant has to do with that clause which provides that the contract "shall remain in full force and effect, thereafter, until six months after the cessation of the present war." Defendant urges that the period specified in the contract has elapsed because the war is at an end and that there is no contract existing between the parties. To this contention there are two answers. In the first place, § X of the contract provides for the setting up of a Trade Board to settle "all disputes and questions between employer and employee or between the parties hereto relative to the meaning, interpretation or alleged violation of the provisions of this contract * * * and the decision of the majority of the members of the Board upon any matter referred to it pursuant to the terms of this agreement shall be final." The complaint for the injunction alleges (and no counter-affidavits were filed, the defendant submitting the issue on demurrer) that a Trade Board was set up under this section and that on December 26, 1945, there was submitted to the Board the question of what was meant and intended by the words "cessation of the present war," and the Board determined that this clause meant "six months after a joint declaration by The Congress of the United States that said war is terminated." This ruling was reaffirmed by the Board in March, 1946. No such formal resolution of termination has, as yet, been made by The Congress.

[12] In the second place, we are of the opinion that the interpretation of the Trade Board, even if not conclusive, was correct. Defendant urges that while no formal resolution of termination has as yet been made, in view of the revocation of most of the war powers, and termination of many, but not all, of the war time controls, by such resolutions as Public Law 239, 61 Stat. 449, passed July 25, 1947, the continuance of the war is a mere fiction, and contends that by this clause the parties were not referring to the fictional continuance of the war. The fact that a state of war still exists between this country and the axis powers is by no means a fiction. Until treaties of peace are executed or until The Congress by joint resolution sees fit to declare the war terminated, in a very real sense there has been no "cessation of the present war." There can be no doubt at all, and defendant so admitted in the oral argument, that if the phrase under construction or one similar to it appeared in a statute that it would be interpreted to mean that the statute was to continue until the execution of peace treaties or until a joint resolution of The Congress declared the war over. A few of the cases so holding are Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; Hijo v. United States, 194 U.S. 315, 24 S.Ct. 727, 48 L.Ed. 994; First Nat. Bank of Pittsburgh v. Anglo-Oesterreichische Bank, 3 Cir., 37 F.2d 564; Ex parte Sichofsky, D. C. 273 F. 694; Citizens Protective League v. Byrnes, D. C., 64 F.Supp. 233.

[13] In the instant case no evidence of what the parties intended other than the contract itself was introduced before the trial court. What defendant is asking us to do is to determine, as a matter of law, that the parties intended something different from what various legislatures have intended by identical or similar language. The reason that the courts interpreted the language appearing in statutes as they did is that such interpretation is the natural, ordinary, and practical meaning of the words. The same reasons compel the same interpretation of the same or similar language in contracts. There is no merit in the contention.

Appeal numbered 13,450 is dismissed. The order from which the appeal is taken in appeal numbered 13,384 is affirmed.

BRAY, J., and FINLEY, Justice pro tem., concur.

82 Cal.App.2d 636

OHRAN v. NATIONAL AUTOMOBILE INS. CO.

Civ. 13418.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1947.

Hearing Denied Jan. 29, 1948.

1. Insurance 🔑246

Highway Carriers' Act providing that compulsory insurance shall be not cancellable on less than ten days' written notice to the Railroad Commission restricts possibility of cancellation only with respect to injured members of public but also restricts the contractual right of the parties to cancel the insurance between themselves. Gen. Laws, Act 5129a, § 7.

2. Insurance 🔑229(2)

Compulsory motor vehicle liability policy of highway carrier could not be effectively canceled as between the parties prior to end of statutory ten-day period of notice to Railroad Commission even though insured carrier had taken out other insurance to replace policy canceled. Gen.Laws, Act 5129a, § 7.

3. Insurance 🔑246

Where effectiveness of voluntary cancellation of compulsory motor vehicle liability policy of highway carrier depends on compliance with statutory requirement, a voluntary cancellation cannot be effectuated by attempted substitution without compliance with the statutory requirements. Gen. Laws, Act 5129a, § 7.

4. Insurance 🔑229(2)

The provision of Highway Carriers' Act that insurance shall be not cancellable on less than ten days' written notice to Railroad Commission is intended mainly to further continuous protection of public against damage caused by carriers and control of Railroad Commission over continous character of the protection. Gen.Laws, Act 5129a, § 7.

5. Insurance 🔑229(1)

Insured motor carrier could not waive statutory ten days notice to Railroad Commission of cancellation of compulsory motor vehicle liability policy. Gen.Laws, Act 5129a, § 7; Civ.Code, § 3513.

6. Insurance 🔑233

Even though compulsory motor vehicle policy of highway carrier may not be effectively canceled prior to termination of ten days' statutory notice to Railroad Commission, insured may be estopped to avail himself of his rights under the policy or good faith and honest dealing might prevent recovery even though all elements of estoppel might not be present.

7. Insurance 🔑146(1)

A contract of insurance, including its termination, is governed by same rules which ordinarily apply to other contracts and the manifest intention of parties is normally decisive.

8. Insurance 🔑232

Where insurer's general agent received highway carrier's compulsory motor vehicle liability policy for cancellation and policy bore note "Cancel Flat; not taken", but the general agent did not consent to flat cancellation and gave notice to Railroad Commission that policy was canceled effective as of March 26 and so informed the insured and collected earned premium up to March 26, policy was in force at time of accident on March 22 and the insurer was liable for its share of the loss. Gen.Laws, Act 5129a, §§ 3, 5–7.

9. Insurance 🔑146(3)

Ambiguous insurance policy provisions must be interpreted most strongly against insurer.

10. Contracts 🔑154
Insurance 🔑146(2)

Generally, where one construction would make a contract unreasonable or unfair and another construction, equally consistent with language, would make it reasonable, fair, and just, the latter construction must be adopted, and such rule applies to construction of compulsory provisions of insurance contract.

11. Insurance 🔑229(2)

Where compulsory motor vehicle liability policy of highway carrier contained endorsement prescribed by Railroad Commission providing that insured agreed to reimburse insurer for any payment made by the insurer on account of any accident, claim, or suit involving breach of policy and for any payment the insurer would not have been obligated to make under policy except for agreement contained in endorsement, such agreement did not preclude insured from recovering reimbursement from insurer for payments made because of accident occuring during statutory ten day notice of cancellation of policy. Gen.Laws, Act 5129a, § 7.

12. Appeal and error ⚿1008(3)

Appellate court was not bound by trial court's implied construction of policy provision, where no extrinsic evidence was taken in aid of trial court's interpretation.

◆

Appeal from Superior Court, City and County of San Francisco; W. T. Belieu, Judge.

Action by Wallace Ohran against the National Automobile Insurance Company on a policy of compulsory motor vehicle liability insurance. From an adverse judgment, the plaintiff appeals.

Reversed.

Walter K. Olds, of San Francisco, for appellant.

John J. Taheny, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action by the insured, Wallace Ohran, on a policy of compulsory motor vehicle liability insurance. The trial court held that as between the parties the insurance was effectually cancelled prior to the date of the accident which gave rise to the liability for which insured tries to recover. The insured appeals.

The facts are virtually undisputed: Appellant was a highway carrier operating under a permit from the Railroad Commission and was under the Highway Carriers' Act (Statutes 1935, Chap. 223, as amended by Statutes 1937, Chap. 722, secs. 3, 5, 6 and 7, Deering's Gen. Laws, Act 5129a) required to maintain a policy of liability insurance as described in that act. On February 13, 1943, respondent issued to appellant such a policy covering a certain Mack truck, the only truck then used in appellant's business, which policy was to be effective from February 27, 1943, to February 27, 1944, and certificate of insurance was duly filed by respondent with the Railroad Commission. The policy consisted of a standard combination automobile policy form to which were attached certain endorsements among which Form T & S 391 prescribed by the Railroad Commission for all policies insuring motor vehicles subject to its regulation, to the provisions of which we will revert later. The standard automobile policy contained a co-insurance clause which provides for proportional liability of insurers if there is more than one collectible insurance against the same loss and a cancellation clause which permits cancellation by insured by surrender or written notice and by insurer by at least five days' written notice with provisions for computation of earned premium due in each case of cancellation.

After appellant, in the beginning of March, 1943, had acquired a second truck, he asked Collins his insurance broker and an agent of respondent for possible cheaper rates in case of combined insurance on the two trucks. On or about the 13th of March, Collins told him the rates for combined insurance both of respondent and of the American Casualty Company. As the rates of the American Casualty Company were lower appellant told Collins that he wished to place the insurance in that company and wished to cancel the policy of respondent. At the same time or shortly thereafter he gave Collins the policy of respondent for that purpose. He asked Collins whether the policy could be cancelled flat (without payment of any premium); Collins noted on the policy, "Cancel Flat; not taken. Please notify R. R. Commission and pick up certificate." However, in the presence of appellant he asked Humphreys, the general agent of respondent, by telephone whether the policy could be cancelled flat and then informed appellant that it could not be done because of the Railroad Commission endorsement. Appellant nevertheless told Collins to have the policy of respondent cancelled. Collins then returned the policy to the general agent and ordered a policy from the American Casualty Company. This policy was effective from March 15, 1943, until March 15, 1944, but the certificate of insurance was not filed with the Railroad Commission until March 23, 1943. The policy contained the same railroad commission endorsement and co-insurance clause as the policy of respondent. When the general agent received the returned policy with Collins' note on it, and found out that Ohran was still registered with the Railroad Commission as a carrier and that no other certificate of insurance was on file, he sent on March 16th a notice of cancellation to the Railroad Commission effective March 26, 1943, which notice was received on March 17th. In a letter of that date Humphreys informed Collins of the issuance of the cancellation notice with the required ten days' notice and of the necessity to make a charge "for the time this policy was in force, that is from February 27th, 1943, to March 26, 1943," a bill as to which charge would be sent at the end of the notice period. Such bill for premium up to March 26, 1943, in the amount of $7.92 was paid by appellant on that date.

On March 22, 1943, the Mack truck described in respondent's policy while being used on appellant's business as a carrier severely injured one Jean Stimson, who on account thereof filed an action for damages against appellant in the amount of $15, 573. Both respondent and the American Casualty Company were duly notified of the accident. The American Casualty Company took part in the defense of the action but respondent refused to participate. Respondent maintained this position when on November 6, 1943, it was informed that the claim could be settled for $6000 of which on the basis of the co-insurance clause it was expected to contribute one-half. In the last part of November, 1943, appellant and the American Casualty Company settled the action for $5,750 of which amount each paid one-half or $2,875. This action was brought by the appellant for reimbursement of the amount so paid by him.

The trial court found in part that on or about the 15th day of March, 1943, the plaintiff caused said policy to be surrendered to the defendant for cancellation, and that on the 15th day of March, 1943, said policy was received by the general agent of the defendant for said purpose, and that on March 17, 1943, the defendant duly filed with the Railroad Commission its notice of cancellation of said policy and certificate specifying that cancellation of said policy and certificate would be effective ten days thereafter.

The trial court concluded in substance that the plaintiff's surrender of the policy as provided for in the standard policy form with intent to cancel it and to replace it with the policy of the American Casualty Company terminated the insurance as between the parties effective from the surrender and that whatever liability the defendant had thereafter existed only in favor of third persons; that plaintiff had a right to waive the requirement of ten days' notice and did waive it by the surrender for cancellation and by the replacement of the policy; that any payment which the defendant would be obliged to make after March 15, 1943, would be required solely by virtue of the Railroad Commission endorsement and should therefore be reimbursed by plaintiff as provided in that endorsement, so that defendant can not be liable to plaintiff for any payment arising out of the accident of March 22, 1943.

The only question involved in this appeal is whether respondent's obligations as to appellant were terminated as of March 15, 1943, prior to the accident, or as of March 26th or 27th, 1943, subsequent to the accident.

Appellant contends that as a matter of law the policy could not be effectively cancelled as between the parties prior to the end of a statutory ten days' period of notice to the Railroad Commission and that the evidence does not support a holding that as a matter of fact the parties had terminated it prior to that time. Both contentions seem correct.

Appellant's first contention is based on Section 7 of the Highway Carriers' Act (Statutes 1935, Chap. 223, as amended by Statutes 1937, Chap. 722; Deering's Gen. Laws, Act 5129a), which reads:

"The protection against liability as outlined in section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall be not cancellable on less than ten (10) days written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7, inclusive."

He relies on Heuer v. Truck Ins. Exchange, 51 Cal.App.2d 497, at page 503, 125 P.2d 90, at page 93, in which case the defendant insurer, who had issued a compulsory liability insurance policy pursuant to the City Carriers' Act, which requires the same ten days' notice as the Highway Carriers' Act, claimed, when sued by the heirs of the injured person, that the policy had been cancelled by mutual consent of insurer and insured prior to the accident, although the accident happened within the ten days' notice period, and in which the court stated: "It is a sufficient answer to this claim and to the authorities relied upon by defendant to point out that the policy here was issued to provide the compulsory, statutory insurance required by the above-mentioned act in order to qualify Robinson for a permit to operate under said act. Under the terms of said act, said policy could be cancelled only in the manner provided in section 6 of the act and it could not be cancelled by mutual consent of the parties in violation of the provisions of said section." Respondent distinguishes the Heuer case on several grounds of which the most important one with respect to the above quotation is that the action in the Heuer case was brought by the heirs of the injured person, the person the statutory provision intends to protect, whereas in the present case the only interested party is the insured, who, according to respondent, should be ruled by the terms of the contract he made.

[1] Although this distinction is in itself material because of the recognized difference in position between an injured third person and the insured (Olds v. General Acc. Fire Etc. Corporation, 67 Cal.App.2d 812, 820, 155 P.2d 676), we do not think that section 7 of the Highway Carriers' Act can be construed as restricting the possibility of cancellation only with respect to injured members of the public without restricting the contractual right of the parties to cancel the insurance as between themselves. The words of the provision offer no basis for the distinction and we do not believe that such a distinction was intended. If it had been the intention of the legislature to provide that notwithstanding cancellation by the parties the statutory liability of the insurer as to injured third persons would continue until ten days after notice to the Railroad Commission the legislature would have used language to that effect and not the words "not cancellable."

This is corroborated by Home Accident Ins. Co. v. Pleasant, 36 Ariz. 211, 284 P. 153, a case concerning an action of an insurer against the insured for the payment of premiums of workmen's compensation insurance. The Arizona Workmen's Compensation Law required agreement by the Industrial Commission to a cancellation. On October 12, 1926, the insured gave written notice to the insurer to cancel its policy as of that date. On November 12th the insurer requested permission of the commission to cancel on the basis of said notice. Prior to November 12th the employer had filed application with the commission to become a self-insurer and had filed a surety bond of a surety company antedated to October 12, 1926. Both applications were granted on November 12, 1926. The court held that premium was due until November 12, 1926, using (284 P. at pages 155, 156) language to the effect that the legislature had "taken the common-law or contract right of cancellation out of the hands of the insurer and insured and placed it in the control of the Industrial Commission"; that "when the statute provides the manner by which a compensation policy may be cancelled, it must be strictly pursued in order to be effective"; that the policy therefore was not cancelled until November 12th and "continued a binding and subsisting contract during the interim from October 12th, binding alike upon the insured and the insurer."

In Otterbein v. Babor & Comeau Co., 272 N.Y. 149, 5 N.E.2d 71, 72, 73, 107 A.L.R. 1510, a case not more directly in point than the Heuer case, supra, as the action was brought by an injured employee, the New York Court of Appeal in construing a ten days' notice provision of the local Workmen's Compensation Law, Consol.Laws, C. 67, uses the following language:

"In determining the legislative intent as to when a contract of insurance shall be deemed cancelled within the meaning of subdivision 5 of section 54, we may consider the accepted definitions of the words 'cancel' and 'cancellation.' To cancel is 'to annul or destroy; to revoke or recall,' and, with respect to insurance, the word 'cancellation' means 'the termination either by the insured or the insurer or by both of insurance in accordance with the terms of the cancellation clause of a policy.' Webster's New International Dictionary (2d Ed.)

"* * * It must be assumed that in enacting subdivision 5 of section 54, the Legislature had in mind that a contract of insurance might provide that the coverage of the policy could be terminated by act of the carrier, by act of the employer, or by agreement between the carrier and employer. * *

"Notice of cancellation must be given to the commissioner in all cases in order to make an attempted cancellation effective."

In accordance with these views it must follow that the legislature enacted section 7 of the Highway Carriers' Act with full contemplation of the practice and use of cancellation clauses generally as between insurer and insured and that it intended therein to limit this right of cancellation according to the strict terms of the statute, making such notice indispensable for an effective termination both as to the parties and to the public.

No case has been cited to us in which it was held under a comparable statute, that a policy of compulsory insurance was cancelled effectively as between the parties although it remained in force as to the public. A few cases seem to imply such possibility. Amalgamated Casualty Ins. Co. v. Winslow, App.D.C., 135 F.2d 663, 664; Tri-State Casualty Co. v. Speer, 189 Okl. 191, 115 P.2d 130, 132. With respect to the section here under consideration we do not accept this possibility.

[2, 3] Our conclusion that in this case the policy could not be effectively terminated as between the parties until March 26th is not affected by appellant's taking out of other insurance effective March 15th to replace respondent's policy. Respondent cites several cases with respect to non-compulsory fire insurance in support of the contention that the procuring of new insurance with the intent to have it take the place of the existing insurance, and with no intent to acquire additional insurance, constitutes an effective, voluntary cancellation of the existing insurance, in which case the insured may not recover on both policies. This rule applies in general with respect to non-compulsory fire insurance, although not without exception. Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507. It can have no unrestricted application where the effectiveness of voluntary cancellation of a compulsory insurance depends on the compliance with statutory requirements. Where such requirements exist, a voluntary cancellation can no more be effectuated by attempted substitution without compliance than by mutual consent or surrender without it.

Respondent also relies on cases like Automobile Ins. Co. v. Southern Transp. Co., Tex.Civ.App., 101 S.W.2d 585, and Workmen's Compensation cases like Gratopp v. Carde Stamping & Tool Co., 216 Mich. 355, 185 N.W. 675, and Eurich v. General Casualty & Surety Co., 152 Md. 209, 136 A. 546, which hold that the statutory period for notification of a commission of the cancellation of a policy of compulsory insurance does not apply, either with respect to the public or to the parties, if the policy, to the knowledge of the commission, is replaced without interruption by other satisfactory insurance. As to this point the authorities are divided. See the opposite holding in Tri-State Casualty Co. v. Speer, 189 Okl. 191, 115 P.2d 130, supra; Cowles v. State Ins. Fund, Idaho 173 P.2d 722. However, none of these authorities is in point here as it is undisputed that in this case the Railroad Commission was not notified of the substitution prior to the accident. In such a situation the authorities are unanimous that the original insurer remains liable. See for instance Phillips v. Iron County, 273 Mich. 157, 262 N.W. 656, and Zielke v. A. J. Marshall Co. 306 Mich. 474, 11 N.W.2d 209, both cases from Michigan, the jurisdiction where the principle of the Gratopp case, supra, originated and compare Otterbein v. Babor & Comeau Co., 272 N.Y. 149, 5 N.E.2d 71, 107 A.L.R. 1510, supra, and

Arner v. Manhattan Spring & Couch Co., 264 N.Y. 501, 191 N.E. 535, New York cases which hold the original insurer liable notwithstanding substitution but where it does not appear whether the commission was notified of the new insurance, and Home Accident Ins. Co. v. Pleasant, supra, 36 Ariz. 211, 284 P. 153, 156.

[4, 5] After our holding that the parties could not as between themselves cancel or terminate the compulsory insurance contract in any manner by consent, surrender or otherwise without compliance with the ten days' notice provision, little need be said about the pretended right of the insured to waive said notice. Section 3513 of the Civil Code declares as a maxim of jurisprudence: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." The notice provision of section 7 of the Highway Carriers' Act is not intended solely or even principally for the benefit of the insured, but mainly to further continuous protection of the public against damage caused by carriers and control of the Railroad Commission over the continuous character of the protection. This is a public reason which excludes waiver. Respondent relies on Eurich v. General Casualty & Surety Co., supra, and Automobile Ins. Co. v. Southern Transp. Co., supra, which seem to recognize the power of the insured to waive such notice requirement. However, in those cases it was held that because of substitution of other valid insurance known to the commission, no public interest was involved in the ten days' notice requirement; if the requirement nevertheless subsisted it could only be for the benefit of the insured who then could waive it. In those cases the substitution rule of the Gratopp and Eurich cases is the indispensable basis for the recognition of the waiver. We have stated before that that substitution rule, even if it were accepted, would not apply in this case.

[6] Although we have rejected the possibility of a cancellation of an insurance policy as meant in section 7, Highway Carriers' Act, effective as between the parties prior to the end of the ten days' notice period provided for in that section, we are aware of the possibility that the insured by his acts or representations subsequent to the issuance of the policy may be estopped to avail himself of his rights under the policy or even that the good faith and honest dealing called for by the contractual relation (Nelson v. Abraham, 29 Cal.2d 745, 750, 177 P.2d 931) might prevent recovery, even though not all elements of estoppel might be present.

However, the complete and undisputed facts in evidence in this case do not show any circumstance which could be held to bar appellant's recovery and leave no doubt that, at the time, it was the understanding of the parties that the policy would remain in full force and effect until March 26, 1943, the end of the ten days' notice period.

The facts found by the trial court that the appellant caused the policy to be surrendered to respondent for cancellation and that on the 15th of March, 1943, said policy was received by the general agent of the respondent for that purpose do not necessitate the conclusion that the policy was terminated as of March 15, 1943.

[7] A contract of insurance, including its termination, is governed by the same rules which ordinarily apply to other contracts and the manifest intention of the parties is normally decisive. Compare Kast v. Dubuque Fire etc. Ins. Co., 112 Cal.App. 125, 132, 296 P. 324, Stevenson v. Sun Ins. Office, 17 Cal.App. 280, 288, 119 P. 529. "All such transactions are to be construed reasonably and fairly, and in accord with the evident understanding of the parties at the time." Hillock v. Traders' Ins. Co., 54 Mich. 531, 20 N.W. 571, 574. In Farris v. Commercial Union Fire Ins. Co. of New York, 176 Okl. 331, 55 P.2d 432, 433, where the insurer had given notice of cancellation with the five days' notice required by the policy, but the insured returned the policy prior to the end of the notice period, the court decided that the insurance terminated at the end of the five days' period and not at the moment of surrender, quoting from 14 R.C.L. 1016 as follows: "The courts appear to be unanimous in holding that the mere physical surrender of a policy by the assured does not terminate the contract, but that the

question is one of intent to be gathered from all the facts and circumstances connected with the physical act of surrender."

In this case the evidence shows that the notice provision of section 7 of the Highway Carriers' Act was one of the circumstances which manifestly influenced the understanding of the parties as to the termination.

[8] When Humphreys, the general agent of respondent, received the policy for cancellation it bore the note "Cancel Flat; not taken," a form of termination, differing from the surrender with payment of earned premium provided for in the cancellation clause of the policy and not effective without consent of the insurer. Boutwell v. Globe & Rutgers Fire Ins. Co., 193 N.Y. 323, 85 N.E. 1087; Insurance Co. of North America v. Detroit & Security Trust Co., 9 Civ., 51 F.2d 155, 159. Humphreys did not consent to this flat cancellation; he gave notice to the Railroad Commission that appellant's policy was cancelled "effective as of the 26th day of March 1943 * *" and in a letter to Collins, appellant's broker, intended for appellant, he informed him of the issuance of the cancellation notice with the required ten days' notice, and wrote in part: "In view of the fact that the assured did file with the Commission, it will be mandatory that a charge be made *for the time this policy was in force, that is from February 27th 1943, to March 26, 1943.* * * * At the end of the cancellation notice, we will send you bill for the amount of earned premium." (Emphasis ours.) As stated, such a bill was then sent and paid.

Not only the words emphasized, but also the collection by respondent of earned premium up to March 26, 1943, constitute admissions that the policy was in full force and effect up to March 26, 1943, and entitled appellant to rely on respondent's being on the risk until that date. Compare Hill v. Industrial Accident Commission, 10 Cal. App.2d 178, 185, 51 P.2d 1126. In Amalgamated Casualty Ins. v. Winslow, supra, the fact that the first insurer had not received premium over the period in which the accident took place whereas the substituted insurer had received premium over that period was held decisive for the second insurer's duty to bear the loss. The same circumstance is stressed in the Gratopp and Eurich cases, supra, in which also the first insurer was exonerated. In the case at bar the co-insurance clauses in both policies prove that the parties had contemplated the possibility of more than one valid insurance for the same accident. That it was appellant's understanding that both insurance companies were on the risk is shown by the fact that he notified both of the accident and of the opportunity of settlement. The only possible conclusion supported by the evidence is that, both according to the manifest understanding of the parties and in fairness, respondent was on the risk and has to bear its equal share of the loss.

It is however contended that the indemnity clause contained in the Railroad Commission endorsement bars appellant's recovery. This clause reads: "The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement." The reasoning applied is that but for the agreement contained in the Railroad Commission endorsement appellant's surrender would have terminated the policy as of March 15, 1943; that all payments which respondent would have to make because of accidents occurring after that date would have to be reimbursed by appellant, and that appellant cannot recover where he is himself held to indemnify.

[9, 10] We do not think that this clause is intended to apply to the cancellation of a policy in accordance with the ten days' notice provision of section 7 of the Highway Carriers' Act repeated and elaborated in the third paragraph of the Railroad Commission endorsement. The indemnity clause itself forms part of the second paragraph of the Railroad Commission endorsement, which contains the liabilities of the insurer as to third parties, which liabilities include those for injuries and death caused by vehicles operated by the insured although not specifically described in the policy and

which also provides that those liabilities "shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard to any warranty, condition, declaration, or provision of the policy." It is clearly to this increase in liability of the insurer provided for by this second paragraph that the indemnity clause refers. If the application of the indemnity clause is restricted to the cases of added liability mentioned in this same paragraph the insured will only be placed in the undesirable position of an indemnitor in case of unjustifiable conduct of himself or his employees—misrepresentation, breach of contract, use of an unauthorized vehicle. If however the application of this clause were extended so as to include the cancellation mentioned in the third paragraph, the insured could be made an indemnitor by acts of the insurer only—if the insurer should give five days' notice of cancellation to the insured, the policy would according to the standard form terminate at the end of this notice period, but according to the statute and the third paragraph of the Railroad Commission endorsement the insurer would remain liable until ten days' after receipt of the statutory notice by the Railroad Commission. It would be unreasonable and unfair if the insured would be under duty to indemnify the insurer during the interim. Although it seems doubtful whether the rule that ambiguous insurance policy provisions must be interpreted most strongly against the insurer (Linnastruth v. Mutual Benefit etc. Ass'n, 22 Cal.2d 216, 218, 137 P.2d 833) applies to provisions required to be inserted by statute or regulation. 44 C.J.S., Insurance, § 297. The general rule that where one construction would make a contract unreasonable or unfair and another construction, equally consistent with the language, would make it reasonable, fair and just the latter construction is the one which must be adopted, (Cohn v. Cohn, 20 Cal.2d 65, 70, 123 P.2d 833; Stein v. Archibald, 151 Cal. 220, 223, 90 P. 536) will apply as well to the construction of compulsory provisions.

[11, 12] Because of the paragraph in which the indemnity clause is placed and because of the more reasonable and fair result reached, we construe the indemnity clause as applying only to the added liability of the insurer caused by the provisions of the second paragraph of the Railroad Commission endorsement. We are not bound by the implied opposite construction of the trial court as no extrinsic evidence was taken in aid of its interpretation. Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

On the whole case we are satisfied that there is no escape from the conclusion that when the parties agreed to the cancellation of the first policy they acted in contemplation of the express terms of the statute declaring that such cancellation was not effective until the expiration of the ten day period.

Therefore the judgment is reversed.

GOODELL and DOOLING, JJ., concur.

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82 Cal.App.2d 794

Ex parte LACY.

Cr. 2510.

District Court of Appeal, First District, Division 1, California.

Dec. 11, 1947.

Habeas corpus 🔑46

Petitioner could not obtain a determination in the District Court of Appeal by habeas corpus of her property rights growing out of her marriage agreement and divorce suit in which superior court determined such property rights, where petition for habeas corpus showed that superior court had jurisdiction over the person and subject matter in the divorce suit.

Proceeding in the matter of the application of Rosa Lacy for a writ of habeas corpus to determine property rights of the petitioner.

Petition denied.

Lucille F. Athearn, of San Francisco, for petitioner.

PER CURIAM.

Petitioner seeks to determine, through habeas corpus proceeding, the property rights of Rosa Lacy growing out of a marriage agreement and subsequent divorce in which the Superior Court determined such property rights. It appears, from the petition, that the Superior Court had jurisdiction over the person and the subject matter. Under such circumstances petitioner's remedy is not by habeas corpus.

The Petition for Writ of Habeas Corpus is denied.

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82 Cal.App.2d 744

PEOPLE v. VALDEZ et al.

Cr. 4139.

District Court of Appeal, Second District, Division 3, California.
Dec. 5, 1947.

Rehearing Denied Dec. 17, 1947.

Hearing Denied Dec. 31, 1947.

1. Kidnapping 🔑5
Robbery 🔑24(1)

Evidence sustained conviction of robbery while armed with a deadly weapon and of kidnapping for the purpose of robbery while so armed.

2. Criminal law 🔑531(3)

Evidence showed that confessions made by defendants and received in evidence were made voluntarily.

3. Criminal law 🔑662(6)

The defendants' right to confrontation of witnesses against them was not infringed by the use at the trial of evidence received at preliminary examination where such evidence was used with consent of counsel and their attorney and defendants had had a prior opportunity for the cross-examination of witnesses giving such testimony. Pen.Code, § 686, subd. 3; Const. art. 1, § 13.

4. Criminal law 🔑662(6)

The defendant's right to "confrontation of witness" against him is confined to guaranty of opportunity for cross-examination and does not include observation of the witness's demeanor by the trier of the facts, and where opportunity for cross-examination has once been afforded, the statutory requirements that witness be dead, insane, etc., before former testimony may be used may be waived. Pen.Code, § 686, subd. 3; Civ.Code, § 3513; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Confrontation".

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Reyes Valdez and Lloyd Noriega were convicted of robbery while armed with a deadly weapon and of kidnapping for the purpose of robbery while armed with deadly weapon following previous convictions of felonies and service of terms of imprisonment in the state prison, and from such convictions and from orders denying their motions for a new trial, they appeal.

Judgment affirmed.

Leola Buck Kellogg, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and John F. Hassler, Jr., Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Reyes Valdez and Lloyd Noriega were convicted in a non-jury trial of robbery while armed with a deadly weapon, and kidnapping for the purpose of robbery while armed with a deadly weapon; they were acquitted of grand theft of the property which was the subject of the robbery. Each defendant was charged with and admitted having been previously convicted of a felony and having served a term of imprisonment in the state prison. They appeal from the judgments and from orders denying their motions for a new trial.

The evidence introduced at the preliminary examination at which defendants testified fully was received at the trial and defendants introduced certain additional evidence, including brief testimony given by themselves. This procedure was adopted by stipulation, joined in by defendants and their attorney. Certain facts were established by the testimony of defendants and that of other witnesses. At about 2 o'clock p. m., November 18, 1946, one McLemore, a colored boy, was driving a truck loaded with 135 sacks of walnuts belonging to his employer, L. A. Nut House; when he stopped for a signal at Washington Street his truck was boarded by Noriega and another man, the truck with its load was taken to the plant of California Celery Growers, a wholesale produce firm composed of Pete Regas and John Abadjian. Before the arrival of the truck defendant Valdez had arranged with Regas for the sale of a load of walnuts to the firm; Regas was not present when the truck arrived but the walnuts were unloaded and stored; Valdez returned the following day and was paid for the walnuts, in cash, by Abadjian; the money, $2,650 according to Abadjian and Regas, and $1,350 according to Valdez, was divided between Valdez and Noriega. The evidence was conflicting as to whether others participated in the division. Noriega testified at the preliminary that he was alone when he entered the truck, that he asked McLemore for a ride, which was granted, that he proposed to McLemore that the truck and load would be turned over to him, the walnuts would be sold, that McLemore would receive $200, and that McLemore agreed to the arrangement; that the truck was driven to Ninth and Alameda where Noreiga telephoned to Valdez, asking him to arrange a sale of the walnuts, that Valdez asked him to call back in a few minutes which he did; that Valdez directed him to drive to California Celery Growers, that he did so, met Valdez there and the nuts were delivered. Valdez testified to the same effect. He was acquainted with Regas and Abadjian; Noriega was not. He testified that he did not participate in taking the walnuts or have any knowledge of the circumstances until Noriega asked him to arrange a sale of them, but understood that they were "hot" and told Regas they were. In short, Noriega admitted the theft of the walnuts but denied the robbery and kidnapping and Valdez denied all connection with the transaction except the receipt of the stolen property and its sale for $1,350. The testimony of defendants was contradicted by confessions which they made to police officers and by the testimony of other witnesses. McLemore testified that Noriega entered his truck from the left side, held a gun on him, an automatic, that another man entered and sat at McLemore's right, that he was told to keep his eyes closed and did so; that the truck was driven for a number of blocks when he was transferred to the rear seat of a coupe with Noriega and another man; that he heard the truck leave and heard one man refer to another as "papa"; that all the conversation was in Spanish which he did not understand, although threats were uttered which he did understand; that he was driven to another location where he was taken from the car, placed on a hard seat for some 20 minutes, re-placed in the car and driven to a point near his home, where he arrived at about 5 o'clock p. m. He testified that he was threatened and in fear, that he kept his eyes closed as ordered; that his head was covered with a cloth while he was in the car, and that when he opened his eyes in being transferred to the car that he looked only at Noriega. He denied that he consented to the theft or received any money. Regas testified that on the Thursday preceding the Monday when the crime was committed, Valdez negotiated with him for the sale of a load of walnuts, first asking $30 per hundred pounds; that he refused to pay that price; that Valdez came again the following day asking the same price which was refused and that he returned on Monday when a price was agreed upon which totaled $2,650. It was the first purchase of walnuts the firm had made and the partners denied having had knowledge of the stolen character of the goods.

The People introduced at the preliminary written reports of confessions made to police officers by both defendants. Officer Neeley testified that while in custody Valdez made a statement to him and officer Northrup; that he stated that he had known Noriega in San Quentin, had not seen him for a long time until about 10 days ago;

that he at first denied all knowledge of the walnuts; that he was questioned further as to whether he was in on the "walnut high-jack" and said that he was, with Noriega; that he, Valdez, drove the truck; that Noriega had a .25 automatic which he usually carried in his right hip pocket; that they drove the truck to a location where they had stationed a rented car; that he put his jacket over the colored boy's head, identifying a black leather jacket; that he took the truck to Regas' place and left the walnuts; that on the previous Friday he had had a conversation with Regas in which the latter said he could use "walnuts, beans or tires"; that he had no other deals with Regas; that he recalled that one of the fellows had called him "papa" as testified by McLemore, and that "the fellows" called him that. A written statement was introduced at the preliminary and at the trial which purports to be a report of a statement of Valdez before officers McCreadie, Neeley and Northrup. It commences "Reyes Valdez stated" and contains a purported statement by Valdez to the effect that on the Friday before the robbery Noriega had come to his house and asked him to arrange a deal with "Pete" (Regas), that he contacted Regas who told him to "grab some walnuts," that he reported to Noriega who said he could not get them until Monday, which he, Valdez, reported to Regas, that "Noriega and the boys" delivered the walnuts, that he, Valdez, collected $2,350 the next day and gave all but $200 of it to Noriega; that Noriega had the rented "Chevy" which he had hijacked the truck with; that he, Valdez, took it back and exchanged it for a Mercury which he had when arrested. Another writing was likewise introduced at the preliminary and at the trial. It purports to be a question and answer statement of Valdez corresponding to the confession which was testified to by officer Neeley. At the preliminary Valdez testified that he had admitted to the officers that he had hijacked the truck but that he did so only because they had his two brothers there and were threatening to charge them with the offense. He also testified that he was a truck driver by occupation; that he had never hauled walnuts but had seen them purchased. At the trial Valdez denied having testified at the preliminary that he had hijacked the truck and denied having made any admission or confession to the officers.

[1] We have made the foregoing statement of the evidence for the reason that counsel for Valdez, who did not represent him at the trial, contend here that the evidence was insufficient to establish his guilt of either offense. We hold it to be sufficient. In addition to the confessions, there was strong circumstantial evidence which tended to prove that Valdez participated actively in the commission of the crimes.

Testimony was given by officer Neeley that Noriega also confessed, and a written statement was introduced at the preliminary which purported to be a report of the confession. In its main features it coincided with the testimony given by McLemore and it named one Navarro as Noriega's assistant in taking the truck and Valdez as the driver of the coupe. Noriega stated to the officers, as he testified, that he did not have a gun, but only a short piece of pipe which looked like one. It is not claimed on the appeal that the evidence was insufficient to establish his guilt.

[2] It is claimed that the confessions were inadmissible against either defendant because they were not shown to have been made voluntarily. Counsel for appellants are unfamiliar with the record in this connection. Officer Neeley testified that each confession was made freely and voluntarily. He was not examined on voir dire or cross-examined on this point, and no objection was made to his testifying to the confessions. The writings which purported to be transcripts of the confessions were not identified as such at the preliminary but they were placed in evidence at the preliminary without objection, and at the trial by stipulation. The testimony of Valdez that he confessed to participation in the robbery only to shield his brothers presented only a conflict with the testimony of Officer Neeley as to the circumstances under which the confession was made. The trial court's decision of this factual question rendered the confession admissible. Then, too, the officers' testimony given at the preliminary

was received at the trial under the stipulation. There was no error in admitting evidence of the confessions.

[3, 4] A further contention of the defendants is that their constitutional rights were invaded by the use at the trial of the evidence received at the preliminary examination even though such evidence was used with their consent and that of their attorney. We disagree with this contention. The privilege of a defendant in a criminal action to confrontation by the witnesses against him in the presence of the court is not expressly secured by our constitution, but it is guaranteed by subsection 3 of section 686 of our Penal Code subject to the limitations there stated. However, we may assume for present purposes in keeping with the like assumption of the United States Supreme Court in Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575, that this privilege is protected by the due process provision found in section 13 of article I of our constitution. This assumption poses the question as to the nature and scope of the assumed constitutional privilege. Wigmore states that the privilege in its primary and indispensable aspect is merely an application of the common-law rule against the admission of hearsay testimony, that is testimony, the accuracy of which has not been subjected to the test of cross-examination; while in its secondary and dispensable aspect it is simply a requirement established for the purpose of affording the trier of the facts a better basis for the evaluation of the worth of testimony by insuring the witness's presence before him when giving such testimony. (Wigmore, Evidence (3d Ed.1940), secs. 1362, 1365, 1395-1397; cf. 14 Am.Jur. pp. 888-889.) From this statement it may be deduced that the constitutional privilege is confined to the guaranty of an opportunity for the cross-examination of the witnesses against the defendant and does not include the observation of the witness's demeanor by the trier of the facts. This deduction is borne out by the aforementioned subsection 3 of section 686 of our Penal Code which permits the use of testimony adverse to the defendant taken on preliminary examination or by deposition and of testimony generally given at a trial, where in each of the three situations the witness giving such testimony in the presence of the defendant is shown to be at the time of the trial dead or insane or "cannot with due diligence be found within the state," provided the defendant in person or by counsel has cross-examined the witness or had an opportunity to do so. In other words subsection 3 allows the use at the trial of prior testimony adverse to the defendant where the witness who gave it is unavailable at the trial for the reasons stated and the defendant has had a prior opportunity for the cross-examination of such witness. The existence of this statutory limitation upon the assumed constitutional privilege demonstrates that the privilege is restricted to the opportunity of cross-examination. Similarly, the California decisions recognize the opportunity for cross-examination as constituting the whole of the assumed privilege. People v. O'Neill, 78 Cal.App.2d 888, 891, 179 P.2d 10; People v. Schwarz, 78 Cal.App. 561, 579, 248 P. 990. In fact, on this basis, without reference to whether confrontation is a part of due process, subsection 3 had been repeatedly held constitutional. People v. Hermes, 73 Cal.App.2d 947, 955, 168 P.2d 44; People v. Bernstein, 70 Cal.App.2d 462, 469, 161 P.2d 381; People v. Clark, 151 Cal. 200, 204, 90 P. 549; People v. Sierp, 116 Cal. 249, 252, 48 P. 88. It follows that once the assumed constitutional privilege of cross-examination has been granted, the remaining statutory requirements of subsection 3 may be waived by a defendant. This right of waiver has been recognized both here in California (People v. Hanna, 36 Cal.App.2d 333, 336, 337, 97 P.2d 847; People v. Brown, 83 Cal.App. 236, 238, 239, 256 P. 569; People v. Bird, 132 Cal. 261, 264, 64 P. 259), and elsewhere. (Wigmore, op. cit. sec. 1399; 23 C.J.S., Criminal Law, § 1009; 14 Am.Jur. p. 897.) To the extent that the statutory safeguards of subsection 3 extend beyond the assumed constitutional privilege of opportunity for cross-examination, they are intended solely for the private benefit of defendants, and consequently may be waived by them. (Civ.Code, sec. 3513.) They were effectually waived by defendants and their claim that their rights were invaded is without merit.

The criticism leveled at the practice of trying felony cases by stipulation upon the transcript of the evidence taken upon the preliminary examination is scarcely applicable to the facts of the present case. Each defendant testified to having participated in a criminal activity; the only questions were as to the extent of the participation by each. They testified at the trial but made no effort to present anything in the way of a defense which was not presented at the preliminary. Defendants had competent representation. It was made clear to them how their case was to be tried and they added their express consent to that of their attorney. It does not appear that they suffered any disadvantage in waiving the right to be again confronted by the witnesses who had testified against them.

The judgments were not uncertain or defective for the reason that the sentences were made to run concurrently with any sentences which might be imposed for violation of parole.

The judgments and orders denying motions of defendants for new trials are affirmed.

WOOD, J., and VALLÉE, J. pro tem, concur.

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82 Cal.App.2d 733

MARTIN v. NELSON et al.

Civ. 13511.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1947.

1. Negligence 🔑6

In an action for injury to person or property, evidence of defendant's violation of a statute in causing the injury, is in effect a showing of negligence.

2. Negligence 🔑6, 121(1)

Proof of violation of a statute pertinent and applicable to the facts of a negligence case creates a prima facie showing of negligence, which must be rebutted by evidence that the violation was justifiable or excusable.

3. Negligence 🔑6, 121(1)

In a negligence action against a defendant who violated a statute, burden of proving justification or excuse for violation of the statute must be met by the defendant ordinarily, but where the violation is caused by some independent force over which the defendant had no control, the violation is excused.

4. Automobiles 🔑246(60)

In action for injuries sustained in head-on automobile collision when defendants' automobile came over onto wrong side of center line on bridge, instruction that any violation of Vehicle Code is presumptively negligence until rebutted by evidence that it was justifiable was not erroneous on ground that it cast on plaintiff burden of proving that defendants' presumptive act of negligence in driving on wrong side of bridge was not justifiable. Vehicle Code, §§ 525, 526, 527, 544, 546, 671.

5. Trial 🔑243

Instruction that any violation of Vehicle Code is presumptively negligence until rebutted by evidence that it was justifiable was not erroneous on ground that it contradicted another instruction that negligence is not presumed, but must be proven. Vehicle Code, §§ 525, 526, 527, 544, 546, 671.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Perry V. Martin against Helen E. Nelson and others to recover for injuries sustained by plaintiff in an automobile collision. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

J. Adrian Palmquist, of Oakland, and Nathan G. Gray, of Berkeley, for appellant.

Lewis N. Mitchell and Appelbaum & Mitchell, all of Oakland, for respondents.

WARD, Justice.

This is an appeal in a personal injury action from a judgment after a jury verdict. In his opening brief plaintiff states that the two errors claimed on appeal are based exclusively on instructions to the jury.

On the evening of the accident plaintiff was driving an automobile westward on the upper deck of the San Francisco-Oakland Bay Bridge, which has six vehicle lanes. He was driving in the inner lane for westbound traffic. Defendant driver was proceeding in the opposite direction, in the inner lane for eastbound traffic. Plaintiff testified that he was driving at a speed of approximately thirty-five miles an hour. Suddenly he became aware that an automobile about two car lengths ahead of him, and traveling eastward, had crossed the center double line for traffic on the bridge into the lane in which he was traveling. A collision resulted.

The following instruction was given: "You are further instructed that any violation of the provisions of the Vehicle Code of the State of California to be read to you shortly is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances." It is argued that the above instruction cast upon plaintiff the burden of proving that defendants' presumptive act of negligence in driving on the wrong side of the road was not justifiable or excusable. Instructions covering Vehicle Code provisions applying to driving on the right side of a roadway, driving on roadways laned for traffic, passing vehicles proceeding in opposite directions and the duty to give signals were given. Vehicle Code, secs. 525, 526, 527, 544, 546, 671.

[1, 2] The proper conduct of a reasonable person may be regulated by statute. It is true that in an action resulting in injury and damage to person or property, a violation of a statute is in effect a showing of negligence. Mora v. Favilla, 186 Cal. 199, 199 P. 17. Plaintiff contends that such negligence is negligence per se, or, in other words, negligence as a matter of law. The latest expression by the Supreme Court on this subject is that proof of a violation of a statute pertinent and applicable to the facts of the case on trial creates a prima facie showing of negligence. A presumption of negligence arises from the prima facie showing, which must be rebutted by evidence that the violation was justifiable or excusable. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Trowbridge v. Briggs, 140 Cal.App. 554, 35 P.2d 426; Parker v. Auschwitz, 7 Cal.App.2d 693, 47 P.2d 341; Anderson v. Freis, 61 Cal.App.2d 159, 142 P.2d 330; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51.

[3, 4] The burden of proving justification or excuse is a factual question which ordinarily must be met by the alleged violator of the statute. When the violation is caused by some independent force over which the violator had no control the violation is excused. See cases cited in Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d page 589, 177 P.2d page 283. Defendants offered evidence in rebuttal tending to prove that a third car going in the same direction had hit theirs on the right side and hooked into their right rear fender or bumper; that the impact forced defendants' car over the center double line and that this caused the collision between the plaintiff's and defendants' cars. The defense did not claim that plaintiff was negligent but that the carelessness and negligence of the driver of the east bound car which drove defendants' car over into the lane for westbound traffic was not only the cause but the sole proximate cause of the accident. The claim that no instruction was given to the effect that it was the duty of the defendants to go forward to escape the application of the rule heretofore set forth, is without merit. The defendants not only went forward but assumed the burden of proving that an independent cause for which they were not responsible and over which they had no control justified and excused their being on the wrong side of the road.

A highway patrol officer testified that "He [plaintiff] told me he was headed west next to the double line, going about 35 miles an hour as traffic was very heavy, and he believed he saw a side-swipe accident in the eastbound lanes, immediately following which a car crossed the double line and hit him head-on. He had no opportunity to apply the brake or even swerve, it happened too fast." This testimony was admitted without objection and without limitation. Assuming that the language in the instruction plaintiff refers to as No. 5 could have been improved upon and made clearer to the jury, still there is no claim that the jury was misled or that the evidence was insufficient to sustain the verdict.

[5] The second assigned error is that instruction No. 5 was a legal contradiction of an instruction referred to as No. 3, namely, "Negligence is not presumed, but must be proven." That instruction is a correct statement of the law. The burden of proving negligence is on the party alleging negligence. Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480. In submitting proof to sustain the allegations of the complaint there was no presumption that defendants were on the wrong side of the road. That step in the proof of negligence was a burden upon plaintiff, without which, in the absence of other proof of negligence, plaintiff's case would fail. In view of the necessity of giving instruction No. 5 as applicable to the particular facts of this case, there might have been added to instruction No. 3—"except as hereafter indicated"—or some similar language to make it easier for a layman to understand. The above instructions Nos. 3 and 5 are not inconsistent and there is nothing in the record to indicate that the jurors were confused.

Plaintiff does not contend that there was any error in refusing instructions presented by him. The claim that the instructions mentioned were prejudicially contradictory is without merit. There was no offer to clarify either instruction No. 3 or No. 5, or a request that an instruction should have been given covering Code of Civil Procedure secs. 1959, 1961. See, also, Ramos v. Service Bros., 118 Cal.App. 432, 5 P.2d 623; Mecham v. Crump, 137 Cal.App. 200, 30 P.2d 568. When the facts of this case are analyzed and each instruction considered with other instructions it appears that a miscarriage of justice did not occur.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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82 Cal.App.2d 751

PHILLIPS v. CLEAVER et al.

Civ. 3482.

District Court of Appeal, Fourth District, California.

Dec. 5, 1947.

Rehearing Denied Dec. 20, 1947.

Hearing Denied Jan. 29, 1948.

1. Landlord and tenant ⚷331(6)

In action for an accounting and damages arising out of a farming venture where plaintiff contracted with defendant for farming of the land and such defendant subsequently turned farming thereof over to a co-defendant, evidence established that agreement was not substantially performed by defendants and that co-defendant was not substituted in place of defendant by agreement.

2. Landlord and tenant ⚷331(3)

Finding that plaintiff had been damaged to the extent of $2500 on account of the breach of farming agreement by other party thereto was not sustained by the evidence.

3. Appeal and error ⚷1178(6)

Where proof clearly showed that one party to agreement had breached such agreement but finding as to the amount of damages was not sustained by the evidence, the judgment would be reversed for a new trial on the sole issue of the amount of damages.

4. Landlord and tenant ⚷331(3)

Where one party to farming agreement had failed to plant barley as agreed, recovery of full damages for such failure is all that plaintiff would be entitled to, and no recovery could be had of additional damages for failure to raise a sufficient quantity of watermelons on the same land.

5. Appeal and error ⚷442

A judgment for damages for breach of contract which also directed an accounting and payment of such amount as should be found due was a final judgment and where it was appealed from, the trial court was without jurisdiction to proceed with the accounting until the appeals should be determined.

6. Landlord and tenant ⚷332

Where it was found that co-defendant was acting as agent of defendant and that he claimed an interest in the proceeds of crops and had sold crops and received proceeds, he was properly made a party defendant in action by land owner against the other party to farming agreement.

◆

Appeals from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Harold B. Phillips against Charles J. Cleaver and Willard M. Hanzlik for damages for breach of contract and for an accounting. From a judgment for plaintiff against first defendant for $2,500 damages for breach of contract, and a second judgment against the two defendants for $483.81, amount found to be due on accounting, both defendants appeal.

Judgment affirmed in part and reversed in part and remanded.

Alva D. McGuire, of Riverside, for appellant Cleaver.

James C. Webb, of Long Beach, for appellant Hanzlik.

William W. Waters, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for an accounting and for damages arising out of a farming venture.

The plaintiff, as the owner of about 34 acres of land, entered into an oral agreement with the defendant Cleaver for the farming of the land during the 1944 crop year. The agreement was entered into on December 10, 1943, and provided that Cleaver would furnish the tools and the labor of one man; that he would farm the land, putting in about 18 acres of barley and about 16 acres of fall potatoes; that all expenses, including the cost of any additional labor, should be shared equally by the parties; and that they would share equally in any profits derived from the venture.

Cleaver neglected to begin operations until the season for planting barley had passed, so no barley was planted. In February, 1944, Cleaver turned over the farming of the land to the defendant Hanzlik under some sort of an arrangement between them. Hanzlik planted 18 acres of watermelons, but because of late planting and improper care the crop produced was very small. Later on Hanzlik planted about seven acres of the land to fall potatoes, and for the same reason a small crop was produced. The remaining nine acres was never planted to anything.

Having received nothing from the crops produced the plaintiff brought this action for an accounting and for damages. The court found in favor of the plaintiff, finding that this was a joint adventure as between the original parties; that Hanzlik acted as the agent of Cleaver during this cropping season, but claimed an interest in the profits from the joint adventure; that crops of watermelons and potatoes were produced; that the defendants retained all the proceeds therefrom and had refused to account to the plaintiff therefor; that it was impossible to ascertain the amount due to the plaintiff from the proceeds of these crops without an accounting by a referee; that the defendants had failed to properly care for the crops which were planted; that the defendant Cleaver had failed to plant 18 acres of barley, had failed to plant nine acres to any crop at all, and had failed to properly farm and care for such crops as had been planted; and that the plaintiff had been damaged in the sum of $2500 because of such failure on the part of Cleaver. A judgment, which followed the conclusions of law, was then entered on June 25, 1946, which provided (1) that a certain referee be appointed to take an account and report his findings with respect to the receipts and expenditures in connection with the crops that were produced; (2) that plaintiffs have and recover from the defendants, and "they are hereby ordered to pay to plaintiff", the amount which such an accounting disclosed to be due to him; and (3) that plaintiff have and recover from the defendant Cleaver, and that Cleaver "is hereby ordered to pay to the plaintiff" the sum of $2500 as general damages for his breach of the contract as above indicated.

The defendants Cleaver and Hanzlik each appealed from this judgment within the time allowed, and requests for transcripts were filed. While these appeals were pending the referee proceeded to hold a hearing and make the accounting. The referee filed his report on October 16, 1946, showing that receipts from the venture were $3033.87, disbursements $2066.24, and the net profits $967.63, and finding that one-half of this profit, or $483.81, was the amount due to the plaintiff. On October 28, 1946, the court entered another judgment reciting that the referee had reported that $483.81 was due to the plaintiff, and decreeing that the plaintiff recover from the defendants Cleaver and Hanzlik the sum of $483.81, with costs. The defendants Cleaver and Hanzlik separately appealed from this judgment also, and the appeals from both of the judgments above referred to are here presented.

The appellant Cleaver contends that his agreement with the respondent was substantially performed; that the entry of any judgment against him was clearly erroneous since the evidence conclusively shows that he withdrew from this venture and that Hanzlik was substituted in his place, with the knowledge and consent of the respondent who confirmed such substitution; and that the evidence further does not support the award of $2500 damages made against him.

[1] The contentions that this agreement was substantially performed and that Hanzlik was substituted in place of Cleaver by agreement of the parties rest upon mere conflicts in the evidence. There is ample evidence to show that the agreement was not substantially performed, and the same is true with respect to the matter of substitution of parties to the contract. While there is some evidence that the respondent was told about the 10th of May, 1944, that Cleaver had turned the entire matter over to Hanzlik and that the respondent made an equivocal reply, this was not only denied by the respondent but there is evidence that when it was brought to his attention at that time, or later, that Hanzlik claimed some interest in the project, he informed Cleaver that he would not release him from his obligation. Among other things, Hanzlik, on July 31, 1944, wrote a letter to the respondent stating that he had agreed with Cleaver to work the place on the same basis as the original contract with Cleaver, and that they had agreed between themselves not to inform the respondent of that fact. The evidence is entirely sufficient, in these respects, to support a judgment as against Cleaver for any amount or amounts that may properly be found due to the respondent.

[2, 3] On the other hand, the evidence is not sufficient to support the award of $2500 as general damages against the appellant Cleaver. While it conclusively appears that he breached his contract, and while there is evidence as to the amount of barley that could have been produced on the 18 acres and as to the amount of potatoes that could have been produced on 16 acres, if planted and properly cared for, evidence as to several elements which would then be necessary in order to show the amount of resulting damage is lacking. The amount of the judgment allowed by the court seems to have been arrived at by allowing damages not only for failure to plant the grain but also for matters in connection with the watermelons which were later planted on the same ground. While the matter of the watermelons was material and important in connection with reducing any damages caused by the original breach of the contract, the respondent was not entitled to double damages in connection with the same ground. It would appear from such figures as are in the record that the court not only overlooked this matter but that it overlooked the fact that, in determining what the result would have been had the contract been performed, the respondent would have been entitled to only one-half of any net profits and not to all of such profits. It follows that this judgment for $2500 against the appellant Cleaver should be reversed and the matter remanded for a new trial on the sole issue as to the amount of such damage suffered by the respondent.

[4] On a retrial, care should be taken to avoid giving the respondent double compensation for the breach of contract upon

which he relies. If he recovers his full damages for the failure to plant and care for 18 acres of barley he should not recover additional damage for failure to raise a sufficient quantity of watermelons on the same land.

[5] With respect to the appeals of the appellant Hanzlik, it clearly appears that the first judgment, entered on June 25, 1946, was a final judgment not only as to the general damages awarded against Cleaver, but also as to the element of an accounting. A present judgment was ordered for, and the appellants were ordered to pay, the sum found to be due to the plaintiff by reason of the accounting. Nothing further remained to be done in the nature of a judicial action, the rights of the parties were fully established, and all that remained was such proceedings as were necessary to carry the judgment into effect. This was a final judgment (Zappettini v. Buckles, 167 Cal. 27, 138 P. 696), and the court was therefore without jurisdiction to proceed with the accounting until the appeals therefrom were decided. Moreover, it would appear that the referee's account, which was accepted by the court without a further hearing, erroneously held that certain disbursements amounting to $1533.37 were not chargeable to the joint adventure. While these are not fully itemized it clearly appears that, under the original agreement of the parties, a part of these expenses were chargeable to the joint adventure. While not clearly appearing, it also seems probable that at least a large part of one of these items, that for labor in the amount of $899.51, was also chargeable to the joint adventure. Under the original agreement, all labor was chargeable to the joint adventure with the exception of that of one man, which was to be furnished by Cleaver. From a comparison with other items in the account it seems probable that an important element has been overlooked in making this account. In any event, a new accounting should be had.

[6] Hanzlik's further contention that no judgment could be entered against him, since it was found that he was acting as Cleaver's agent, is without merit. It was further found that he claimed an interest in the proceeds of these crops, it appeared that he had sold the crops and received the proceeds, and he was the only one who was in a position to furnish the information necessary to an account.

That portion of the judgment entered on June 25, 1946, which awards $2500 damages as against the appellant Cleaver is reversed and remanded for a new trial solely on the issue of the amount of the damages; the remainder of that judgment is affirmed; and the judgment entered on October 28, 1946, is reversed and that matter remanded for a new accounting. The appellants to recover their costs on appeal.

MARKS and GRIFFIN, JJ., concur.

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82 Cal.App.2d 761

SILVEYRA v. HARPER.

Civ. 13424.

District Court of Appeal, First District, Division 1, California.

Dec. 9, 1947.

1. Appeal and error 🔑931(1)

Where trial court, on conflicting evidence, believed respondent's story, appellate court must conclusively presume that such story was true.

2. Bills and notes 🔑518(1)

In action on note, evidence sustained finding that note was unsupported by consideration so that plaintiff could not recover.

3. Evidence 🔑37

The court may not take judicial notice of the law of a foreign country.

4. Evidence 🔑81

In absence of proof to the contrary, it will be presumed that foreign law is the same as California law even where California law is statutory law.

5. Contracts 🔑249

While third party beneficiary of contract may sue thereon, parties to such contract may rescind, no estoppel being present, at any time prior to institution of suit by beneficiary. Civ.Code, § 1559.

6. Contracts 🔑274

Where in reliance on lender's promise to pay borrower's creditor a certain sum, creditor changed his position to his injury by incurring obligations, lender was required to pay such sum even if contract between lender and borrower was a third party beneficiary contract which normally could be rescinded by parties before beneficiary commenced suit, since such rescission cannot affect rights of third parties that have vested in reliance on contract prior to rescission. Civ.Code, § 1559.

7. Contracts 🔑262

Where lender allegedly agreed to pay off borrower's creditor an amount which had been incurred prior to date contract was entered into, as to such obligation, if contract was a third party beneficiary contract, no estoppel existed and hence lender who did not obtain mortgage security which borrower had agreed to give was not liable to borrower's creditor. Civ.Code, § 1559.

8. Contracts 🔑278(1)

Where an implied condition for payment of money by lender to borrower's creditor was borrower's furnishing of mortgage security to lender, and such security was never furnished, and no elements of estoppel were present, lender's obligation to pay such sum to creditor never came into existence.

9. Appeal and error 🔑1050(4)

Where defendant counterclaimed on alleged contract which allegedly had been delivered to plaintiff, and plaintiff's position was that no such contract had ever been executed, admission of secondary evidence of contents of the contract was not prejudicial on ground that plaintiff had not been given reasonable notice to produce such document. Code Civ.Proc. § 1938.

10. Trial 🔑105(5)

Where defendant counterclaimed on basis of alleged contract and defendant testified that he gave a receipt to plaintiff's attorney, and demand was made for original at trial but counsel stated that he did not have it, failure to object on ground that reasonable notice had not been given to produce waived such objection and hence defendant's copy was properly admitted as secondary evidence.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Augustin Silveyra against Joy P. Harper to recover on a note wherein defendant counterclaimed for a sum of money allegedly owing to defendant by plaintiff. From an adverse judgment, plaintiff appeals.

Affirmed in part and reversed in part with instructions.

Fabian D. Brown, of San Francisco, for appellant.

O'Keefe & O'Keefe, of Redwood City, for respondent.

PETERS, Presiding Justice.

Plaintiff, Augustin Silveyra, brought this action against defendant, Joy P. Harper, to recover from defendant on a $6,000 promissory note alleged to have been executed by defendant. The defendant denied liability, and, in addition, counter-claimed for $12,000, claiming that plaintiff was indebted to him in that sum under the terms of a contract alleged to have been breached by plaintiff. The trial court found that the promissory note was unsupported by consideration and found for defendant on his counter-claim for the full amount requested—$12,000. From this judgment plaintiff appeals.

Appellant has filed a three-page opening brief and a two and a third page closing brief. Respondent has filed a four-page reply brief. Neither counsel has seen fit to summarize the facts, nor has either counsel analyzed the points of law involved in relation to the facts. This has imposed a totally unnecessary burden on this court.

The following statement of facts is taken from the reporter's transcript:

During the year 1945 respondent, a contractor and trainer of race horses, agreed with one Vallejo Leal to construct a road from Tia Juana, Mexico, to the Pacific Ocean, over certain property owned by Leal. By July, 1945, Leal owed respondent $14,000 for work already performed. Leal did not have the money to pay this debt and respondent discontinued work. Under these circumstances, on July 14, 1945, in Tia Juana, Leal, respondent and appellant (the latter being the manager of a Tia Juana race track) met for the purpose of ascertaining whether appellant would advance money to Leal so that he could pay respondent for his past and future work on the road. Respondent testified that a contract was entered into in writing signed by all three of the parties. Respondent had no copy of the contract and when, upon demand during the trial, appellant could not produce it, he contending no such contract had been executed, the trial court permitted respondent to testify over objection as to its terms. He testified that by this written agreement appellant agreed to advance to Leal the sum of $20,000 at 20 per cent interest, which loan was to be secured by a mortgage on the real property owned by Leal. The money was to be paid to Leal for the use and benefit of respondent, it being agreed that $6,000 in cash was to be paid to respondent upon the execution of the agreement so that respondent could meet his payroll and pay past due bills, $4,000 one week from the date of the agreement, and $10,000 30 or 40 days from the date of the agreement. Pursuant to the terms of this agreement, appellant, on July 14, 1945, paid to respondent the sum of $6,000. Respondent, thereupon, as contemplated by the agreement and in reliance upon it, once again started work on the road, worked on it for two weeks, and incurred labor and other charges of $4,000. Appellant, however, did not, as provided in the agreement, pay to respondent or to Leal for respondent the sum of $4,000 one week after July 14, 1945, nor at any other time. Thereupon, respondent stopped work on the road. The reason why appellant refused to pay the $4,000 and the $10,000 required to be paid by him under the contract is that Leal, and the appellant were unable "to legalize" the mortgage. In other words, for reasons that do not appear, appellant did not secure from Leal the mortgage he was to receive as security for the money advanced. The trial court interpreted the contract to mean that appellant was absolutely obligated to pay to respondent the sum of $14,000 owed by Leal to respondent and further obligated appellant to pay the $4,000 required under the contract to be paid on July 21, 1945, making a total of $18,000. Of this sum he had paid respondent $6,000, leaving a balance of $12,000. It was on this theory that the trial court gave judgment against the appellant on his counter-claim for $12,000, although Leal had not complied with the agreement by giving appellant the promised mortgage.

The promissory note which forms the basis of the action by appellant against respondent was for $6,000 and was admittedly signed by respondent. It is dated "San Diego, California, August 6th, 1945." Respondent testified, and the trial court found, that in fact the note was executed in Tia Juana, Mexico. Appellant testified that about July 31, 1945, he loaned to respondent $6,000 so that respondent could finish his road contract with Leal. He denied knowing anything else about that road contract and denied entering into the contract discussed above. He stated that the August 6, 1945, note was given as evidence of this loan, and had not been repaid. Respondent denied this story in its entirety, and the trial court has found in accordance with respondent's testimony. This conflict must be resolved in favor of respondent.

[1, 2] Respondent testified that on August 6, 1945, appellant was manager of a race track in Tia Juana. Respondent, as agent and trainer for the owners, had certain race horses stabled at the track, the horses being valued at in excess of $10,000. Appellant claimed respondent owed him $6,000. If respondent's story is to be believed, and since the trial court so found we must conclusively presume it is true, this claim was based apparently on the $6,000 advanced by appellant to respondent under the Silveyra-Harper-Leal contract of

July 14, 1945. Respondent denied that he owed appellant $6,000 or any other sum, but appellant threatened that unless respondent signed the $6,000 note, he, the appellant, would detain the race horses in Tia Juana. Respondent testified that the owners of the horses had instructed him to bring the horses to the United States. Under these circumstances respondent signed the note in order to release the horses. The trial court found that the note was unsupported by consideration and that finding is obviously supported.

[3, 4] No attempt was made to prove the Mexican law, and no findings were made on that subject. Under such circumstances, since this court may not take judicial notice of the law of a foreign country, in the absence of proof to the contrary it will be presumed that the foreign law is the same as California law even where the California law is statutory law. (See many cases collected 5 Cal.Jur. p. 430, § 12; 3 Cal.Jur., 10 Yr.Supp., p. 724, § 12.)

[5-7] It is most difficult to ascertain from appellant's scanty briefs the exact basis of his attack on the judgment. The judgment, insofar as it denies appellant any relief on his cause of action on the promissory note, is obviously supported by the evidence and findings, and the findings support the judgment. So far as the contract forming the basis of the counterclaim is concerned, it seems to be appellant's thought that the contract was between appellant and Leal for the benefit of respondent, and that because the contract was never completed by the giving of security, respondent as a third party beneficiary could acquire no rights thereunder. No authority is cited for this position. While it is the law of California that a third party beneficiary of a contract may sue thereon (§ 1559 of the Civ.Code), it is also the law that the parties to such contract may rescind, no estoppel being present, at any time prior to the institution of suit by the beneficiary. More v. Hutchinson, 187 Cal. 623, 203 P. 97; K. Lundeen Corp. v. Barlow, 120 Cal.App. 391, 7 P.2d 1102; see note 12 Cal.L.Rev. 328. Here, the parties interpreted the contract of July 14, 1945, as requiring appellant immediately, and before security was provided, to pay to respondent $6,000. That must have been the interpretation of the parties because that sum was paid. The contract also contemplated that respondent, on the faith of the contract, would immediately, and before security was provided, start work on the road and incur obligations which appellant agreed to pay up to $4,000 on July 21, 1945. In reliance on that agreement respondent did incur obligations up to $4,000. That sum appellant must pay even if this were a third party beneficiary contract which normally could be rescinded by the parties before the beneficiary has commenced suit, because such rescission cannot affect rights of third parties that have vested in reliance on the contract and pursuant to its terms prior to the rescission. As to the $4,000, appellant is estopped from exercising his normal right of rescission for the obvious reason that, in reliance on appellant's promise to pay, respondent recommenced work, and thus changed his position to his injury by incurring $4,000 of obligations. In his reply brief appellant concedes the existence of such an estoppel as to the $4,000. But the same cannot be said as to the balance of the judgment. The judgment was for $12,000. The $8,000 difference between the $4,000 already mentioned, and the amount of the judgment, was to pay off Leal's obligation to respondent which had been incurred prior to the date the contract was entered into. Obviously, appellant was not going to pay that sum to respondent unless and until he got his promised security. As to this obligation, if the contract was a third party beneficiary contract, no estoppel exists because respondent in no way changed his position to his damage in reliance on that part of the promise. Thus either because Leal and appellant rescinded, or because the contract was never completed by the giving of security, respondent cannot recover as to this $8,000.

[8] The preceding discussion has proceeded on the theory that this was a third party beneficiary contract. A more logical interpretation of the relationship of the parties, however, is that this was a tri-

partite agreement. Respondent testified that all three signed the agreement and assumed obligations thereunder. Respondent was therefore not a mere beneficiary of the contract, but was a party to it. The contract required appellant to advance $6,000 at once to respondent before the promised mortgage was to be executed. That portion of the contract went into immediate operation and was executed. The contract also required respondent to immediately commence work and contemplated that he would incur obligations. This respondent did to the extent of $4,000. While the contract contemplated that security would be given by Leal to appellant, that could not have been an implied condition precedent to the obligation to pay the $4,000. That obligation became fixed and certain upon the execution by respondent of that part of the contract. But, as to the balance of $8,000 for which judgment has been granted, it was obviously an implied condition that Leal furnish appellant the mortgage security. That condition not having been performed, and no elements of estoppel being present as to this portion of the contract, the obligation to pay this sum never came into existence.

It is quite apparent, therefore, that, whether the agreement be treated as a third party beneficiary contract or a tripartite transaction, the same result follows —the judgment may be sustained only to the extent of $4,000, and must be reversed as to the balance.

Appellant, citing as his sole authority § 1938 of the Code of Civil Procedure contends that the trial court erred in allowing respondent to give oral testimony of the contents of the contract over appellant's objection that the contract was the best evidence. The respondent testified that the contract was delivered to appellant, and the court permitted respondent to demand production of the contract during the trial. Appellant urges that this violated § 1938 in that that section requires "reasonable notice" to be given the party in possession of the document to produce it.

[9] When respondent's counsel, during the trial demanded the production of the document, appellant's counsel did not complain that he needed further time to secure the document, or that he had been taken by surprise and damaged by this late request, but took the position that "there never was any such document" and "there is no such document." In other words, appellant's position was that no such document had ever been executed. How appellant could have been prejudiced by not being given reasonable notice to produce a document appellant claimed did not exist does not appear. Obviously, no prejudice could have resulted and it was not error to admit secondary evidence of the contents of the contract. See generally, IV Wigmore on Evidence, 3d Ed., § 1208, p. 375; Jones v. Jones, 38 Cal. 584; Burke v. Table Mountain Water Co., 12 Cal. 403.

[10] Appellant also objects to a ruling permitting secondary evidence, respondent's copy, of the receipt which respondent testified he gave to appellant's attorney. Demand was made for the original at the trial but counsel stated that he did not have it. The court, without objection by appellant, admitted the copy. The failure to object on the ground that reasonable notice had not been given to produce operates as a waiver. (See, generally, 10 Cal. Jur. p. 858, § 137; 5 Cal.Jur., 10 Yr.Supp., p. 661, § 137.)

None of the other rulings of which complaint is made could possibly have been prejudicial.

That portion of the judgment denying to plaintiff any relief on his cause of action is affirmed; that portion of the judgment granting affirmative relief to defendant in the amount of $12,000, and based upon the counter-claim, is reversed. The trial court is instructed to modify its findings, conclusions and judgment so as to reduce the judgment to $4,000 as herein indicated; both sides to bear their own costs on this appeal.

WARD and BRAY, JJ., concur.

KNAPP et al. v. ROSE et al. *

Civ. 15848.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1947.

Rehearing Denied Dec. 10, 1947.
Hearing Granted Jan. 15, 1948.

1. Execution 🔑99
Fraudulent conveyances 🔑316

Where executions on money judgment were returned unsatisfied, judgment debtor conveyed property to others without consideration, and in subsequent action against grantees the court ordered property reconveyed so as to be subject to creditor's executions, that part of decree in the subsequent action which ordered issuance of an "alias execution" to sell the property conveyed by fraudulent deed was superfluous and unauthorized. Code Civ.Proc. §§ 683, 688.

2. Judgment 🔑855(1)

Clerk of court is without authority to issue a writ of enforcement in the absence from decree of specific directions to issue writ.

3. Execution 🔑7
Judgment 🔑777

Money judgment is a lien upon realty of judgment debtor and it is enforced by levy and sale under a writ of execution.

4. Fraudulent conveyances 🔑316, 317

Where executions on money judgment were returned unsatisfied, debtor conveyed property to others without consideration, and in subsequent action against grantees the decree ordered property reconveyed so as to be subject to creditor's executions, provision in such decree for a writ of enforcement to enforce the judgment was void, notwithstanding that in such decree a lien was established on specific property of debtor in the money judgment, and hence sale made by marshal and all of his acts done pursuant thereto under the writ, were likewise void.

5. Fraudulent conveyances 🔑316

Where executions on money judgment were returned unsatisfied, debtor conveyed property to others without consideration, and in subsequent action against grantees the court ordered property reconveyed to debtor so as to be subject to creditor's execution, action to annul writ of enforcement in the subsequent or third action, and to set aside sale thereunder would lie as against contention that a motion in the second action should have been made, where movant could not make a motion, because she had satisfied the judgment against her for costs some time prior to assignee's acquisition of the judgment.

6. Judgment 🔑382, 452

Where a void judgment is rendered, a stranger to the record cannot attack the judgment by motion but only by a suit in equity.

7. Judicial sales 🔑45

Where a sale of property of a stranger to the action has been illegally made, his remedy is by a suit in equity.

8. Judgment 🔑707

Where creditor recovered money judgment and executions were returned unsatisfied and debtor conveyed property to others by fraudulent deed, and court subsequently ordered property reconveyed so as to be subject to the creditor's executions, and proceeding for writ of enforcement of the judgment was subsequently brought, an order denying a motion to quash and recall an order of sale and decree of foreclosure in enforcement proceeding was not res judicata of an action to annul the writ of enforcement where the principal movant was not a party to enforcement proceeding because of satisfaction of judgment against her and inclusion of her name as a movant was evidently an inadvertence.

9. Judgment 🔑707

A judgment or an order cannot affect a stranger to the action and only parties or their privies are bound.

10. Judgment 🔑862

A judgment lien on realty which had expired by lapse of five years was properly revived where judgment debtors were found to have fraudulently placed their property beyond search of lienor and lienor had been diligent in his efforts to collect the judgment.

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* Subsequent opinion 197 P.2d 7.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by June Knapp and E. W. Knapp against Maurice Rose, individually and doing business as Golden State Finance Company and others, to annul a writ of enforcement and all acts done pursuant thereto. From an adverse judgment, defendants Maurice Rose, individually and doing business as Golden State Finance Company and others appeal.

Judgment affirmed.

Alexander L. Oster and A. J. Weiss, both of Los Angeles, for appellants.

S. V. O. Prichard, Oliver O. Clark and Robert A. Smith, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

This action was brought to annul a writ of enforcement issued by the clerk of the superior court of Los Angeles county (which was the forum for all actions herein mentioned) and all acts done pursuant thereto in action 334097, herein referred to as cause 33. Defendants appeal from the judgment awarding plaintiffs the relief demanded.

On May 6, 1929, Lorn Betty recovered judgment against Ellen B. Crowder and her son E. W. Knapp for $3,000 and costs in the sum of $74.05. That action was numbered 260222 and will be referred to as cause 26. In action 33 the court found that E. W. Knapp and June Knapp were husband and wife and that Ellen Crowder was the mother of E. W. Knapp; that after the entry of judgment in cause 26 numerous executions were issued therein and delivered to the sheriff but that all of them were returned unsatisfied; that proceedings supplemental to execution resulted in no collection on account of the judgment in cause 26, but that during the period of the efforts of Betty to collect on his judgment Mrs. Crowder without a valuable consideration conveyed to June Knapp all of the real property owned by herself and son for the purpose of defeating Betty's collection of his judgment. The court thereupon decided that the property so transferred should be reconveyed to Mrs. Crowder and her son and enjoined them pending the issuance of an alias execution from selling or encumbering it. The judgment entered thereon annulled the conveyance to June Knapp insofar as it affected Betty as a judgment creditor and decreed (1) that Betty has a lien upon the property described in such conveyance for the full amount of his judgment and costs in action 26; (2) that an alias execution be issued in cause 26 directed to the sheriff of Los Angeles county empowering and commanding him to sell such portion of the real estate described in the fraudulent deed as will be sufficient to satisfy the judgment in cause 26; (3) that plaintiff Betty recover from Mrs. Crowder and her son the sum of $3,000 and costs in the sum of $431.50 with legal interest from the date of judgment in cause 26; (4) that plaintiff (Betty) may proceed upon his execution heretofore issued or upon an alias execution upon his judgment in cause 26; and (5) that the defendants deliver to the sheriff the property described in the deed to be sold and the proceeds applied to the satisfaction of the judgment in cause 26 and interest and costs incurred in cause 33 in the sum of $74.55.

[1] The judgment in cause 33 having made no attempt to declare the judgment in cause 26 to be satisfied but having prescribed that it should be processed by an alias execution in cause 26, it is clear that the judgment in cause 33 was intended to be merely supplemental to the statutory method for enforcing the judgment in cause 26. Despite the character of the last mentioned judgment, on October 21, 1941, appellant Rose caused it to be duly assigned to himself. Several writs of execution having been theretofore returned unsatisfied, Rose caused an "alias Writ of Enforcement" to be issued on April 6, 1942, in cause 33 and to be delivered to the marshal of the Los Angeles municipal court. Pursuant to Rose's instructions the marshal without making a levy advertised and sold the property of respondents as in the case of foreclosure sales.

The present action having been brought to vacate the writ of enforcement, upon a trial the court below adjudged (1) that the judgment in cause 33 limits the processes of the court to execution theretofore issued in cause 26 or to an alias execution thereafter issued in the latter cause; (2) that the alias writ of enforcement issued April 6, 1942, in cause 33 was void from and after its issuance; (3) that the certificate of sale issued by the marshal May 13, 1942, and his deed issued May 22, 1943, were and are void and expunged from the public records; (4) that none of the defendants has any right to or estate in the realty described in the marshal's certificate and deed.

While that part of the judgment in cause 33 which ordered the issuance of an "alias execution" whereby to sell the realty conveyed by the fraudulent deed was superfluous (see Code Civ.Proc., secs. 683, 688), the fatal error which was corrected by the present judgment was the issuance by the clerk and the execution by the marshal of a writ of enforcement in cause 33. The decree in cause 33 did not, and indeed legally it could not, provide for the issuance and execution of process for the enforcement of the judgment in that proceeding. Its purpose and its office were merely to effectuate the collection of the judgment in cause 26. The language of the pleadings as well as of the decree in cause 33 are so plain that any construction other than that above announced would be to disregard the terms of such decree as well as pertinent statutes.

[2-4] In the absence from a decree of specific directions to issue a writ of enforcement the clerk is without authority to do so. The judgment in cause 26 when filed in the office of the county recorder is a lien upon the real property of the judgment debtors and it is enforced by levy and sale under a writ of execution. Wellborn v. Wellborn, 55 Cal.App.2d 516, 521, 131 P.2d 48. The decree in cause 33 pointed the way to be followed in enforcing the money judgment in cause 26, and by establishing for Betty a lien upon the Crowder-Knapp property nothing was left for the imagination to devise as the course of the judgment creditor in cause 26. Just as a writ of execution cannot be used for the sale of specific property subject to a lien specified in the judgment, so a writ of enforcement such as that under which the marshal made sale of the Crowder-Knapp property was not authorized for enforcing payment of the former money judgment in cause 26, notwithstanding that in the subsequent equity action, cause 33, a lien was established on specific property of the debtor in the money judgment. Montgomery v. Meyerstein, 195 Cal. 37 43, 231 P. 730. Had the property of Crowder and Knapp been sold and the proceeds paid to Rose, the judgment in cause 26 would remain unsatisfied since there is no indication that Rose has any interest in the money judgment. It follows that the writ of enforcement was void, and therefore the sale made by the marshal and all of his acts done pursuant thereto are likewise void. Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591.

[5-7] Appellants contend that the instant action (cause 49) was not authorized for the purpose of setting aside a sale under execution and that a motion in cause 33 was the appropriate procedure. It is true that as a general rule the proper procedure is by motion to vacate the sale in the action under which irregularities are alleged to have occurred. But the present situation presents an exception to that rule and such exception conferred upon the equity jurisdiction of the court the power to do the needful. Mitchell v. Alpha Hardware & Supply Company, 7 Cal.App.2d 52, 56, 45 P.2d 442. While June Knapp had been a defendant in cause 33, she had satisfied the judgment against her for costs some three years prior to Rose's acquisition of the judgment. Having no interest in that action she was in no position to make a motion to vacate the sale and to nullify the marshal's certificate and deed. Difani v. Riverside County Oil Company, 201 Cal. 210, 214, 256 P. 210. Also see Lavaysse v. Superior Court, 63 Cal.App.2d 223, 225, 146 P.2d 686. If where a void judgment is made a stranger to the record cannot attack it by motion but only by a suit in equity. (Bennett v. Wilson, 122 Cal. 509, 514, 55 P. 390, 68 Am.St.Rep. 61), then where a sale of the property of a stranger to the action has been illegally made his remedy is by a suit in equity. (Ibid.)

[8, 9] The order of December 31, 1941, is not res judicata of the present action. On August 13, 1940, these respondents filed

their notice of motion to quash and recall the order of sale and decree of foreclosure in cause 33. Several grounds for the motion were alleged including the grounds that no order of foreclosure and decree of sale had been made against Mrs. Crowder and the Knapps and that "the foreclosure does not describe the property." Because the motion was denied on December 31, 1941, appellants now contend that the order of denial is res judicata of the present action, citing Denio v. City of Huntington Beach, 74 Cal.App.2d 424, 168 P.2d 785. The cited case holds nothing more than the familiar doctrine of res judicata. Appellants by such contention again ignore the fact that on the date of the denial of such motion June Knapp was not a party to cause 33, having satisfied the judgment against her. The inclusion of her name as a mover of the motion was evidently an inadvertence and was not sufficient to reinstate her as a party. No attempt was made by the defendants in the motion to have the order applied to Mrs. Knapp. In her absence and by reason thereof the court's denial of the motion was foreordained. A judgment or an order cannot affect a stranger to the action; only parties and their privies are bound. Holt Manufacturing Company v. Collins, 154 Cal. 265, 271, 97 P. 516; Trowbridge v. Love, 58 Cal.App.2d 746, 749, 137 P.2d 890.

The finding is that the judgment in cause 33 limits the processes of the court to be thereafter issued and used in the enforcement of the rights of the plaintiffs as determined in cause 33 to the execution theretofore issued or to an alias execution to be thereafter issued upon the judgment in cause 26. Such finding is neither irrational nor arbitrary but is supported by the evidence. The conclusion that cause 33 does not authorize the issuance of a writ of enforcement out of that cause but limits the processes to be used in the enforcement of plaintiffs' rights to the issuance of an alias execution in cause 22 is a logical sequitur of such finding.

[10] In cause 33 the judgment provided that plaintiff have a judgment lien in cause 26 upon the property described in the fraudulent conveyance of Mrs. Crowder for the full amount of his judgment and costs plus the costs accrued in cause 33. The declaration reviving the judgment lien which had expired by virtue of the lapse of five years was justified by the decision that the judgment debtors had fraudulently placed their property beyond the reach of the lienor as well as by the showing that the latter had been diligent in his efforts to collect the judgment in cause 26. Without recording a new abstract of the judgment in the latter cause or the judgment in cause 33 the judgment creditor pursued the course of having the marshal sell the respondents' property under the writ of enforcement issued out of cause 33. There is no authority for such course as has been demonstrated.

Judgment affirmed.

WILSON, J., concurs.

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82 Cal.App.2d 717

DICKENS v. DICKENS.

Civ. 15830.

District Court of Appeal, Second District,
Division 3, California.
Dec. 4, 1947.

1. Divorce ⚿309

A property settlement agreement, which was approved by divorce decree and which required husband to pay $25 per month for support of child whose custody was awarded to wife, did not deprive court of power to award additional necessary support for child.

2. Divorce ⚿309

Superior court, granting divorce and awarding custody of child to mother and requiring father to pay $25 per month for support of child, had continuing jurisdiction under statute to modify support order. Civ.Code, § 138.

3. Divorce ⚿309

The allegations which are necessary, in affidavit for order to show cause in respect to modification of order for support for minor child of divorced parents, to entitle the affiant to a hearing, are needs of child and ability of opposing party to pay.

4. Divorce ⚷309

Divorced mother's affidavit for modification of order requiring husband to pay $25 for support of child whose custody was awarded to mother was not insufficient for failure to state that mother had no resources to support child and that child was in need. Civ.Code, § 196.

5. Divorce ⚷312

On divorced husband's appeal from order modifying order for support of child, husband could not urge that commissioner to whom hearing was referred for findings of fact erred in considering as the wife's direct examination the wife's affidavit in support of her allegation for order to show cause, where husband did not object to such consideration of affidavit when commissioner announced that he was so considering it, and husband had opportunity to and did cross-examine wife as to allegations of affidavit.

6. Divorce ⚷312

The amount to be contributed by divorced father for support of child whose custody was awarded to mother was question of fact for trial court's determination in exercise of sound discretion, and reviewing court would not interfere with trial court's action unless, as a matter of law, trial court abused such discretion.

7. Divorce ⚷312

The credibility of witnesses testifying in proceeding for modification of order requiring divorced husband to pay for support of child was for trial court.

8. Divorce ⚷309

Modification of order increasing from $25 to $50 per month the amount to be paid by divorced husband for support of child whose custody was awarded to mother was not abuse of discretion under evidence.

9. Divorce ⚷309

In divorced wife's proceeding for modification of order requiring divorced husband to contribute to support of child whose custody was awarded to wife, evidence as to amount of money wife had in joint savings account with second husband and as to earnings of second husband was not admissible, since second husband was under no obligation to support the child.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Divorce action by Helen A. Dickens against Alvin T. Dickens, wherein a final decree of divorce was entered awarding custody of minor child to plaintiff and requiring defendant to pay $25 a month for support of child. From an order modifying the order for support of child, the defendant appeals.

Order affirmed.

D. Chase Rich, of Los Angeles, for appellant.

Gerald Willis Myers, of Los Angeles, for respondent.

WOOD, Justice.

Appeal by defendant from an order modifying an order for support of child. In May, 1937, plaintiff and defendant, who were then wife and husband, entered into a written agreement entitled "Property Settlement Agreement," which provided among other things that the minor child of the parties should reside with the plaintiff and that the defendant should pay to plaintiff for the support of the child the sum of $25 per month until the child, then aged about four years, should reach her majority; and it was further provided therein that the agreement might be made a part of an interlocutory decree and a final decree of divorce entered in any divorce proceedings between the parties. In June, 1937, plaintiff obtained an interlocutory decree of divorce which approved the property settlement agreement, and ordered that the minor child should reside with plaintiff and that defendant should pay to plaintiff for the support of the child the sum of $25 per month pending the further order of the court. In September, 1938, a final decree of divorce was entered which stated that the provision in the interlocutory decree concerning custody and support of the child should be binding on the parties the same as if it were set forth in full in the final decree. Plaintiff remarried, and two children were the issue of that marriage. Defendant also remarried, and two children were the issue of that marriage.

In September, 1946, plaintiff filed an "Affidavit for Order to Show Cause in re Modification of Order of support of minor child," in which she requested the court to modify the original order by directing the defendant to pay $75 per month for the support of the child; and in which she stated that since said order was made the conditions and circumstances surrounding the parties had materially changed, in that, the original "order was made in 1937 at a time when said minor child was about 4 yrs. old and the defendant was earning about $180.00 per month. That said child is now about 13 yrs. of age, and in Junior High School and the expense of her clothes, and food and incidentals has materially increased. The defendant is now employed with the General Petroleum Corp., earning in excess of $300.00 per month. That the cost of said minor child for the past year has been approximately $700.00." Upon hearing the order to show cause, regarding such modification, the court modified the original order for support of the child by ordering that the defendant pay the sum of $50 per month.

[1-4] Appellant (defendant) contends that the affidavit of plaintiff was not legally sufficient to entitle her to a hearing for a modification of the order. He argues that under the provisions of Section 196 of the Civil Code she had the obligation of supporting the minor child if she was financially able to do so, and in order for an affidavit to be sufficient to entitle her to be heard, it should show affirmatively that plaintiff has no resources with which to support the child, and that the child is in need. Said Section 196 provides, in part, that the parent entitled to the custody of a child must give him support suitable to his circumstances. The fact that plaintiff had custody of the child under an agreement with defendant, and also had custody under an order of court, did not relieve the defendant of his obligation to support his child. The agreement between the parties did not deprive the court of its power to award additional necessary support for the child. Lewis v. Lewis, 174 Cal. 336, 341, 163 P. 42. The Superior Court had continuing jurisdiction to modify its order regarding support of the child, by virtue of Section 138 of the Civil Code, and furthermore, the court reserved jurisdiction in its divorce decrees by providing that the amount of $25 per month should be paid pending the further order of the court. In Metson v. Metson, 56 Cal.App.2d 328, 132 P.2d 513, wherein there was an order to show cause regarding modification of an order for child support, there was no allegation in the petition that the petitioner (the mother) was unable to pay the various bills mentioned in the petition, nor was there any allegation that the amount then being paid by defendant was insufficient to pay those bills, and the court held that the petition was sufficient. In that case the court said, 56 Cal.App.2d at page 331, 132 P.2d at page 515: "Although the petition was filed by the respondent as the divorced wife and mother of the children, she appears in a representative capacity on behalf of the children. They are the real parties in interest. Moreover, the state, itself, is a party to this proceeding in the sense that, independent of the rights of the parents, it has an interest in the welfare and maintenance of the children." The allegations which are necessary in such an affidavit, to entitle the affiant or petitioner to a hearing, are "the needs of the child and the ability of the defendant to pay." See Metson v. Metson, supra, 56 Cal.App. 2d at page 332. The affidavit herein was sufficient.

[5] Appellant also contends that the commissioner, to whom the hearing was referred "for Findings of Fact," erred in considering the affidavit of plaintiff (made in support of her allegation for the order to show cause) as her direct examination. Appellant's counsel states in his brief that the hearing had progressed several minutes before he noticed that a reporter was not present, and that he then made a demand for a reporter, and that after the reporter arrived the attorneys and the commis-

sioner attempted to state for the record all that had happened when the reporter was not present. His counsel also states in his brief that the reporter's transcript incorrectly credits him with "direct examination" of the plaintiff when it should have recited that it was "cross-examination"; and that such error was probably due to the fact that the commissioner "had announced that the affidavit filed by plaintiff would be accepted as her 'prima facie case.'" Respondent's counsel states in his brief that a reporter was not requested when the hearing commenced, and that during the time when a reporter was not present the commissioner "asked if the affidavit of the plaintiff and respondent was stipulated as her direct examination which was agreed to by all parties and cross-examination by appellant then followed." The reporter's transcript shows on page 3 (apparently when the attorneys and commissioner were stating for the record what had occurred prior to the arrival of the reporter) as follows:

"The Commissioner: Also further for the record; I am considering the affidavit on modification on the direct examination of the plaintiff. Do you wish to add anything to that, Mr. Myers?

"Mr. Myers [attorney for plaintiff]: No, I think that is all.

"The Commissioner: Cross-examine, Mr. Rich. And that brings us up to date.

"Mr. Rich [attorney for defendant]: You might preface this, Mr. Reporter, Mr. Brandt, with the statement that the defendant objected to any hearing on the ground that the affidavit and petition is legally insufficient, not entitling her to a hearing.

"The Commissioner: And the Commissioner overruled that objection. I believe that does bring the record up to date."

The summary of the proceedings had in the absence of the reporter does not show that the parties stipulated that the affidavit of plaintiff might be considered as the evidence of plaintiff on direct examination, and it does not show that appellant's counsel objected to the affidavit being considered as such evidence on direct examination. Counsel for appellant does not deny, in his brief or at all, the statement of counsel for respondent that it was stipulated during the absence of the reporter that the affidavit of plaintiff might be considered as her direct examination. It appearing that appellant did not object to such consideration of the affidavit when the commissioner announced that he was so considering it, and it appearing that he did not object to it at all, and it also appearing that appellant had the opportunity to cross examine the plaintiff as to the allegations of her affidavit, and that he did cross examine her, he is not in a position on this appeal to urge that such consideration of the affidavit was error. The commissioner did not err in considering the affidavit as evidence of plaintiff given on direct examination.

[6-8] Appellant also contends that the evidence was insufficient to support the order of modification. Plaintiff testified that the child is 13 years of age; that the child lives with her mother (plaintiff), stepfather, and two half sisters; that the living expenses for the family, including rent, food, and public utilities, amount to $185 per month. Defendant testified that his salary was $300 per month, and that he received $300 as a bonus at Christmas; that his net income per month, after deducting taxes, was $282.20; that he maintained a home for his present wife and their twin daughters, aged 7 years; that his monthly expenses, including those for insurance, physician, dentist, and automobile, amount to $293.82. The amount to be contributed by the father for the support of the child was a question of fact for the determination of the trial court in the exercise of sound discretion, regard being given to the circumstances of the parties and the child; and a reviewing court may not interfere with the action of the trial court, unless, as a matter of law, the trial court has abused that discretion. Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 625, 135 P.2d 184. The matter of credibility of witnesses was, of course, a matter to be decided by the trial court. It cannot be said that the trial court abused its discretion. The evidence was sufficient to support the order.

[9] Appellant asserts further that the commissioner erred in sustaining objections

to two questions he asked the plaintiff, and that he erred in rejecting two offers of proof. Counsel for appellant asked plaintiff how much money she had in a joint savings account with her present husband. He also asked her how much her present husband earned per month. Objections to those questions, upon the grounds that they were immaterial and irrevelant, were sustained. Counsel for appellant then offered to prove that plaintiff had approximately $10,000 in such joint account and offered to prove that her present husband earned in excess of $400 per month. The rulings of the court were correct. The present husband was under no obligation to support the child of appellant and respondent.

The order modifying the order for support of the child is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

82 Cal.App.2d 823

SEYMOUR et al. v. SHAEFFER et al.

Civ. 15825.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1947.

1. Specific performance ⇨37

Receipt signed by vendors and reciting that check payable to bank as deposit on realty had been received, and providing that vendors agreed to take back a trust deed in certain amount and to furnish purchasers with rental statement, termite report, and inventory of furniture and linens, was merely an "offer" by vendors that they were at liberty to withdraw at any time, and did not constitute a sufficient memorandum in writing to entitle purchasers to a conveyance, and therefore vendors, who withdrew the offer before it was accepted by purchasers, had a complete defense to purchasers' action for specific performance.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

2. Contracts ⇨10(5)

A contract for purchase and sale of realty must be mutual and reciprocal in its obligations, and if the contract is not binding on one of the parties and enforceable against him, it cannot be enforced against the other.

3. Specific performance ⇨49(2)

Where purchaser's check, given as deposit on purchase of realty, was payable to bank rather than to vendors, and it could not be cashed by vendors, it did not constitute payment of any consideration for the agreement so as to entitle purchasers to specific performance.

4. Specific performance ⇨17

Where wife who with her husband sought to purchase realty did not sign escrow instructions which were signed by husband and called for a deed vesting title in husband and wife, as joint tenants, wife could not have been compelled by vendors to perform the agreement purportedly created by the escrow instructions, and therefore she could not maintain an action to enforce the purported agreement.

5. Vendor and purchaser ⇨133, 140

Where contract for sale of realty is silent as to furnishing of an abstract of title or a policy of title insurance, it is not implied that vendor shall furnish the abstract or policy, but purchaser must provide it and satisfy himself as to the condition of the title.

6. Vendor and purchaser ⇨15

Where vendors' agreement to sell realty was a unilateral agreement for which vendors received no consideration, withdrawal of the agreement by the vendors terminated any obligation originally created by the agreement.

7. Vendor and purchaser ⇨21

Even if purchasers' signatures had been appended to vendors' receipt reciting that bank had received purchasers' deposit, the receipt would not have been binding on the purchasers, and therefore not binding on vendors.

8. Evidence ⟹400(2), 455

In action for specific performance of purported agreement of sale of realty, oral statements of the parties were not admissible to vary, explain or add to terms of agreement.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by David Seymour and Charlotte D. Seymour against Ohmer H. Shaeffer and Edith Shaeffer to enforce specific performance of a purported agreement for sale of realty. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Edward Feldman, of Los Angeles, for appellants.

Oliver O. Clark, Robert A. Smith and James S. Jarrott, all of Los Angeles, for respondents.

WILSON, Justice.

This is an action to enforce specific performance of a purported agreement of sale of real property. Judgment was entered in favor of defendants and plaintiffs have appealed.

After preliminary negotiations concerning the price to be paid for the property, respondents executed a receipt to appellant David Seymour reading as follows: "Recd. of David Seymour the sum of ($1000.00) check payable to Union Bank 8th & Hill St as a deposit on the property located at 737 S. Olive known as the State Hotel together with furniture & furnishings therein The total purchase price is $128,750 One Hundred & Twenty Eight Thousand Seven Hundred & fifty Dollars The sellers Homer Shaffer & Edith Shaffer agree to take back a first Trust Deed of $80,000 Eighty Thousand Dollars payable $600.00 or more per month including 5% till paid The Sellers agree to furnish the buyer with an O.P.A. rental statement and Termite report, inventory of furniture & linens for the Buyers approvall. Escrow to close on January 4th 1946. (Signed) O. H. Shaeffer Edith Shaeffer."

At the time of the execution of the receipt David Seymour handed to respondent Ohmer H. Shaeffer a check for $1,000 payable to Union Bank & Trust Company. On the back of the check was the following: "Deposit on State Hotel 737 So. Olive St. subject to terms and conditions of contract Oct. 29, 1945 & signed between David Seymour & Homer & Edith Shaeffer."

On November 7, 1945, appellant David Seymour went to the Union Bank & Trust Company where escrow instructions were prepared and signed by him. The instructions recited that "I will hand you $48,750.00 and any additional funds and documents" required for the compliance by said appellant with the instructions. The escrow holder was authorized to use the cash and documents provided on or before January 4, 1946, instruments were filed entitling the escrow holder to procure a policy of title insurance with the title company's liability of $128,750 on the property, showing title vested in David Seymour and Charlotte D. Seymour, his wife, as joint tenants, subject to a mortgage securing a note for $80,000 executed by appellants in favor of respondents. The escrow holder was directed to hold for buyer a termite report by a licensed termite inspector, showing property free and clear of termites, dry rot, fungus, or other wood-destroying pests or insects. The escrow instructions were not signed by appellant Charlotte D. Seymour, nor were they signed or accepted by respondents. In fact the instructions were prepared without their knowledge, consent or authority.

[1] Appellants maintain that the receipt of October 29, 1945, constitutes a sufficient memorandum in writing to entitle them to a conveyance. Neither the receipt nor the escrow instructions, nor both together, constitute an enforceable contract.

[2] The receipt was not signed by either one of the appellants. It was not a mutual and reciprocal agreement. Appellants did not agree to purchase the property or to pay for it, hence if the Shaeffers had desired to enforce the contract against the Seymours the latter would have had a complete defense. A contract for the pur-

chase and sale of real property must be mutual and reciprocal in its obligations, and if the contract is not binding upon one of the parties and enforceable against him it cannot be enforced against the other. Cisco v. Van Lew, 60 Cal.App.2d 575, 582, 141 P.2d 433; Johnson v. Clark, 174 Cal. 582, 586, 163 P. 1004; White v. Bank of Hanford, 148 Cal. 552, 553, 83 P. 698. The receipt constituted an offer by respondents which they were at liberty to withdraw at any time. The offer was never accepted by appellants and was withdrawn by respondents before the commencement of this action.

[3] Respondents received no consideration for the purported agreement represented by the receipt. The check delivered by David Seymour at the time the receipt was signed was made payable to Union Bank & Trust Company. It could not be cashed by respondents and therefore did not constitute the payment of any consideration for the agreement. The check was later returned.

[4] Appellant Charlotte D. Seymour was not named in the receipt of October 29 and she therefore acquired no right thereunder. The escrow instructions which were signed by appellant David Seymour called for a deed vesting title in David Seymour and Charlotte D. Seymour, his wife, as joint tenants. Mrs. Seymour did not sign the instructions. In the absence of her signature she could not have been compelled by the Shaeffers to perform the agreement purporting to have been created by the escrow instructions (Waldeck v. Hedden, 89 Cal. App. 485, 492, 265 P. 340) and she therefore cannot maintain an action to enforce the same against them.

[5] Appellant David Seymour inserted requirements in the escrow instructions which he signed and made demands therein that are not recited in or contemplated by the receipt of October 29: (1) They called for a policy of title insurance with a liability of $128,750.00 covering the property in question, showing record title to be vested in appellants, the policy to be paid for by respondents. Respondents did not agree in the receipt to pay for a title insurance policy. Where a contract is silent as to furnishing an abstract of title or a policy of title insurance it is not implied that the vendor shall furnish the same but it is incumbent on the purchaser to provide the abstract or insurance policy and to satisfy himself as to the condition of the title. Easton v. Montgomery, 90 Cal. 307, 313, 27 P. 280, 25 Am.St.Rep. 123; Griesemer v. Hammond, 18 Cal.App. 535, 540, 123 P. 818. (2) The instructions called for a termite report showing the property free and clear of termites or other wood-destroying pests or insects. The receipt of October 29 provided merely for a termite report but did not specify that it should show the property free of pests. At the trial David Seymour testified that he was willing to waive a termite inspection but it does not appear that his waiver was ever communicated to respondents prior to the trial. (3) The demand with reference to payment of taxes by respondents was an arbitrary demand not covered by the original receipt.

[6, 7] The offer made by the receipt of October 29 was withdrawn on November 12, 1945, before the commencement of this action. Since it was a unilateral agreement for which respondents received no consideration the withdrawal terminated any obligation originally created by the receipt. Even if appellants had appended their signatures to the receipt it would not have been binding upon them (and therefore not binding on respondents) because there is nothing in the receipt whereby appellants agreed to purchase the property or to pay the purchase price. The cases such as Bird v. Potter, 146 Cal. 286, 79 P. 970; Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681, and Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am.St.Rep. 123, and others cited by appellants wherein it appears that unilateral agreements were specifically enforced, are those in which the purchaser paid or offered to pay the purchase price and perform or offered to perform all provisions of the agreement before the offer was withdrawn.

The purported contract evidenced by the receipt is silent as to several essential items. It refers to an escrow but none of the terms of the purported escrow are enumerated. Mrs. Seymour did not approve the receipt nor did she approve the escrow instructions.

Evidence was received with reference to conversations had between appellant David Seymour and respondent Ohmer Shaeffer both prior to the execution of the receipt and after Seymour had signed the escrow instructions. Such conversations were not received by the trial court for the purpose of varying, explaining or adding to the terms of the receipt and will not be considered by us for that purpose.

[8] Appellants complain that the court erred in refusing to admit evidence concerning other oral statements of the parties. Such evidence was inadmissible and no error can be predicated on the rulings of the court.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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82 Cal.App.2d 769

MASON et al. v. MAZEL.

Civ. 15892.

District Court of Appeal, Second District, Division 3, California.

Dec. 9, 1947.

Rehearing Denied Jan. 9, 1948.

1. Brokers 🔑94

Provisions of contract between real estate owner and broker that if broker negotiated sale of realty or brought owner in contact with purchaser, with whom owner or someone else for his account consummated sale, owner would pay broker a commission, did not authorize broker to bind owner by contract for sale of realty.

2. Brokers 🔑94

The ordinary authority of real estate agent, deputed to sell realty, is simply to find purchaser, and he has no power to bind principal by sale contract, unless intent to confer such additional authority appears.

3. Brokers 🔑94

A real estate owner's intention to give agent, deputed to sell realty, authority to consummate sale contract, as well as to find purchaser, so as to bind owner to convey realty, must be clearly stated in contract with agent.

4. Brokers 🔑94

The phrase, "to sell," as used in provision of agreement between real estate owner and agent that owner gave agent exclusive right to sell realty, was insufficient to authorize agent to enter into sale contract binding owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Sell".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by James Clifford Mason and J. Warren Tatum against A. J. Mazel for specific performance of a contract, made by plaintiff Tatum as defendant's agent, to sell and convey certain realty to plaintiff Mason. Judgment for defendant, and plaintiffs appeal.

Affirmed.

A. P. Coviello, of Los Angeles, for appellants.

Irwin R. Buchalter and Ernest M. Silver, both of Los Angeles, for respondent.

WOOD, Justice.

In this action for specific performance, plaintiffs appeal from a judgment for defendant. The judgment followed a ruling of the court sustaining, without leave to amend, an objection by defendant to the introduction of evidence upon the ground that the second amended complaint, upon which the case was called for trial, did not state a cause of action.

The second amended complaint (referred to herein as the complaint) alleged in substance that plaintiff Tatum was a licensed real estate broker; that defendant was the owner of certain real property located in Los Angeles County; that on April 26, 1946, defendant employed and appointed plaintiff Tatum as his exclusive agent for the purpose of selling said property for $6,000 cash to any person said Tatum could find; that on said day the defendant and Tatum executed a written agreement confirming said employment and appointment; that a copy of said agreement had been attached to the first amended complaint as exhibit "A" and the same was incorporated in the second amended complaint as though it were therein set forth verbatim; that at the time of the execution of said agreement and as part of the consideration therefor the defendant agreed to convey said property by a good and sufficient deed to any person with whom said Tatum could negotiate a sale thereof on the terms provided in said agreement; that on May 5, 1946, said Tatum did negotiate a sale and did sell said property to plaintiff Mason; that said sale was negotiated and made pursuant to the authority and powers granted to Tatum by said agreement between Tatum and defendant; that on said day and thereafter said Mason has been ready, able and willing to pay said price for the property and any other moneys required to be paid by him pursuant to said agreement, and has been ready, able and willing to perform all the covenants and conditions on his part to be performed as required by said agreement; that on said day said Mason paid to Tatum the sum of $500 as a deposit on account of said agreement; that Tatum then, by virtue of authority vested in him under said agreement and as agent of defendant and within the scope of his agency, executed a receipt and written agreement in favor of Mason by which Tatum as agent of defendant agreed to sell and convey said property to Mason, and Mason agreed to buy said property upon the terms and conditions of said agreement of April 26, 1946; that on May 11, 1946, an escrow was opened with the Bank of America for the purpose of paying said price of said property and any other money required to be paid under said agreement of April 26, 1946, and in order to comply with the terms of said agreement and also the receipt and agreement of May 5, 1946, between Tatum, as agent of defendant, and Mason, as purchaser of the property; that on May 7, 1946, and at all times thereafter the defendant refused to accept the money due him as the price of the land, and has failed and refused to execute a good and sufficient deed to Mason conveying said property, and has refused to perform any other covenants upon his part to be performed in connection with the agreement of April 26, 1946, notwithstanding that on May 5, 1946, and on many occasions thereafter plaintiffs demanded of defendant that he accept said money and execute said deed and comply with the terms of said agreement; that all the terms and conditions of said agreement were and are equitable and reasonable to all concerned; that it is necessary that the court make its judgment requiring defendant to specifically perform all covenants and conditions of said agreement of April 26, 1946, upon his part to be performed.

The said agreement of April 26, 1946, (a part of the complaint) was as follows:

"Los Angeles, Cal April 26 1946

Mr. J. W. Tatum:

In consideration of your listing, advertising and showing the herein described property I hereby employ you, J. W. Tatum, as my exclusive agent and broker for the period of 90 days for the purpose of negotiating a sale of my property known as N. E. Cor. 3 & Highland being Lot 64 Block ——— Tract 8326 and in case of such sale being made during the life of this agreement, I agree to convey said property by a good and sufficient deed to the purchaser, and furnish a policy of Title Insurance of the Title Insurance and Trust Co. showing Title in my name, free and clear of all encumbrances, except restrictions, reservations and rights of way now of record. This is an exclusive listing and if during the term of this agreement you negotiate a sale of said property or bring me in contact with a purchaser with whom I or someone else for my account consummates a sale I agree to pay you as a commission and full compensation for services rendered 5 per cent of the selling price. Commission to be paid out of the first money received as purchase price.

"My price is $6,000.00; terms to be cash. Current Taxes, Insurance, Rents, and Interest to be prorated to close of escrow. Size of lot 61 x 175; Improvements none. Taxes are $105.00 per year. Encumbrance clear ——— Interest ——— Held by ——— Due date ———.

"I also give you the exclusive right to sell said property on the above terms; and I agree to pay you said commission in the event of a sale by you or me or anyone else during the terms hereof.

A. J. Mazel,
Witness: J. W. Tatum Owner.
[address omitted]"

Appellants state that the question on appeal is "whether the contract above referred to falls within the category of the ordinary real estate listing agreement, so as not to empower the agent to bind the seller in a sale of the property described and referred to in the said contract." They contend that said agreement "empowered respondent's agent Tatum, not merely to find a purchaser, but to actually enter into an agreement of sale for the said property on behalf of his principal Mazel," and to do all things necessary to bind the purchaser.

[1] In support of their contention they refer particularly to the sentence in the agreement as follows: "This is an exclusive listing and if during the term of this agreement you negotiate a sale of said property or bring me in contact with a purchaser with whom I or someone else for my account consummates a sale I agree to pay you as a commission and full compensation for services rendered 5 per cent of the selling price." They argue that said sentence dispels the contention of respondent that the agreement limited the power of the agent to merely finding a purchaser. The provision that the agent is given power to "negotiate a sale" does not mean that he is authorized to bind the owner in a contract for the sale of the property. "Negotiate" means "To * * * treat with a view to coming to terms upon some matter, as a purchase or sale, a treaty, etc.; to conduct communications or conferences as a basis of agreement; as, to negotiate for the purchase of a house." (Webster's New International Dictionary, 1942.) The provision that the owner would pay a commission to the agent if the agent should bring the owner in contact with a purchaser with whom the owner or someone else for his account "consummates a sale" indicates that it was contemplated the agent should find a prospective buyer and that the owner or someone thereafter to be designated by him should consummate or complete the sale. If it had been intended to authorize the agent Tatum to consummate a sale on behalf of or for the account of the owner, it would seem that the owner would have so designated that agent at that place in the document, rather than to refer specifically to himself or generally to "someone else" in connection with consummating a sale. It appears that by use of the word "negotiate" in referring to the agent Tatum, and by the use of the word "consummates" in referring to the owner or to "someone else" who might act for the owner, it was intended to make a distinction between the agent's power to negotiate a sale and the owner's power to consummate it.

[2-4] At the beginning of the agreement it is stated that in consideration of Tatum's "listing, advertising and showing" the property the owner employed him "for the purpose of negotiating a sale" of the property. The agreement states expressly, in the next sentence, that it is a "listing" of the property. "The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority." Stemler v. Bass, 153 Cal. 791, 794, 795, 96 P. 809, 811. An intention to give such an agent additional authority, such as to bind the owner to convey the property, must be clearly and definitely stated. Bacon v. Davis, 9 Cal.App. 83, 88, 98 P. 71. In the case of Church v. Collins, 18 Cal.App. 745, at page 748, 124 P. 552, 553, it was stated: "The rule deduced from the authorities with regard to the power * * * of agents to execute contracts of sale of real property for the owners thereof is * * * if such authority is intended to be conferred, the language used in conferring it should

be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such is its purpose." The phrase "to sell" as used in the expression in the last paragraph of the agreement, "I also give you the exclusive right to sell said property," is not sufficient to authorize the agent to enter into a contract of sale binding the owner. See Slater v. Rauer, 43 Cal.App. 748, 749, 185 P. 864.

Appellant quotes at length from the case of Bacon v. Davis, supra [9 Cal.App. 83, 98 P. 72], wherein it was held that the agent had authority under the agreement therein to bind the owner. That case is distinguishable from the present case in that the agreement therein authorized the agent "to sell for me (owner), in my name," and the agreement also provided that the owner would convey "to any purchaser," and it included full details as to the terms of the sale.

In the case of Holway v. Malloy, 70 Cal.App.2d 317, 160 P.2d 893, wherein plaintiff sought specific performance, the listings of the property with the agent were similar to the one herein. The court said therein 70 Cal.App.2d at page 319, 160 P. 2d at page 894,: "They were merely authorizations to the broker to find a purchaser or purchasers for the property. Authority given to a broker 'to sell' real property, in listing it for sale, only authorizes him to find a purchaser; it relates to the services to be performed by the agent in order to earn the agreed compensation and does not make him the agent of the owner to enter into a contract of sale."

The listing agreement herein of April 26, 1946, did not empower the agent to enter into an agreement of sale on behalf of the owner.

The agent is a party plaintiff herein, but the question as to whether he is entitled to a commission is not involved in this appeal. That point has not been presented here or in the trial court. The complaint does not show whether or not the agent has been paid a commission.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

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82 Cal.App.2d 737

MARTIN v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 16097.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1947.

1. Workmen's compensation ⚷1913

Ordinarily, an order or award of Industrial Accident Commission will not be annulled if it is supported by any valid ground, except where order or award is expressly stated to be based upon a particular ground and no findings are made as to other possible grounds which might support such order or award, and evidence in relation to such grounds upon which no findings were made was in substantial conflict.

2. Workmen's compensation ⚷1939

District Court of Appeal, on petition for writ to review order of Industrial Accident Commission, is not authorized to evaluate weight of evidence or pass upon credibility of witnesses unless it can be held that such evidence is so lacking in substantiality or is so inherently improbable as to amount to no evidence at all, and in such case the review thereof presents a question of law.

3. Workmen's compensation ⚷1121

Insurance carrier could not take advantage of asserted defect in attestation of signature to compromise agreement entered into between insurance carrier and compensation claimant as ground for withdrawal from agreement, since statutory provision requiring attestation of agreement is for protection of injured employee only. Labor Code, § 5003.

4. Workmen's compensation ⚷1125

Industrial Accident Commission was authorized, on petition for rehearing, to amend its order denying approval of compromise agreement entered into between compensation claimant and insurance carrier upon ground that agreement was not executed in accordance with statutory provisions, where circumstance that claimant's attorney, who attested signatures to agreement, was in fact a notary public was unknown to Commission at time of original order, and existence of such circumstance would render original order inequitable. Labor Code, § 5003.

5. Workmen's compensation ⚷1121

Omission of attestation clause reciting fact that compensation claimant's attorney attested signatures on compromise agreement entered into between claimant and insurance carrier in his capacity as a notary public did not constitute a fatal defect in execution of the agreement and release under statute. Labor Code, § 5003.

6. Workmen's compensation ⚷1778, 1781

The Industrial Accident Commission has broad powers to alter, amend or rescind its awards for good cause, and such power is properly exercised in behalf of employer or insurance carrier, as well as employee.

7. Workmen's compensation ⚷1144

Industrial Accident Commission has power to withhold approval of a compromise agreement entered into between compensation claimant and insurance carrier, or to amend or vacate an award based thereon, when equities require it. Labor Code, §§ 5000–5004.

8. Workmen's compensation ⚷1913

Where order denying approval of compromise agreement entered into between compensation claimant and insurance carrier expressly assigned improper execution of agreement as ground for the denial, and no other ground upon which such disapproval might be based appeared in commission's findings, order could not be affirmed on ground that there was sufficient evidence that parties executed the agreement under mutual mistake as to extent and existence of claimant's disability. Labor Code, §§ 5000–5004, 5003.

Proceeding under the Workmen's Compensation Act by Charles T. Martin, claimant, opposed by Pacific Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission denying approval of a compromise agreement, the claimant petitions for a writ of review.

Award annulled and case remanded.

Byron R. Bentley, of Los Angeles, for petitioner.

R. C. McKellips, of San Francisco, and John A. Rowe, Jr., of Los Angeles, for respondent Pacific Indemnity Co.

Herlihy & Herlihy, of Los Angeles, for respondent Pacific Indemnity Co.

WHITE, Justice.

Petitioner herein, the applicant before the Industrial Accident Commission, seeks annulment of an order of the commission which, among other things, denied approval of a compromise agreement entered into between petitioner and respondent insurance carrier upon the sole ground that such agreement was "not properly executed in accordance with the provisions of section 5003 of the Labor Code of the State of California."

Petitioner sustained an injury in the course of his employment on August 27, 1945, resulting in temporary total disability, and on December 5, 1945, respondent commission entered its award in his favor for the sum of $30 per week, to continue during his disability or until further order of the commission. On October 17, 1946, respondent carrier filed a petition under section 4056 of the Labor Code seeking to have its liability terminated so far as the applicant's disability was affected by his alleged unreasonable refusal to submit to certain medical treatment. This petition was denied. Thereafter, on or about November 12, 1946, petitioner and respondent carrier pursuant to the provisions of sections 5000 to 5004 of the Labor Code, entered into a written compromise agreement which provided for the payment of a lump sum of $4,500 (including an attorney's fee of $500). Upon filing of the executed agreement with the commission a date was set for hearing "on adequacy of compromise and release and attorney fees." At this hearing, on January 20, 1947, respondent carrier again sought to have its liability terminated, and through its agent stated that it desired to withdraw from the compromise. The matter was continued to April 3, 1947, at which time the carrier raised the issue that the agreement was not properly executed. The issues before the referee at this hearing were stated to be as follows:

"1. Adequacy of Compromise and Release.

"2. Amount of Attorney's fee.

"3. Extent of disability.

"4. Whether the defendant has the right to withdraw from the Compromise and Release filed November 19, 1946.

"5. Whether the execution of the instrument, the Compromise and Release, is insufficient, in that it was not executed in accordance with the Statute.

"6. Estoppel of the defendant to raise above issue since the Compromise and Release was prepared by them and filed by them."

Upon this hearing evidence was adduced as to the extent and nature of petitioner's disability and also as to the manner of execution of the agreement. Pursuant to report of the referee, the commission, on May, 5, 1947, entered its "Order Denying Defendant's Petition to Terminate and Order Amending Findings and Award." By this order the carrier's petition to terminate liability was denied; the commission found, in accordance with its earlier findings, that petitioner's injury caused temporary total disability; that such temporary total disability terminated January 26, 1947; and reserved jurisdiction "to rate for permanent disability where the condition becomes permanent and stationary * * *." It was further found that: "4. Compromise and Release filed herein November 19, 1946, is not properly executed in accordance with the provisions of Section 5003 of the Labor Code * * *", and by its award the commission held: "Pursuant to Finding No. 4, the parties' request for approval of the Compromise and Release filed herein November 19, 1946, is hereby denied."

From the foregoing it will be seen that although the issues at the hearing included the questions of adequacy of the compromise, the right of the carrier to withdraw from the compromise, whether the compromise was properly executed, and whether the carrier was estopped to raise the issue of proper execution, the commission by its order, findings and award based its disapproval of the compromise upon the sole ground that it was not executed in accordance with the provisions of section 5003 of the Labor Code. In fact, in the "Report of Referee" the following language appears: "Upon a review of the file it becomes unnecessary to pass upon the adequacy of the compromise and release, the amount of the attorney fee, or whether or not the defendant has the right to withdraw from the compromise and release, for the reason that the execution of the compromise and release itself is not in accordance with the provisions of Section 5003 of the Labor Code." And as hereinbefore noted, the award of the commission was specifically made pursuant to Finding No. 4, which concerned only the validity of the execution of the compromise and release. The order here under review contains no findings as to the adequacy of the compromise, the right of the carrier to withdraw therefrom, or the alleged estoppel of the carrier to raise the issue of due execution.

[1, 2] While ordinarily an order or award will not be annulled if it is supported by any valid ground, a different situation is presented where such order or award is expressly stated to be based upon a particular ground and no findings are made as to other possible grounds which might support such order or award, and where the evidence in relation to such grounds upon which no findings were made, was in substantial conflict. We are not authorized to evaluate the weight of evidence or pass upon the credibility of witnesses, unless it can be held that such evidence is so lacking in substantiality or so inherently improbable as to amount to no evidence at all. In such case the review thereof presents a question of law.

Under the record as presented in this case we are limited to a consideration of the sole question decided by the commission, viz., was the compromise agreement and release executed in accordance with the provisions of section 5003 of the Labor

Code? Unless the decision of the commission can be sustained by a negative answer to that question, then the award must be annulled and the cause remanded to the commission to make findings upon the foregoing material issues.

Proceeding to a consideration of the execution of the compromise agreement here in question, we find that section 5001 of the Labor Code provides that no release of liability or compromise is valid unless it provides for the payment of full compensation or unless approved by the commission. Section 5002 requires that an executed copy of the agreement shall be filed with the commission, which may, on its own motion or on application of either party, enter an award based thereon. Section 5003 provides that every such agreement "shall be in writing and duly executed, and the signature of the employee or other beneficiary shall be attested by two disinterested witnesses, or a notary public." The agreement here in question was executed by the applicant in the office of his attorney, and his signature was attested by his attorney and the attorney's secretary. After execution by the respondent insurance carrier, the latter caused the agreement to be filed for approval with the commission. It was not until after such filing that the carrier sought to withdraw from the agreement, upon the ground that petitioner's attorney and the attorney's secretary were not "disinterested witnesses" within the meaning of section 5003 of the Labor Code.

[3] The first point urged by petitioner, that respondent carrier may not take advantage of the asserted defect in the attestation of his signature as a ground for withdrawal from the agreement, is well taken. Section 5003 of the Labor Code, as it stood prior to its amendment in 1945, required every release or compromise to be "duly executed, and attested by two disinterested witnesses * * * ." As amended in 1945, the section provided that such compromise be "duly executed, and the signature of the employee or other beneficiary shall be attested by two disinterested witnesses, or a notary public." This provision is obviously for the benefit and protection of the injured employee. Its purpose was fully accomplished when the employee, at the hearing, stated that he desired to go through with the agreement. Whatever technical defect might be said to exist in the attestation of the agreement could have been readily cured. In addition, it appears that petitioner's attorney was a notary public, and as such could have cured the defect by affixing his certificate and seal. Counsel for respondent commission state in their answer to the petition for writ of review: " * * * it is hereby conceded that Mr. Bentley petitioner's attorney who was one of two witnesses who attested the signature of Mr. Martin, the petitioner, has by affidavit shown himself to have been at that time a notary public. Also, it is conceded that, although the $500 attorney fee provided in the agreement made him an interested witness, still his attestation since he was a notary public, is sufficient compliance with the statute. In addition we make no point of the omission of the attestation clause reciting the fact that Mr. Bentley attested the signature as a notary."

[4, 5] Respondent insurance carrier however, urges that because petitioner did not produce evidence that his attorney, who "witnessed" his signature to the compromise and release agreement, was a notary public, or have a certificate of acknowledgment affixed to the instrument, until he filed his petition for rehearing, the commission properly rejected and ignored such evidence presented for the first time in a petition for rehearing. Respondent insurance carrier bases this claim upon the ground that there was no showing as to why, had reasonable diligence been exercised, such evidence could not have been sooner produced. However, we are constrained to hold that under the facts here present the commission was authorized, on a petition for rehearing, to amend its findings and award when the circumstance that petitioner's attorney was in fact a notary public was unknown to the commission at the time of the original award, and where the existence of such circumstance, unknown to the commission at the time of the award, would render such original award inequitable. Pullman Co. v. Indiana

Acc. Comm., 28 Cal.2d 379, 388, 170 P.2d 10; Colonial Mut. Compensation Ins. Co. v. Indiana Acc. Comm., 47 Cal.App.2d 487, 490, 118 P.2d 361. In view of the broad powers and continuing jurisdiction of the commission, we find ourselves in accord with the foregoing concession of respondent commission that the omission of the attestation clause reciting the fact that petitioner's attorney attested the signature in his capacity as a notary public, did not constitute a fatal defect in the execution of the agreement and release under the provisions of section 5003 of the Labor Code.

Respondent commission, however, argues that the order under review should be affirmed because (a) there was sufficient proof that the parties executed the agreement under a mutual mistake as to the extent and existence of disability, and (b) that the evidence before the commission would support an order reopening and annulling an order of approval had such order of approval been made. It may be conceded that evidence was presented which would support a finding of mistake, and also evidence that petitioner at the time of the hearing was gainfully employed. It is also pointed out that in his petition for rehearing before the commission and in his petition to this court, petitioner made no objection to that part of the order which terminated liability for temporary total disability as of January 26, 1947, but based his petitions solely on the ground that the agreement was properly executed and should have been approved by the commission.

[6-8] There can be no doubt as to the broad powers of the commission to alter, amend or rescind its awards for good cause, and such power is properly exercised in behalf of the employer or insurance carrier, as well as the employee. Bartlett Hayward Co. v. Indiana Acc. Comm., 203 Cal. 522, 532, 540, 265 P. 195; Ocean Accident & Guarantee Corp. v. Indiana Acc. Comm., 12 Cal.2d 116, 120, 82 P.2d 603. It is within the powers of the commission to withhold approval of an agreement, or to amend or vacate an award based thereon, when the equities of the case require it. Silva v. Indiana Acc. Comm., 68 Cal.App. 510, 516, 229 P. 870. In the present cause, however, as heretofore pointed out, we are confronted with the fact that the order or award expressly assigns as the ground for denying approval the asserted improper execution of the agreement which holding we find to be erroneous, and no other ground upon which such disapproval might be based appears in the findings. There is no finding that the agreement was the result of mistake or that it is inequitable.

The award is annulled and the cause remanded to respondent commission for further proceedings in accordance with the views herein expressed.

YORK, P. J., and DORAN, J., concur.

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82 Cal.App.2d 502

In re HOBART'S ESTATE.

Civ. 13528.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1947.

Rehearing Denied Dec. 20, 1947.

Hearing Denied Jan. 19, 1948.

1. Descent and distribution 🔑71(4)

The burden of establishing a claim of heirship is on claimant. Probate Code, § 229.

2. Descent and distribution 🔑11

The origin or source of property determines its distribution under Probate Code section pertaining to descent of separate property of a previously deceased spouse. Probate Code, § 229.

3. Descent and distribution 🔑12

Probate Code section pertaining to descent of separate property of a previously deceased spouse does not apply to a transfer for a consideration or to a transfer between parties who are not spouses. Probate Code, § 229.

4. Descent and distribution 🔑12

Where husband granted wife, before their marriage, a joint tenancy interest in securities which husband owned, notwithstanding reissuance of certificates in joint tenancy using wife's new name after marriage, upon husband's death, wife became owner of securities by survivorship, not inheritance, and on wife's death, statute regulating descent of separate property of predeceased spouse had no application. Civ. Code, § 683; Probate Code, § 229.

5. **Husband and wife** ⚿14(3)

The word "otherwise", as used in statute declaring a joint interest to be one owned by two or more persons in equal shares, by a title created by a single transfer when expressly declared to be a joint tenancy from a husband and wife holding title as community property or otherwise to themselves, relates to a holding of title otherwise than as community property in sense that joint tenancy is otherwise than community property. Civ.Code, § 683.

See Words and Phrases, Permanent Edition, for all other definitions of "Otherwise".

6. **Husband and wife** ⚿47(3), 49½(7)

Personal care and nursing given by wife to husband prior to their marriage, language used in deed and internal revenue stamps on deed supported finding that transfer of real estate from husband to wife was based upon a valuable consideration and that presumption that conveyance was merely a gift was overcome and authorized judgment that real estate be distributed to heir of wife rather than to sister of predeceased husband. Probate Code, § 229.

7. **Deeds** ⚿54

Delivery is essential to effectiveness of deed.

8. **Deeds** ⚿53

Whether grantor of deed intended to transfer title is a question for trier of fact to be determined from a consideration of all evidence bearing upon the question.

9. **Deeds** ⚿124(3)

The fact that grantor intended to keep a life estate in himself would not prevent fee from vesting in grantee under grant deed.

10. **Descent and distribution** ⚿71(4)

Sister of decedent's predeceased husband, in seeking to establish right to real estate which her brother had deeded to decedent, had burden of proving, in heirship proceeding, a lack of delivery of deed and that facts brought case within purview of statute providing for descent of separate property of a previously deceased spouse. Probate Code, § 229.

11. **Deeds** ⚿195

A grant deed is supported by a presumption of consideration, and burden is upon party seeking to avoid deed, and presumption applies to pleadings as well as to proof. Civ.Code, §§ 1614, 1615; Code Civ. Proc. § 1963, subd. 39.

12. **Appeal and error** ⚿907(2)

Generally, matters not contained in record will not be considered on appeal and under such circumstances findings are considered conclusive.

13. **Appeal and error** ⚿660(1)

Where missing deed had not been filed in or lodged with superior court, augmentation of record on appeal with reference to missing deed would be denied as a futile act. Rules on Appeal, rule 12.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding in the matter of the estate of Elsie Hobart, deceased, on the claim of heirship of Egeria Hobart Taft, opposed by Bertha Hagist and Edward F. Hagist. From an adverse order determining heirship, claimant appeals.

Affirmed.

Geo. K. Ford, of San Francisco, for appellant.

John L. Reith, of Oakland, for respondents.

WARD, Justice.

This is an appeal from a portion of a decree determining heirship, wherein it was ordered and adjudged that all of the property described in the inventory and appraisement in the estate of Elsie Hobart, deceased, be distributed to Bertha Hagist, the mother of Elsie Hobart, except a small sum in cash which was distributed to Egeria Hobart Taft, a sister of the deceased husband of Elsie Hobart. Egeria Hobart Taft, the claimant in the heirship proceedings, is the appellant herein. The main question to be decided is the correctness of the court's construction of Probate Code section 229.

The petition for letters of administration filed by Edward F. Hagist sets forth "That Elsie Hobart, also known as Elsie Vogel Hobart, * * * died on the 26th of August, 1945 * * *; that deceased left estate * * * consisting of real and personal property." Bertha Hagist was named the only heir. Two brothers and one sister were named as relatives. The petitioner, one of the brothers of the deceased, was appointed administrator of the estate.

The statement of claim of heirship alleged that "a true and correct inventory and appraisement" had been filed by the administrator and "That said Egeria Hobart Taft was and is a sister of Melmouth F. Hobart, who was the pre-deceased husband of said Elsie Hobart, the above named decedent; that said pre-deceased spouse of said decedent at the time of death of said decedent left him surviving no issue, no parent and no brother, sister, niece or nephew, excepting said Egeria Hobart Taft, only surviving sister, and claimant above named; that said Elsie Hobart, decedent herein, left her surviving no spouse, and no issue and that her estate was partially community property of said deceased and said pre-deceased spouse and belonged to or went to said decedent by virtue of its community character on the death of said pre-deceased spouse or came to the decedent from said pre-deceased spouse by gift, descent, devise or bequest, or become vested in said decedent on the death of said predeceased spouse by right of survivorship in a homestead or in a joint tenancy between such predeceased spouse and the said decedent or was separate property of said predeceased spouse and came to said decedent from such predeceased spouse by gift, descent, devise or bequest."

The property of the estate consisted of cash, securities and real estate. By consent of the parties the cash was divided equally between the claimant and the respondent Bertha Hagist. The court found that securities should be distributed to the same respondent. The court also found that certain real estate was the separate property of Fred Hobart prior to his marriage to Elsie and was conveyed to her thereafter as sole grantee and that there was a good and valuable consideration for the particular conveyances and that none of it came to Elsie Hobart in the manner and method described in Probate Code sec. 229. Other listed properties were found to be without the purview of the same probate section because of an insufficiency of evidence to uphold the claim of the sister of the deceased husband. Finally as to two items it was found that the property was the separate property of Elsie Hobart and did not come to her through Fred Hobart, whose full name was Melmouth Frederick Hobart.

[1] The burden of establishing a claim of heirship under section 229 is placed upon the claimant. In re Estate of Beaty, 27 Cal.App.2d 745, 81 P.2d 1002. A narration of the relationship of the parties appears in the following summary of the testimony of Bertha Hagist, the mother and heir of the decedent Elsie Vogel Hobart. The witness first met Fred Hobart and his first wife ten or fifteen years previous to the trial. The back yards of the Hobart and Hagist houses were adjoining. Her daughter Elsie lived with her husband Art Vogel and the families were very friendly. When Fred Hobart's first wife was sick, Elsie took care of her. She died approximately ten years ago. After her death Fred Hobart became sick, and Elsie's first husband told her, "take care of him, he is alone." Fred Hobart lived alone in his house, with Elsie taking care of him; this arrangement lasted for about two years. Fred Hobart then moved in with Art and Elsie Vogel. Art Vogel died in 1938. Fred Hobart continued living in the Vogel home, with Elsie caring for him. Fred and Elsie were married in July, 1939. The following is from the transcript of the testimony of Bertha Hagist:

"Q. * * * Why did he want Elsie to have the property? A. She should have the property because he didn't have nothing to do with his sister, that is what he said to me.

"Q. Anything else? A. He says that she didn't treat him right, she wasn't all right, she was—I can't say the word.

"Q. You can't say the word? A. No. He was just against her, wouldn't talk to her.

"Q. Well, how many conversations do you think you heard about property matters? A. Oh, many, you know, on a couple of times when I just came in that they were talking. * * * Yes, he said nobody did so much for him than she did and for his wife, the first wife, yes."

Edward P. Hagist supplemented his mother's testimony in relation to the location of the respective homes, the illness of Hobart's first wife and the subsequent condition of Fred Hobart. He testified: "Fred said he had—well, he did say definitely he had everything taken care of to go to Elsie and that she would have no trouble and would avoid certain fees and court appearances, I believe is what they meant, that he wanted her to have everything he had, since there was no other people on earth that took care of Fred as Elsie and Art while he was living, and he would take care of the will before he was ever married to Elsie. * * * Well, there was the family discussed at times and he stated had he not married Elsie he would have bequeathed everything to the Mason's Home. * * * We often asked about family affairs and at that time he hadn't seen or heard anything for about 17 years, 15 or 17 years, of his nearest relation besides his wife. He did receive two letters and he kept them and showed them and we asked him, 'Well, why don't you answer them?' and he says 'No, I will wait a few days,' and he waited a few days and he said no, and threw it down and said, 'I wouldn't answer it,' and he did not answer it."

It was agreed by the respective parties as to history and dates of transfer, that all of the securities should be considered in accordance with the evidence in reference to certain shares of preferred stock of the Pacific Gas and Electric Company. The evidence discloses that prior to 1931 the securities stood in the name of Fred Hobart. In 1931 they were reissued in the names of Fred Hobart and his first wife, Elena Hobart, as joint tenants. Approximately a month after Elena's death, in March of 1937, they were reissued in the name of Fred Hobart. Subsequently Fred Hobart married Elsie Vogel. In October, 1937, approximately twenty months prior to the marriage of Fred and Elsie, they were reissued in the names of Fred Hobart and Elsie Vogel as joint tenants. After the marriage they were reissued in the names of Fred Hobart and Elsie Hobart. Fred Hobart died. On July 26, 1943, approximately two years before Elsie's death they were reissued in the name of Elsie Hobart. The court found "that these Securities were issued to Fred Hobart and Elsie Vogel, as joint tenants, more than twenty months before they were married, and are therefore not affected by Section *229* of the California Probate Code; that the reissuance of said Securities from Fred Hobart and Elsie Vogel, as joint tenants, to Fred Hobart and Elsie Hobart, as joint tenants, on August 15, 1939, was a re-issuance of said Securities from the holders thereof to themselves, the only change being in the name of Elsie Vogel being changed to Elsie Hobart, her new married name. The Court finds that said Securities should be distributed to Respondent."

[2-4] "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation." Probate Code, sec. 229. The origin or source of the property determines its

distribution (In re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918; In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; In re Estate of Taitmeyer, 60 Cal.App.2d 699, 141 P.2d 504) if section 229 is applicable as the basis of the order. Section 229 does not cover a transfer for a consideration. If there is a consideration exchanged for the transfer, then that portion of the property so obtained did not come to the deceased spouse "by gift, descent, devise or bequest." Homestead proceedings or joint tenancy are not involved in the distribution of the real estate. The section does not refer to transfers between parties who are not spouses. Courts are not permitted to supply words which do not appear in the statute (50 Am.Jur. sec. 234) in order to rule in accord with the contentions of a litigant. Plaintiff proved that the securities originally stood in the name of Melmouth F. Hobart (Fred Hobart) and that they stood in his name at the time that there was a transfer of certificates to Hobart and Elsie Vogel. Elsie Vogel's interest as a joint tenant was complete though the interest in the joint tenancy may have been a gift. If Elsie Vogel had changed her name by marriage to someone other than Fred Hobart, her interest as a joint tenant would have continued. If Fred Hobart had caused the stock to be reissued in his name and the newly adopted or acquired name of the former Elsie Vogel no greater title or less interest would have been conveyed to Elsie. The reissuance of the stock under such circumstances would be only a confirmation of the previous transfer to joint tenancy and perhaps a convenience as notice to the stock issuing corporations. Likewise, the transfer in joint tenancy of the certificates in the names of Fred Hobart and Elsie Hobart after she became the wife of Fred Hobart added nothing to the validity of the previous transfer. The interest vested in Elsie through the previous joint tenancy transfer could not be destroyed by a second transfer to the same parties under another name. Upon the death of Fred Hobart, his wife, Elsie Hobart, in view of the facts of this case, did not become the sole owner of the joint tenancy interest in the securities by descent but by survivorship in the original grant creating the tenancy. 7 Cal.Jur. 334-335.

[5] Appellant cites Civil Code section 683 on the subject of joint interest. "A joint interest is one owned by two or more persons in equal shares, by a title created by a single * * * transfer, when expressly declared * * * to be a joint tenancy * * * from a husband and wife when holding title as community property or otherwise to themselves * * * when expressly declared in the transfer to be a joint tenancy * * *." The use of the word "otherwise" relates to a holding of title otherwise than as community property, in the sense that joint tenancy is otherwise than community property; however, it does not follow that any change results from a transfer from a husband and wife of property held in joint tenancy to themselves in joint tenancy.

The answer to appellant's contention on the joint tenancy, assuming that Elsie obtained her interest as a gift, is that the gift was not made from one spouse to the other but from one unmarried person to another. So far as the evidence discloses the joint tenancy transfer was not made in contemplation of wedlock.

Appellant contends that the trial court erred in awarding the real property formerly owned by Fred Hobart to Elsie Hobart's heir, Bertha Hagist, the respondent herein. There does not seem to be any claim that the particular parcels of property declared to be the separate property of Elsie Hobart prior to her marriage to Fred Hobart were not in fact her separate property. These items may be passed without further comment.

[6] As in the claim for the securities, so in the claim for the real estate, the burden of proof rested with the appellant. On appeal appellant merely mentions that the brother of Elsie Hobart testified that Fred Hobart stated the deed was made to Elsie to avoid probate proceedings. Appellant claims this was the only evidence produced upon the subject, and that under such circumstances the property should be awarded to the sister of the predeceased husband. These particular deeds and the contents

thereof appeared from the records of the county recorder's office and were marked as exhibits in the case. The statement of Fred Hobart does not negative the issue of consideration. In the absence of further proof by appellant the personal care and nursing given by the wife prior to her marriage, language used in the deed and the internal revenue stamps on the deed are sufficient to support the trial court's finding that the transfer of certain parcels of real estate was based upon a valuable consideration and that any presumption that the deeding of the property was merely a gift was overcome.

[7-11] For the deeds to be effective, delivery was required. The deed of property in Oakland was not recorded until the day after Hobart's death. Whether the grantor intended to transfer the title is a question of fact to be determined by the trial court from a consideration of all the evidence bearing upon the question. Hinshaw v. Hopkins, 37 Cal.App.2d 230, 237, 99 P.2d 283; Moore v. Trott, 162 Cal. 268, 122 P. 462. There is in the record the testimony of Mrs. Hagist and Edward Hagist that Hobart said "Everything belongs to [Elsie Hobart]." The court found that the deed conveying certain property in Alameda County was a grant deed. There is evidence from which the trial court could infer that Fred Hobart relinquished control of the property as his sole property in fee simple. The fact that he intended to keep a life estate in himself would not prevent the fee from vesting in Elsie Hobart. Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St. Rep. 186; Wilkerson v. Seib, 20 Cal.2d 556, 127 P.2d 904. It was still the duty of appellant to prove lack of delivery and that the facts brought the case within the purview of Probate Code sec. 229. In Vanasek v. Pokorny, 73 Cal.App. 312, 318, 238 P. 798, 800, the court said: "It may fairly be inferred from the cross-complaint that the conveyance to appellant was by deed of grant. Such a deed is supported by a presumption of consideration, the burden of proving want of consideration is upon the one seeking to avoid it, and the presumption in its effect applies to the pleadings as well as to the proof, Civ.Code, §§ 1614, 1615; Code Civ.Proc., § 1963, subd. 39." See, also, Banducci v. Banducci, 63 Cal. App.2d 600, 147 P.2d 73.

During argument before the trial judge the attorney for appellant stated his position as follows: "Now, I have in mind that our having filed the petition that the burden is on us to show not only the relationship of our client but also the source from which the property came." The inventory and appraisement in the matter of the estate of Elsie Hobart was admitted in evidence but does not appear in the record on appeal. Whatever the trial court found therefrom must be considered accurate and final so far as this appeal is concerned.

There was some property evidently located in Lake County which must be assumed to have been deeded by Fred Hobart to his wife Elsie, as all parties so treated it. The attorney for the appellant agreed that he would supply that deed for the record. The trial court found that as to certain real estate items the claimant "has failed to prove by a sufficiency of evidence that either or any of said Items came to Elsie Hobart by any manner or method prescribed by California Probate Code Section 229."

[12] The general rule is that matters not contained in the record will not be considered on appeal. Under such circumstances the findings are considered conclusive. Here the trial court definitely found a lack of proof to sustain the contention of claimant. Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 296 P. 1088.

[13] It would be a futile act on this appeal to augment the record relative to the missing deed covering property in Lake County. Augmentation of the record is permitted only when an exhibit has been actually "on file in or lodged with the superior court." Rules on Appeal, rule 12. In the present case the deed was not filed or lodged with the superior court.

The order determining heirship is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

82 Cal.App.2d 872

RENCH v. McMULLEN et al.

Civ. 13350.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1947.

Rehearing Denied Jan. 14, 1948.

Hearing Denied Feb. 9, 1948.

1. Appeal and error ⚿994(3)

Where by way of impeachment of a party his conviction of a felony was proved and by way of rehabilitation the party proved subsequent pardon by governor, the effect as discrediting testimony was for trial judge and if trial judge concluded that party's testimony was not worthy of full belief, his discretion could not be interfered with on appeal.

2. Trusts ⚿83

A trust results in favor of one person where a second person pays for property as a loan to the first person and title is taken in name of second person.

3. Trusts ⚿86

The holder of the legal title to property is presumed to own the full beneficial interest in the property and the evidence to overcome such presumption and establish that the property is held in trust must be clear and convincing.

4. Evidence ⚿588

Trial court is not bound to accept testimony even when unimpeached against a presumption or contrary reasonable inference from the other facts in evidence, and where the only direct evidence of a resulting trust comes from one whom the court may decide is discredited, the court is not bound to believe him.

5. Trusts ⚿89(3)

Evidence was not sufficiently clear and convincing to establish that property title to which was taken in name of defendant's decedent was held under a resulting trust for plaintiff on ground that decedent was to advance the purchase price as a loan to plaintiff and that the revenues from the property had repaid the loan.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by L. Rench against Robert B. McMullen to enforce an alleged resulting trust against defendant. Pending the action McMullen died and the executor and executrix of his will were substituted as defendants and the substituted defendants filed a cross-complaint to quiet title. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Fitzgerald, Abbott, & Beardsely and Stark & Champlin, all of Oakland, for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondents.

DOOLING, Justice.

Plaintiff brought this action to enforce an alleged resulting trust against McMullen. Pending the action McMullen died and the executor and executrix of his will were substituted as defendants. They filed a cross-complaint to quiet title and judgment went for defendants and cross-complainants.

The real property involved in the litigation was purchased by McMullen under an arrangement worked out by appellant Rench with the vendor. It is admitted that McMullen was the signatory to the original option to purchase and that McMullen made the down payment on the property and paid the balance of the purchase price from his own funds. The trial court found that the income received by McMullen from the property had been more than enough to repay these amounts.

Appellant testified that he had discovered that the property was for sale at a low price, had tried to raise the funds to purchase it himself and had then informed McMullen, with whom he had had various business dealings over a period of many years, of the opportunity to buy it. He testified that McMullen had orally agreed to advance up to $15,000 on the transaction as a loan to appellant, to take the title in McMullen's name as security and to transfer it to appellant upon his repaying the advances with 6% interest. Appellant's extensive activities in connection with the purchase of the property, its improvement and its subsequent rental were corroborated by a number of witnesses. It was established that a personal employee of appellant, whose salary was paid by appellant, had also devoted time to the transaction and that the original option to purchase the property which McMullen had signed was prepared by appellant's attorney at appellant's request. Some time after the property was acquired by McMullen, in connection with another transaction, McMullen offered appellant a 25% interest in the property in litigation. Rench thereupon asserted his claim both orally and in writing to the entire property and, upon McMullen's denial both orally and in writing that Rench was entitled to the property, this action was commenced.

[1] By way of impeachment of appellant his conviction of a felony was proved and by way of rehabilitation appellant proved his subsequent pardon by the governor. The effect of these facts as discrediting appellant's testimony was for the trial court to determine. If the trial judge after weighing the facts of conviction and pardon reached the conclusion that appellant's testimony was not worthy of full belief his discretion cannot be interfered with on appeal. (People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480; Dozier v. Hillman, 105 Cal.App. 127, 287 P. 116.)

[2-4] If appellant's testimony was believed he was entitled to the relief prayed, since a trust results in favor of A where B pays for property as a loan to A and title is taken in B's name. (Viner v. Untrecht, 26 Cal.2d 261 and cases cited at page 269, 158 P.2d 3.) However the courts have frequently affirmed that there is a presumption that the holder of the legal title owns the full beneficial interest in the property and that the evidence to overcome this presumption and establish that the property is held in trust must be clear and convincing. (Olson v. Olson, 4 Cal.2d 434, 437, 438, 49 P.2d 827; G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 299, 48 P.2d 669; Woodside v. Hewel, 109 Cal. 481, 484, 42 P. 152; Lane v. Whitaker, 50 Cal.App.2d 327, 330, 123 P.2d 53; Turman v. Ellison, 37 Cal.App. 204, 174 P. 396.) The trial court is not bound to accept testimony even when unimpeached, against a presumption or contrary reasonable inference from the other facts in evidence (Huth v. Katz, 30 Cal.2d 605, 184 P.2d 521) and where as here the only direct evidence of a resulting trust comes from the lips of one whom the court may decide is discredited it certainly cannot be said on appeal that the court was bound to believe him.

[5] Appellant relies on one piece of documentary evidence as convincing corroboration of his testimony. In McMullen's own handwriting he set up a ledger account covering the property in litigation. Among the entries were four separate entries of $100 each charged to Karl Rench and a later entry showing the repayment of this $400 by Rench to McMullen. These items were totalled with other expenditures on the property and it is insisted that they are only consistent with appellant's theory that McMullen held the property in trust for him. However no other expenditures, including the purchase price, were charged to Rench and the entries seem equally consistent with the theory that appellant was acting as agent for McMullen in the purchase of the property and the four advances of $100 each to Rench were entered as possible credits on the commission which might be later paid him. It was for the trial court to weigh this evidence and judge its effect.

The court found that no confidential relationship existed between appellant and McMullen. This finding is attacked but it is not necessary to support the judgment. Given a relation of trust and confidence it could not be inferred from that relation that McMullen had made the payments for the property as a loan to appellant. That fact must still be independently proved to establish a resulting trust for appellant. The trial court's finding on that issue disposes of the case.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

82 Cal.App.2d 838

PATTERSON v. PATTERSON.

Civ. 3444.

District Court of Appeal, Fourth District, California.

Dec. 11, 1947.

Rehearing Denied Jan. 6, 1948.

Hearing Denied Feb. 5, 1948.

1. Divorce 🔑329

In wife's action for separate maintenance, wife could not attack, on ground of fraud, husband's Nevada divorce decree, on ground that it was obtained by false testimony of her alleged cruel treatment of husband.

2. Husband and wife 🔑3(1)

"Matrimonial domicile" is the place where a husband and wife have established a home, in which they reside in the relation of husband and wife, and is the place where the marital contract is being performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Matrimonial Domicile".

3. Divorce 🔑330

Statement in Nevada court's judgment granting husband a divorce, that the "matrimonial domicile" of the parties "has been and now is" in California, was directly contrary to statement that husband was a resident in good faith of Nevada, and therefore reference to matrimonial domicile was disregarded by California court in wife's subsequent action for separate maintenance.

4. Divorce 🔑326

Wife could not prevail in action in California for separate maintenance, where the husband had previously been awarded a valid Nevada divorce.

Appeal from Superior Court, San Bernardino County; Pat R. Parker, Judge.

Action for separate maintenance by Lillian Williams Patterson against Edmund DeWitt Patterson, Jr. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment modified and, as modified, affirmed.

Surr & Hellyer, of San Bernardino (John B. Surr, of San Bernardino, of counsel), for appellant.

Karl F. King, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action for separate maintenance in which defendant, the former husband of plaintiff, was directed to pay her $100.00 per month for her support and $200.00 per month for the support of the two minor children of the parties.

This action was filed on March 28, 1945. It is alleged that defendant treated plaintiff in a cruel and inhuman manner; that defendant boasted that he intended to divorce plaintiff and "to carry out said intention he absconded from the State of California and went to Las Vegas, State of Nevada, for the purpose of unlawfully and fraudulently establishing his resident and for the purpose of unlawfully and fraudulently securing a divorce from plaintiff; that said defendant is not a resident of Las Vegas, Nevada, and plaintiff is informed and believes and alleges the fact to be that said defendant will attempt to establish an illegal residence as aforesaid for the purpose of avoiding his legal responsibility to plaintiff and the minor children of plaintiff and defendant, and for the purpose of evading the laws of the State of California."

Defendant filed a demurrer in the separate maintenance action on May 2, 1945, and an answer on May 24, 1945, and by leave of court a supplemental answer on November 19, 1945, in which it was alleged that by a decree of the Eighth Judicial District Court of the County of Clark, State of Nevada, dated June 13, 1945, defendant had been granted a final decree of divorce from plaintiff which had become final and that plaintiff and defendant were no longer husband and wife.

In the complaint filed in the Nevada court it is alleged that plaintiff (Mr. Patterson) was "able to pay to defendant (Mrs. Patterson) the sum of One Hundred ($100,-00) Dollars per month for her support and maintenance until her death or remarriage" and asked that he be required to pay $50.00 per month for the support of each minor child.

The judgment required Mr. Patterson to pay $50.00 per month for the support of each minor child but awarded Mrs. Patterson nothing.

The instant case went to trial on December 7, 1945, and findings of fact and a judgment were signed on January 22, 1946. Defendant moved for a new trial and on February 20, 1946, new and different findings of fact and conclusions of law and judgment were signed. They are now before us for review.

It was found that plaintiff and defendant were married on December 3rd, 1930, and remained husband and wife until June 13, 1945, when the marriage was dissolved by the Nevada divorce decree and that "thenceforth plaintiff and defendant were not husband and wife, but were by said decree divorced"; that the allegations of the complaint we have quoted were untrue; that "defendant did, about March 15, 1945, go to Las Vegas, Clark County, Nevada, and in good faith take up his residence there, and ever since March 15, 1945, has been a resident in good faith of the City of Las Vegas, Clark County, Nevada, and did there duly obtain the decree of divorce referred to above."

In the conclusions of law we find the following:

"First: That the matrimonial domicile of plaintiff and defendant since their marriage on December 3, 1930, was and now is the County of San Bernardino, State of California.

"Second: Defendant is not and since June 13, 1945, has not been the husband of plaintiff, but plaintiff and defendant were on said date by said decree duly and regularly divorced.

"Third: On or before the 5th day of February, 1946, and on or before the 5th day of each succeeding month until further order of the above entitled court, defendant shall pay to plaintiff the sum of $100.00 for her support and maintenance, by way of alimony."

The judgment contained the following:

"First: That at all times since December 3, 1930, which was the date of the marriage of plaintiff and defendant, the matrimonial domicile of said parties has been and now is the County of San Bernardino, State of California.

"Second: Ever since March 15, 1945, defendant, Edmund Dewitt Patterson, Jr., has been a resident in good faith of the City of Las Vegas, Clark County, Nevada; and on June 13, 1945, a 'Decree of Divorce' in the form of Exhibit 'A' annexed hereto, and which is hereby incorporated herein, was duly given and rendered . . . and plaintiff, Lillian Williams Patterson, and said defendant were by said decree duly and regularly divorced and since the rendition of said decree have not been husband and wife but have been duly and regularly divorced."

Defendant was required to pay plaintiff $100.00 per month for her support and maintenance and $200.00 per month for the support and maintenance of the two children.

While various questions are argued by counsel, we need consider but two of them, namely, the validity of the Nevada decree of divorce and the legality of the award of $100.00 per month for the support of plaintiff in an action for separate maintenance after the bonds of matrimony between the parties had been dissolved by the Nevada decree.

[1] Plaintiff attacks the Nevada decree on the ground of fraud. She argues it was obtained by false testimony of her cruel treatment of defendant. A similar argument was made and rejected in the case of Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670, on the authority of Williams v. State of North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273.

She also seems to argue that the Nevada decree was void because defendant was never a bona fide resident of that state. While it is not clearly stated, we assume that this is somewhat based on the conclusion of law and the recital in the judgment to the effect that at all times since December 3, 1930, the matrimonial domicile of the parties "has been and now is, in the County of San Bernardino, State of California."

[2] "Matrimonial Domicile" was defined in Gould v. Gould, 201 App.Div. 670, 194 N.Y.S. 745, 748, as follows: "The matrimonial domicile, in my opinion, may be defined to be the place where a husband and wife have established a home, in which they reside in the relation of husband and wife. It is the place where the marital contract is being performed." See, also, De Bouchel v. Candler, D.C., 296 F. 482; Rontey v. Rontey, 101 Misc. 166, 166 N.Y. S. 818; Ex parte Allan, 220 Ala. 482, 125 So. 612.

[3] This conclusion of law and this portion of the judgment finds no support in the findings of fact already quoted and are directly contrary to them as well as contrary to other conclusions of law and other portions of the judgment. As they have no support in the findings we may disregard them for the purpose of this opinion.

We have studied the record and it supports the findings of the trial judge to the effect that defendant became an actual bona fide resident of Nevada on or about March 15, 1945. The facts in the instant case are very similar to those detailed in Baldwin v. Baldwin, supra, where it was held that a Nevada divorce was valid and should be given full force and effect in California. (See, also, Estate of Paul, 77 Cal.App.2d 403, 175 P.2d 284.)

[4] The right of a former wife to recover in an action for separate maintenance for support money from a former husband from whom she has been finally divorced seems settled in California. In DeYoung v. DeYoung, 27 Cal.2d 521, 165 P.2d 457, 460, it was held that a valid Mexican divorce was a bar to a subsequent action by the divorced wife for separate maintenance. In an opinion concurring in the judgment, written by Mr. Associate Justice Schauer and concurred in by two other associate justices, we find the following: "Separate maintenance differs from alimony in that it presupposes a continuing marital status. The right to it cannot be established without proof that such status is existent as of the time of trial. Proof of prior dissolution of the marriage is, therefore, a complete defense to such an action."

In Colbert v. Colbert, 28 Cal.2d 276, 169 P.2d 633, 635, it was said: "The existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. Carbone v. Superior Court, 18 Cal. 2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; Talbot v. Talbot, 218 Cal. 1, 2, 21 P.2d 110; Parmann v. Parmann, 56 Cal.App.2d 67, 69, 132 P.2d 851; In re Cook, 42 Cal.App. 2d 1, 3, 108 P.2d 46."

In addition to those already cited, the cases of Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am.St.Rep. 70; Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; Calhoun v.Calhoun, 70 Cal.App.2d 233, 160 P. 2d 923; and Calhoun v. Calhoun, 81 Cal. App.2d 297, 183 P.2d 922, follow the same rule.

It follows that as the right to separate maintenance to be recovered in such a separate maintenance action depends on the existence of the marriage relation and as plaintiff was not the wife of defendant at the time of the trial, the award to plaintiff of $100.00 per month for her support and maintenance cannot be upheld.

The case of Bernard v. Bernard, 79 Cal. App.2d 353, 179 P.2d 625, does not conflict with this conclusion as no final decree of divorce had been rendered and the parties were still husband and wife when she was given support money.

The other questions argued by plaintiff are sufficiently disposed of by what we have already said.

In the closing page of his brief defendant says: "We respectfully urge that the portion of the lower court decree awarding support money to Mrs. Patterson should be stricken out. In this event Patterson will not cavil at the $200 per month allowance for his boys even though it may be excessive."

Under these circumstances we need not consider the question of the allowance for the support of the children.

The judgment is modified by striking therefrom the following: "Third: On or before the 5th day of February, 1946, and on or before the 5th day of each succeeding month until further order of the above entitled court, defendant shall pay to plaintiff the sum of $100.00 for her support and maintenance, by way of alimony."

As so modified the judgment is affirmed. Plaintiff will recover her costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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82 Cal.App.2d 709

McPHEETERS v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al.

No. 13447.

District Court of Appeal, First District, Division 1, California.

Dec. 4, 1947.

Hearing Denied Jan. 29, 1948.

1. Administrative law and procedure 🔑471

The statutory authority of state administrative agencies to select place for hearing nearer respondent's residence or place of occurrence of transaction than place designated by statute on basis of residence or occurrence of transaction in designated District Court of Appeal districts is not limited to cases where transaction occurred in a district other than that of respondent's residence. Government Code, § 11508.

2. Administrative law and procedure 🔑471
Physicians and surgeons 🔑11(3)

State Board of Medical Examiners had jurisdiction under statute to set continued hearing of proceeding to revoke license of a physician residing at Fresno in Fourth District Court of Appeal district at Sacramento which was nearer Fresno than was Los Angeles, though transaction for which revocation was sought also occurred at Fresno. Government Code, §§ 511, 520, 11508.

3. Administrative law and procedure 🔑453
Mandamus 🔑154(4)

Petition verified by attorney and alleging on information and belief that petitioner had not received notice of time and place of continued hearing of proceeding for revocation of his license to practice medicine did not state a cause of action for peremptory writ of mandate to annul order of Board of Medical Examiners setting time and place of hearing, where petition also disclosed petitioner was informed in August of continuance of hearing to October meeting of board and knew exact date of meeting at least three days before it was to be held.

4. Administrative law and procedure 🔑453

Notice of a continued hearing before an administrative agency is not required by statute.

5. Mandamus 🔑7

The issuance of a peremptory writ of mandate is discretionary.

6. Appearance 🔑24(1)

Proof of service of petition and alternative writ of mandate was unnecessary where respondents appeared in response to writ and did not claim lack of service.

7. Mandamus 🔑171

Denial of petition for peremptory writ of mandate on ground that it did not state facts sufficient to justify the relief sought rendered moot petitioner's motion for leave to prove service of subpoenas on respondents as well as respondents' demurrer and motions to dismiss and to quash and recall subpoenas.

8. Mandamus 🔑169

In determining sufficiency of petition for peremptory writ of mandate, court must consider all allegations therein as admitted and true, but where, taking all such allegations as true, petition sets forth no grounds for relief, court has no alternative but to dismiss it.

9. Mandamus 🔑169

Petition for peremptory writ of mandate was properly denied without waiting for respondents to file answer and thereafter affording petitioner opportunity to countervail matters set forth in answer, where petition itself did not state a cause of action.

10. Mandamus ⚿160(1)

While issuance of alternative writ is merely the method by which respondents can be brought into court to answer petition for peremptory writ of mandate, alternative writ should not issue if petition fails to state a cause of action, but issuance of such writ is not a final finding of petition's sufficiency.

11. Administrative law and procedure ⚿704

Administrative proceedings should be completed before issuance of a judicial writ to review them, except where administrative board lacked jurisdiction.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Petition in mandamus by George Carl Heckman McPheeters against Board of Medical Examiners of the State of California and the members thereof to compel respondents to annul an order of the Board setting the continued hearing of proceedings for revocation of petitioner's license to practice medicine and surgery at Sacramento and to require the Board to hold all meetings thereof at Los Angeles. From a judgment denying his petition, petitioner appeals.

Judgment affirmed.

A. A. George, of Fresno, and Lionel Browne, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Dep. Atty. Gen., for respondents.

BRAY, Justice.

The superior court denied appellant's petition to mandamus respondents, Board of Medical Examiners of the State of California and its members, to annul an order of said board setting the continued hearing of certain proceedings at Sacramento and to require said board to hold all hearings thereof at Los Angeles.

The allegations of the petition pertinent here were as follows: that ever since 1914 appellant has been duly licensed to practice medicine and surgery in California; that in September, 1945, a sworn complaint was filed with said board by one of its inspectors, charging appellant with violations of section 2377 of the Business and Professions Code, and asking for the revocation of appellant's license to practice; that appellant is a resident of Fresno, and that the alleged act upon which the charge is based occurred at Fresno; that a hearing was set before the board at Sacramento on October 20th; that upon objection by appellant to the right of the board to hold said hearing at Sacramento, it was continued until the March, 1946, meeting of said board at Los Angeles; that over appellant's objection the board "considered the matter pending before it" and continued the hearing to the board's August meeting at Los Angeles; that at that meeting the board took further evidence and denied a motion of appellant for dismissal upon the ground that the allegations of the complaint were not proved; that then counsel for appellant introduced evidence that appellant was ill in a hospital and requested a continuance of the hearing until the next regular board meeting at Los Angeles; that the board granted a continuance but only to their October meeting and at Sacramento, and informed counsel that notice of the time and place of meeting would be sent to appellant; that the board acted arbitrarily and illegally in setting the matter for hearing at Sacramento instead of Los Angeles as required; "That your affiant, who is one of counsel for petitioner, * * * upon information and belief * * * alleges that petitioner has at no time received a notice of the time and place of the October meeting as was purportedly ordered in the statement of the Hearing Officer. * * *"

Upon this petition an alternative writ of mandate was issued by the court, returnable October 29, 1946. Just what occurred on the return date is not clear from the record.

Appellant claims that his counsel asked the court for permission to be sworn to testify to the service of the petition, alternative writ and certain subpoenas, and that before such request was ruled upon, the board moved the court for permission to file a notice of motion to dismiss as to, and strike the names of, certain parties, and a notice to quash and recall certain subpoenas, which notices had theretofore been served on appellant. The board also requested that if such notions were denied, it be permitted to file the demurrer above mentioned. The record fails to disclose any of these proceedings, other than the fact that the demurrer was filed that day, whether before, at, or during the hearing cannot be determined. The minute order of that day contains the following: "In this action the court order[s] the application for writ of mandate denied."

Appellant in his brief asks permission to supplement the record to show these various motions. At argument, no such request was made. However, for the purposes of this opinion we are assuming appellant's statements in this respect to be correct.

Appellant claims that the court stated it would deny all the requests above mentioned and in the exercise of its discretion would deny the petition. Apparently, the court, after examining the petition, felt that it did not state facts sufficient to justify the relief asked. The main question, then, is whether the petition does set forth facts sufficient to constitute a cause for the relief sought.

[1] The first ground upon which petitioner asks relief is that section 11508 of the Government Code requires that the hearings in this case be held in Los Angeles. This section provides: "The agency shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First District Court of Appeal district, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth District Court of Appeal districts, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third District Court of Appeal district. *Provided* that the agency, if the transaction occurred in a district other than that of respondent's residence, may select the county appropriate for either district; *the agency may select a different place nearer the place where the transaction occurred or the respondent resides;* or the parties by agreement may select any place within the State." (Emphasis added.) Fresno, where the appellant (respondent before the board) resides and where the alleged act of violation occurred, is within the Fourth District Court of Appeal district, and is nearer in distance to Sacramento than it is to Los Angeles. See secs. 511 and 520, Government Code. The board set the continued hearing for Sacramento under that portion of the above section which reads "the agency may select a different place nearer the place where the transaction occurred or the respondent resides." Appellant urges that this clause can apply only if the situation is included in the preceding portion of the same sentence "Provided that the agency, if the transaction occurred in a district other than that of respondent's residence, may select the county appropriate for either district. * * *" In other words, appellant's position is that the board's right to select a hearing place other than in the district of a respondent's residence is limited to situations in which the transactions occurred in a different district. But a study of the section shows otherwise.

The section first provides that the place of hearing shall be in the designated city in the appellate court district where either the respondent resides or the transaction occurs. It then provides for the situation where the respondent resides in one district and the transaction occurs in another. In that event the board may select the designated place in either district. A third situation is then provided for: that the board may select a place closer either to the place of residence or to the place of the transaction than that mentioned in the first and second situations; and finally, a fourth situation, namely, when the parties themselves agree on a place of hearing.

If appellant's interpretation were correct, namely, that the right of the agency to hold the hearing in a place other than the designated city in the appellate district of residence or transaction, is limited to a situation where the transaction occurred in a district other than that of residence, there would be no reason for the two clauses which follow. The section would have read that in such event, the agency might select a different place, without specifying in one clause "the county appropriate for either district", and in the other clause "nearer the place where" etc.

The following quotation from the attorney general's opinion expresses the meaning of this section clearly and succinctly: "The last sentence of said section is expressly made a limitation on the matter immediately preceding it and is, therefore, not subject to the general provisions of the section in the first and second sentences. The question is whether the qualifying parenthetical phrase * * * in the first clause of the last sentence must be deemed to have been included in the second clause of the last sentence of the last section. The wording of the first clause makes it apparent that the qualifying phrase is to be applied to that clause. The second clause is, however, complete within itself, and the two clauses are separated by a semi-colon which, while connective, is generally considered as being appropriate to a distinct thought or division of thought relating to the subject matter. If the parenthetical phrase qualifies the second clause it would also qualify the last clause—which the Legislature could scarcely have intended. Aside from the literal wording and the punctuation of the sentence, the purpose to be accomplished indicates that the parenthetical and qualifying phrase could not have been intended to qualify the second clause of said sentence. In this connection it should be noted that under said section areas of considerable extent are embraced within the counties included. For example, the hearings are, in the absence of special circumstances, to be conducted in the County of Los Angeles if the respondent resides and the transaction occurred in either of the Second or Fourth District Court of Appeal districts." In a case where, for example, the respondent resided or the transaction occurred in the city of El Centro, it is obvious that the Legislature intended to provide a method by which the agency could, in its discretion, for the convenience of parties and witnesses, hold a hearing in El Centro or in a city nearer to El Centro than Los Angeles, but under appellant's interpretation of the section, this could not be done.

[2, 3] As the board had the right to select a place nearer to Fresno, the appellant's residence and the place where the transaction occurred, than Los Angeles, and as Sacramento is nearer to Fresno than Los Angeles, the first ground set forth in the petition for the writ of mandate did not set forth a cause of action. Nor did the second ground. This ground is based on the allegation in the petition, on information and belief, that the petitioner had not received notice of the time and place of the October meeting of the board. Certainly a petitioner should know of his own knowledge whether he had received such notice, and his attorney should inform himself of his client's knowledge before alleging such an important matter.

[4, 5] There is no statutory requirement of notice of a continued hearing. At the August hearing, the hearing officer stated: "The request of the respondent here for a continuance is granted, and the matter is continued by the Board to the Sacramento meeting in October, 1946, and notice of time and place of the meeting will be sent to the respondent." Appellant's petition was filed on October 19th, and referred to the hearing to be held on October 22nd. It is apparent that whether appellant at that time had received formal notice of the hearing or not, he had knowledge of its date, at least three days before the date set. The issuance of a peremptory writ of mandate is in the discretion of the court. Surely, no court could reasonably be accused of an abuse of discretion in denying a petition to interfere with a continued hearing which the petitioner had been informed in August was continued to the October meeting of the board, and of the exact date of which he had knowledge at least three days before it was to be held.

[6, 7] Appellant contends that the trial court could not pass upon the sufficiency of the petition until it had first passed on the motions made by appellant and the

board. So far as appellant's motion to be sworn and prove service of the petition and writ is concerned, there was no necessity for granting it. The board and its members had appeared in response to the writ and were not claiming lack of service. They thereby admitted service, so proving that they had been served would have been an idle act. Also proving service of subpoenas on members of the board would be of no importance as no testimony could be introduced under a petition that did not state a cause for relief. As to the board's motions, the court having determined that the petition did not state facts sufficient to justify the relief sought, wisely determined not to waste time considering motions which were thereby made moot.

The same is true as to the demurrer. Whether it was filed or not, the court apparently was not acting upon it, but upon its own right to examine the petition. Finding nothing in it to justify the relief sought, the court dismissed it.

[8] It is true that in examining the sufficiency of the petition the court must consider all allegations therein admitted and true. Appellant cites a number of cases to this effect. But if, as here, taking all the allegations as true, the petition set forth no grounds for relief, the court has no alternative but to dismiss it.

The situation in this case is well expressed in the opinion in Atkinson v. Warren, 34 Cal.App.2d 119, 93 P.2d 157: "The petition is denied for the reason that the facts alleged therein are insufficient to justify the issuance of a writ of mandate in accordance with the prayer of the petition."

[9] There is no merit in appellant's contention that the court must wait until the board filed its answer and thereafter give appellant the right to countervail the matters set forth in the answer. Where the petition itself is not sufficient there is no reason for filing an answer or proceeding further in the case.

[10] Appellant argues that because the court issued the alternative writ, it thereby passed for all time on the sufficiency of the petition. This, of course, is not the law. The issuance of the writ is merely the method by which the respondents can be brought into court. While the court should refuse to issue an alternative writ where the petition is not sufficient (Patterson v. Board of Supervisors, 79 Cal.App.2d 670, 180 P.2d 945 the fact that the court grants the writ is not a final finding of the petition's sufficiency. The court at any time may determine whether it states a cause for relief.

[11] It will be noted that the writ of mandate is sought for the purpose of reviewing an intermediate step in the administrative process, and was sought before the statewide administrative board had acted on the merits. The attorney general contends that such writ cannot be used to review administrative action until the board has acted on the merits. Certainly, each step in the administrative proceeding cannot be reviewed separately, any more than each ruling in the trial of a civil action may be separately reviewed by a separate appeal. Administrative proceedings should be completed before the issuance of a judicial writ. An exception, of course, appears when the administrative board is without jurisdiction. Apparently, at the time it issued the alternative writ, the trial court believed that the petition presented a jurisdictional question. However, the complete record proves the contrary.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

82 Cal.App.2d 827

PEOPLE v. HALE et al.

Cr. 4158.

District Court of Appeal, Second District,
Division 3, California.
Dec. 11, 1947.

Hearing Denied Jan. 8, 1948.

1. Embezzlement 🔑44(1)

Evidence sustained convictions for grand theft.

2. Criminal law 🔑720(8), 1171(3)

In prosecution for grand theft, statements of district attorney and rulings of trial court on objections to statements, logical effect of which was to authorize jury to consider in weighing evidence, the assumed fact that grand jury had already found defendants guilty was reversible error as to a defendant whose guilt was not clearly established by the evidence.

Appeals from Superior Court, Los Angeles County; Clement D. Nye, Judge.

James Hale and J. Sydell Peterson were found guilty of grand theft and they appeal.

Attempted appeals from judgment dismissed, and order denying motion of Peterson for new trial reversed, and order denying motion for new trial of Hale affirmed.

Walter L. Gordon, of Los Angeles, for appellant Hale.

Phi. O. Clough, of Los Angeles, for appellant Peterson.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SHINN, Acting Presiding Justice.

Defendants James Hale and J. Sydell Peterson were accused by indictment of the crime of grand theft in that they unlawfully took the sum of $5,000, the personal property of the St. John's Baptist Church. They were tried by jury which found them guilty of said offense. Their motions for a new trial were denied, whereupon proceedings were suspended and each defendant was granted probation for a period of ten years, the first six months of the probationary period to be served in the County Jail and each defendant was ordered to make restitution in the sum of $2,500 to the St. John's Baptist Church. Each defendant appealed from the judgment and the order denying his motion for a new trial. Since no judgment was rendered, the attempted appeals from the judgments should be dismissed.

Defendant Peterson, an ordained minister, had been pastor of St. John's Baptist Church of the City of Los Angeles for some two years prior to the occurrence which culminated in this prosecution. Sylvester Davenport was recording secretary of the Church, and a Mr. Bailey was one of the deacons. Herbert Alvin Howard was financial secretary.

In October, 1945, St. John's Church found it necessary to surrender possession of a Japanese buddhist temple, which it had been occupying under lease, and to find other church quarters. The Zion Hill Baptist Church was about to vacate its Church property on East Twenty-second Street and move to a new Church building on McKinley Avenue. Defendant Hale was chairman of the board of trustees of the Zion Hill Church, a position which he had held for some four years, and it was his general duty to look after the Church finances; Reverend Grant Harris was the pastor of the Church. Defendant Peterson requested Mr. Davenport to help find a new Church property and suggested the one being vacated by the Zion Hill Church. Davenport contacted defendant Hale and reported to Peterson that the Church could be purchased, and that Hale had requested that Peterson talk with him about it. Thereupon, Peterson, Bailey and Davenport went to Hale's house and met Hale, who told them that he could not sell the property until the Church had occupied its new building for about thirty days, but that he would give them a chance to buy it. Thereafter, Peterson called a meeting of the board of his Church, and after approval by the board of the plan to acquire a Church property, had himself, Bailey and Davenport appointed as a committee to negotiate for the purchase of the Zion Hill property. The committee of three conferred several times with Hale at his home, and at the latter's suggestion Davenport was made chairman of the board of trustees in order that he might have authority to negotiate on behalf of his Church. After the Zion Hill congregation had moved, other meetings were held at Hale's house. The committee made a bid on the property and Hale fixed a price of $25,000, $5,000 to be paid in cash and the balance at the rate of $200 per month. The matter of the purchase at this price was presented by the committee to the congregation of St. John's. Thereupon, the Church body approved the general plan. It was explained, however, that $10,000 cash would be required. Peterson testified that he, Davenport and Bailey had had a conversation with Hale in which the latter told them he would have to have $10,000 cash altogether, $5,000 to be paid to him as trustee for his Church to be used in painting and renovating the new church building, that there would be a controversy if he went to the church treasury for the money and that after the congregation had been in the new building for thirty days and had had a meeting, a credit of $5,000 would be given on the purchase. Davenport, on the stand, denied, all knowledge of such an arrangement and testified that only $5,000 was to be paid in cash. It was nevertheless represented to the congregation of St. John's that it would be necessary to raise $10,000 and this was done, $8,000 by subscription, and $2,000 by means of loans from parishioners, which were to be repaid in 30 days. Following a meeting of the committee two checks were written by Mr. Howard as financial secretary of St. John's, one check for $5,000 being made payable to James Hale, and one for $5,000 in favor of the company that was to act as escrow holder. Davenport testified that at the meeting he suggested that they call Hale to see how the check for $5,000 was to be written and that Peterson said they would make out two checks, one to Hale and the other to the escrow holder; that Bailey said that Howard would object to that, and that Peterson said that he would take care of Howard. Peterson did call Howard, and the latter, at Peterson's request, wrote the two checks and the same were signed by Howard and Bailey and given to either Bailey or Davenport and taken to Peterson, who placed his "O. K." on them and handed them back to Davenport or Bailey. Howard testified that when he wrote the checks he understood, from statements of the committee to the congregation, and from the directions given him by Peterson, that $10,000 cash was required. Hale, Peterson, Davenport and Bailey met at the title company in the office of Mr. Gorman, escrow and title officer. Gorman testified that Hale arrived first and gave information for instructions, stating that the Church property was being sold for $25,000, $5,000 down, and a promissory note for the remainder payable at $200 or more per month; that Hale, at that time, had the $5,000 check payable to himself and offered to deposit it in the escrow; that he was told by Gorman that he would have to endorse it and give instructions for its use in the purchase of the property, or furnish another check in favor of the title company, and that Hale said he would get a new check. Gorman also testified that Hale then picked up the check from the desk, and that he, Gorman, did not see it thereafter. Hale left and returned with Davenport. Peterson and Bailey arrived later and the instructions were signed by Peterson and Hale. No check was delivered to Gorman at this time but later, on the same day, Hale and Peterson returned and a $5,000 check, payable to the title company, was handed in. In testifying to the occurrence Gorman was unable to recall which of the two produced the check. A note for $20,000 and trust deed were prepared and were afterwards executed by Peterson. In the office of the title company no mention was made of any money to be paid outside of escrow.

The $5,000 check in favor of Hale next appeared the following morning at the bank upon which it was drawn. Peterson, Hale and Bailey were present at the teller's window, and Peterson introduced Hale to the teller and asked her to cash the check for him. According to the testimony of the teller she suggested that they take a cashier's check, but Hale wished the cash and it was paid over in $5, $10 and $20 bills. Hale re-counted the money in the presence of Peterson and Bailey and at his request was given four envelopes, in two of which the bills were placed, each one being entirely filled. The teller testified that the envelopes were picked up by Hale and that the three men then walked away from the window. There was testimony that Hale, Peterson and Bailey walked to Hale's automobile which was parked nearby. Just outside the bank they met Davenport and spoke with him. Davenport testified that he saw an envelope in Hale's hand at the time and that he saw another similar envelope in the pocket of Peterson's suit or overcoat. Hale drove away in his car while Peterson and Bailey stood by. It is here that all direct trace of the money disappeared. Bailey, who perhaps could have explained what happened to it, died before the case was tried. Peterson testified that Hale placed the envelopes containing the money on the seat of his car, laid a revolver beside them, announced that he would have to be going, and drove away. Hale testified that Peterson took the money, announcing that he would take care of it, put it in his pocket, and that he, Hale, then drove away. Each insisted that he got none of the money and that the other got all of it. None of it has been recovered.

Hale, a few days before this event, had purchased a car for $400 cash and monthly payments of $65, and in the following month he purchased a home, paying $1,000 down, and in the following month an additional $1,000, and assumed payments of $75 per month. He had no bank account and the mentioned payments were made in cash. $950, he testified, he received in the form of bonds from his wife, who was a postal clerk. His income from all sources was around $65 per week. The foregoing is an outline of the problem that was submitted to the jury.

It is earnestly contended by counsel for Peterson that the evidence tending to prove his guilt consists only of the uncorroborated testimony of the accomplice, Hale, and that it was therefore insufficient to justify the verdict as to him. Defendant Hale submits his appeal upon the briefs of defendant Peterson which, as we have seen, place all the blame for the theft upon Hale.

[1] We find the evidence sufficient to support the verdicts. It is considerably stronger as to Hale's guilt than as to Peterson's and we shall discuss it particularly only as it applies to the latter. It will be necessary to review it at some length in determining another matter, namely, whether certain statements of the deputy district attorney in his opening argument were so prejudicial to the rights of defendant Peterson as to require a reversal of the order denying his motion for a new trial. It will appear, from what we have to say in that connection that while the evidence of Peterson's guilt was inconclusive, it was not legally insufficient.

Defendants urge as ground for reversal misconduct of the district attorney consisting of improper statements during his opening argument to the jury. The record on this point reads as follows:

"Mr. Crail: If your Honor please, and counsel for the defense and members of the jury, what I am going to say of course is not evidence in this case. It is my object to see that this jury arrives at a proper verdict, a verdict that will express the truth. Now, in this case there isn't any dispute at all about the theft of $5,000.00. That is very definitely established and no one disputes it. Each defendant, of course, blames the other one. The Grand Jury after hearing the testimony returned an indictment against both defendants on the theory that both defendants were guilty—

"Mr. Gordon: Just a moment, we cite that as error, and ask your Honor to caution counsel not to argue on what theory the grand jury returned it.

"The Court: After all, Mr. Gordon, one of counsel's duties is to sum up the evidence and draw such inferences from the evidence as he may deem it warrants.

"Mr. Gordon: The theory on which the grand jury returned an indictment is not evidence.

"The Court: The record will show your statement.

"Mr. Gordon: I assign it as misconduct and ask your Honor to instruct the jury to disregard such remarks.

"Mr. Clough: I make the same objection.

"The Court: You may proceed, Mr. Crail.

"Mr. Crail: When I say that the Grand Jury had a theory, of course, I don't know what their theory was, except the inference to be drawn by the action they took;

but the Grand Jury must have believed that both defendants were guilty or they would not have indicted them.

"Mr. Gordon: May I make the same objection and have a running objection to any remarks along that line by the District Attorney.

"The Court: All right, Mr. Gordon."

It will be noticed that the district attorney took occasion to repeat and elaborate upon the statement to which defendants had objected, and this, no doubt, was due to his understanding that the court had ruled that the remarks were proper. His opening argument closed with the following statement: "That is why I say the grand jury was right when they indicted both of them."

The attorney general discusses the following authorities on the point: People v. Lee Chuck, 78 Cal. 317, 20 P. 719; People v. Grider, 13 Cal.App. 703, 110 P. 586; People v. Brown, 81 Cal.App. 226, 253 P. 735; People v. Edgar, 34 Cal.App. 459, 467, 167 P. 891; People v. Schmidt, 33 Cal.App. 426, 439, 165 P. 555; and also quotes from 8 Cal.Jur. p. 264, refers to People v. McKenzie, 12 Cal.App.2d 614, 55 P.2d 1200, and closes his discussion of the point as follows: "From the above authorities it must be concluded that said remarks of the district attorney in the case at bar were improper. The impropriety thereof, however, does not warrant a reversal of the order denying a new trial [citing cases]. The evidence in the instant case in itself, unaided by said remarks of the district attorney, shows beyond doubt that both defendants were guilty of the crime charged." It is a fair and proper statement of the law and if we could agree that there was strong evidence of Peterson's guilt it would follow that the statements of the district attorney, although improper, would not furnish ground for a reversal. But arguments of this nature by prosecutors have consistently been deemed ground for reversal when guilt has not been clearly established. (See cases collected in State v. Thayer, 124 Ohio St. 1, 176 N.E. 656, 75 A.L.R. 48, 53; Loyall v. Commonwealth, 281 Ky. 497, 136 S.W.2d 784, 127 A.L.R. 352, 357.) We are far from satisfied that the rights of defendant Peterson were not prejudicially affected by the district attorney's improper argument. Although we are of the opinion that the evidence was sufficient to support a verdict of guilty as to Peterson, there were circumstances pointing toward innocence, as well as circumstances pointing toward guilt, and there was evidence which if given full effect by the jury would have cast serious doubt upon the credibility of the witness Davenport.

In determining whether the evidence which was to be weighed in deciding the question of Peterson's guilt was such that the improper statements of the district attorney probably led the jury to return a verdict of guilty and brought about a miscarriage of justice we must examine the evidence which the jury accepted as sufficient to establish guilt and also the opposing evidence. We must weigh the evidence to determine the strength of the case for the People.

It was the theory of the People that Peterson conceived the plan to steal the money and persuaded Hale to join him in the theft; that he represented to his congregation that $10,000 cash was needed, but concealed the fact that $5,000 was to be paid to Hale directly; that he deceived Bailey and Davenport by stating that whichever of the two checks was not used would be destroyed and that he and Hale divided the money which they had placed in envelopes as soon as it was received from the bank. There was evidence that Peterson had known Hale but a few weeks, that he made no inquiry as to his responsibility, that he made no check of Hale's claim that he needed $5,000 for renovation of the new Zion Hill church, that he exacted no receipt from Hale and no written promise that the $5,000 credit would be forthcoming; that he did not report the matter to his congregation; that he exhibited no diligence to obtain the credit, made no complaint to Reverend Harris, Zion Hill's pastor, and showed no interest in placing the matter before the district attorney. Also he signed the note and trust deed for $20,000 and caused nothing to be stated in the escrow instructions as to the payment that was being made to Hale. These and other details of less importance tended to support the theory of guilt advanced by the People. They could lead only to the conclusion that Peterson was guilty of theft or that he was gullible and negligent in the extreme. Much that is urged against him assumes the truth of Davenport's testimony. The jury no doubt believed it and in doing so found a way to reconcile it with certain established facts which tended to impeach it. This we believe was not altogether easy to do. Although Davenport testified that he had never been informed that $5,000 was to be paid to Hale or that $10,000 was to be used in the purchase, he also testified that he knew that $10,000 was being raised, $8,000 from subscriptions and $2,000 from loans. He knew also that the $2,000 was borrowed for thirty days and that Bailey and Peterson had each borrowed $1,000 from a bank, on their own security, for the purpose of repaying the loans. Mr. Howard, admittedly a man of probity and one who was scruplous in handling the funds of the church, testified, as did his wife, that Davenport was present when the two checks were written and signed by Howard and Bailey. He also testified that the committee, Peterson, Davenport and Bailey explained to the congregation that $10,000 cash was needed, and also that from the general discussion and from directions he received from Peterson, he understood that the two checks of $5,000 each were to be used in the purchase. Accordingly, he noted on one of the checks "subscription down payment $5,000 on purchase of property" and upon the other "For escrow $5,000," these notations, he testified, being made when the checks were written. While Davenport testified that he waited outside in his car and did not enter the Howard house while the checks were being written, he did not deny having reported to the congregation that it was necessary to have $10,000 cash to use in the purchase. Incidentally, Davenport testified that he handed Hale as a "love offering" an envelope containing $600 and that he had "put in" $300 of it himself. There was evidence that he reported to his associates that the transaction was costing them $600. Hale testified that the envelope contained only $300. No other explanation was made as to where the money came from nor the purpose of the donation. The incident is mentioned here only because it throws some light on the informal manner in which authority was exercised over the funds of the church and its members by its representatives. The laxity which characterized the entire transaction did not necessarily indicate wrongful motives. When the escrow agreement had been signed, and although Hale had possession of both checks, Davenport made no suggestion that one of them be destroyed nor did he thereafter make any inquiry as to whether the check or the money it represented had been returned to the church. Peterson testified that the arrangement to pay $5,000 to Hale was made in a conversation which took place in an automobile, Peterson, Hale, Davenport and Bailey being present. Davenport denied that the conversation had taken place or that he had been in an automobile with the other men. One Comer, a member of Zion Hill church, and apparently a disinterested witness, testified to having seen the four men drive away from the church under the circumstances described by Peterson. Davenport testified that he was not on friendly terms with Peterson. In short, there was an abundance of evidence in the way of direct contradiction which the jury could have regarded as sufficient to discredit the testimony of Davenport. There were also circumstances to be mentioned later which were inconsistent with an intention on the part of Peterson to steal the money. It would have been difficult to evolve a theory of Peterson's guilt without believing that he received at least a part of the money. It is therefore reasonable to infer that the jury believed Davenport when he testified that as they left the bank Hale had an envelope in his hand and that Peterson had a similar one in his pocket, testimony which was elicited and was relied on to prove a division of the money. Davenport testified that on the morning after the escrow was opened Bailey told him that he, Bailey, Davenport and Peterson were to meet Hale at the bank, that Peterson had directed Hale to the wrong branch and wished Davenport to get him and bring him to the right one, that he, Davenport, did as requested, left Hale at the bank, parked his car, and when he returned to the bank, met the three men as they came out and saw Hale and Peterson each with an envelope. He apparently asked no questions concerning the money and was told nothing. It is to be noted that Peterson was known at the bank, and that all that was necessary to enable Hale to cash the check was Peterson's introduction. Why he should have planned to have Bailey and Davenport present when the check was cashed, if he and Hale intended to steal the money is not explained, and is difficult to understand. According to Davenport Bailey had reported that they wished to get some money to repay what they had borrowed, but the money was already in the church bank account and it does not appear that this matter was mentioned when they met at the bank. There is little doubt that Hale kept a substantial part of the money. He did not accept delivery of his new car until after he had received either $600 or $300 from Davenport; he did not explain where the $2,000 came from which he paid on his purchase of a house, except for $950 in bonds which his wife gave him, and he did not call his wife as a witness or furnish any corroborative evidence that they possessed any bonds. The questions constantly recur why, if the defendant, Peterson, intended to steal the money, would he have called in witnesses to the cashing of the check and why, if defendants intended to divide the money would they have done it before witnesses whose presence Peterson had arranged for? Hale testified that he had never demanded or expected to receive $5,000 or any other sum, that he handed the check back to Peterson in the escrow office, that Peterson had it at the bank and arranged for Hale to cash it, claiming that they were intending to repay money they had borrowed and that their financial secretary was out of the city for several days. He admitted having carried a gun but denied Peterson's testimony that he placed it on the seat of his car by the money as he drove away. His testimony that he gave the money to Peterson was disbelieved by the jury. There were improbabilities in each defendant's story. Judged by ordinary business practices, the entire transaction was irregular and illogical. Hale's account of the reasons for cashing the check was disproved. The jury believed that there was some arrangement for him to receive two thousand dollars or more. The device of having money paid to him directly would appear to have originated with him. The Zion Hill church was spending some $5,000 in improvements on the new building, Hale was its business manager with authority to arrange terms of the sale. It seems more probable that he asked that $5,000 be placed with him in his official capacity to be spent on the church than that Peterson invented this excuse for getting money into the hands of Hale.

The conclusions we reach from this analysis of the evidence are that there was sufficient evidence to establish the guilt of each defendant; that as to Hale the evidence is strong and satisfactory, but that as to Peterson it is much weaker.

The remarks of the court, doubtless through inadvertence, classed the statements of the district attorney as a summation of the evidence and inferences to be drawn therefrom, and therefore legitimate argument. We are bound to assume that the jury believed that the grand jury, acting in its official capacity, had made a determination that both defendants were guilty and that the indictment of both defendants was evidence of that fact. The logical effect of the statements and rulings was to authorize, if not to direct, the jury to take into consideration, in weighing the evidence of guilt, the assumed fact that the grand jury had already found the defendants guilty. Furthermore, the statement of the district attorney that he did not know upon what theory that conclusion had been reached was a suggestion that there may have been evidence before the grand jury which furnished a theory of guilt not deducible from the evidence of the trial.

[2] We conclude that the verdict against Peterson probably resulted from the improper statements of the district attorney and the court's rulings thereon, but that this is not true of the verdict against defendant Hale.

The order denying the motion of defendant Peterson for a new trial is reversed;

the order denying the motion for new trial of defendant Hale is affirmed. The attempted appeals from the judgments are dismissed.

WOOD, J., and VALLEE, Justice pro tem., concur.

82 Cal.App.2d 789

BANKS et al. v. CALSTAR PETROLEUM CO.

Civ. 15961.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1947.

1. Mines and minerals 🔑78(7)

Evidence justified judgment terminating oil and gas lease because of abandonment, where lessee had discontinued operations for more than three years in violation of lease requiring operation of well or drilling of additional wells and had placed cement plugs into well and pulled all tubing from the well so that production of any oil from well became impossible, notwithstanding lessee asserted that it intended to drill additional wells on premises if wells were drilled on adjoining property that produced oil in paying quantities.

2. Mines and minerals 🔑77

Abandonment may be more readily found in cases of oil and gas leases than in other instances.

3. Mines and minerals 🔑77, 78(7)

Abandonment of oil and gas lease, whether it be a complete abandonment or a cessation of operations with intent of never resuming, is a question of intent and may be proved by acts and conduct of party who is alleged to have abandoned property in controversy.

4. Mines and minerals 🔑77

Although nonuser alone without intention of abandonment of oil and gas lease does not constitute "abandonment", nonuser coupled with acts manifestly indicating an intention of lessee to effect a complete abandonment would constitute abandonment.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

5. Mines and minerals 🔑78(1)

Rights granted under oil and gas leases are bestowed for purpose of having property explored and developed to the end that lessor will obtain a financial return from his property, and lessee will not be permitted to fail in development of property and to hold lease for speculative or other purposes unless such holding is in strict compliance with contract and for a valuable and sufficient consideration other than such development.

6. Mines and minerals 🔑78(2)

While forfeitures are not ordinarily favored by chancery court there is an exception when it is against equity to permit a lessee under oil and gas lease to hold possession of property indefinitely without performing any of the duties required of him by his contract.

7. Judgment 🔑91

Where lessee did all that could possibly be done to indicate its abandonment of oil and gas lease and its intention to abandon, and lessee consented to a judgment terminating the lease lessee waived provision in lease requiring arbitration.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mark L. Banks and others against Calstar Petroleum Company, a corporation, to quiet title to real property and for other relief. From an adverse judgment, the defendant appeals.

Affirmed.

Edmund F. Barker, of Montebello, for appellant.

Olive E. Boswell and Martin J. Weil, both of Los Angeles, for respondents.

WILSON, Justice.

This is an action to quiet title to real property and to declare terminated an oil and gas lease alleged to have been forfeited by reason of the abandonment in 1944 of the oil well drilled on the property and the failure of the lessee to do further exploration work. From a judgment for plaintiffs defendant has appealed.

The material facts necessary to a consideration of the appeal as found by the court and substantiated by the evidence are as follows: The lease was executed on May 12, 1938; in August, 1939, a well was drilled to a depth of 7651 feet, which had an initial daily production of 1400 barrels of 36 gravity oil. In October, 1941, appellant discontinued producing oil, gas and other hydrocarbon substances from the well and has produced none since that time for the reason that in the opinion of appellant production from the well did not render it economically feasible to continue further operations, and since that date appellant has not operated, deepened or redrilled the well. In January, 1944, appellant pulled the casing and plugged the well with cement. In April, 1945, respondents notified appellant that it was in default in its operations under the lease and that the lease would be terminated and forfeited unless within 90 days thereafter operations were commenced for the drilling of a new well or for the redrilling or deepening of the well theretofore drilled on the premises. Appellant failed to do any work on the property and in August, 1945, respondents gave notice to appellant of their election to terminate the lease and demanded a quitclaim deed to the property.

[1] 1. *The lease was abandoned.* The failure of appellant to perform any work on the premises between October, 1941, when the operation of the well ceased, and January, 1944, was in violation of the terms of the lease requiring the operation of the well or the drilling of an additional well.

Appellant's intention to abandon the lease was indicated by a notice given by it on January 15, 1944, to the Division of Oil and Gas of the State of California of its intention to abandon the well. On January 20 the Division of Oil and Gas approved appellant's plan for abandonment. In a report filed with the Division dated February 10, 1944, appellant stated that in January, 1944, all tubing had been pulled from the well; a cement plug had been placed at 7372 feet; 7 inch casing had been shot at 1870 feet; all casing from 1794 feet to the surface had been pulled; a cement plug had been placed in the well between a depth of 709 and 734 feet, and a third plug had been placed in the 13⅜ inch casing at the surface. These acts made it impossible to produce any oil from the well. The report of abandonment was approved by the Division of Oil and Gas, whereupon appellant removed the tanks and pumping equipment that had been used by it in the operation of the well.

[2-4] An abandonment may be more readily found in cases of oil and gas leases than in most other instances. Hall v. Augur, 82 Cal.App. 594, 599, 256 P. 232. Abandonment, whether it be a complete abandonment or a cessation of operations with the intent of never resuming, is a question of intent and may be proved by the acts and conduct of the party who is alleged to have abandoned the property in controversy. Thornton v. Phelan, 65 Cal.App. 480, 483, 224 P. 259; Rea v. Glenn, 133 Cal.App. 82, 87, 24 P.2d 204. Although nonuser alone without any intention of abandonment does not constitute an abandonment, nonuser coupled with acts such as have been described above manifestly indicate the intention of the lessee to effect a complete abandonment.

[5] The rights granted under such leases as the one involved in this action are bestowed for the purpose of having the property explored and developed to the end that the lessor will obtain a financial return from his property. A lessee will not be permitted to fail in the development of the property and to hold the lease for speculative or other purposes unless such holding is in strict compliance with his contract and for a valuable and sufficient consideration other than such development. Hall v. Augur, supra; Rehart v. Klossner, 48 Cal.App.2d 40, 45, 119 P.2d 145.

[6] While forfeitures are not ordinarily favored by courts of chancery there is an exception when it is against equity to permit a lessee to hold possession of property indefinitely without performing any of the duties required of him by his contract.

Appellant asserts that it was its intention to drill additional wells on the premises if wells were drilled on adjoining property that produced oil in paying quantities. Such a self-serving declaration is insufficient to permit a lessee to hold a lease for an indefinite period with no further exploration on the property and without paying any consideration. Sauder v. Mid-Continent Pet. Corp., 292 U.S. 272, 280, 54 S.Ct. 671, 78 L.Ed. 1255, 1259, 93 A.L.R. 454. It is more like an afterthought than an intent seriously entertained at the time of the plugging of the well and the removal of the equipment from the property.

[7] 2. *Arbitration is not a condition precedent to an action to terminate the lease.* The lease contained the following provision: "In the event of any controversy between the parties as to any matters of fact arising under this lease, such question of fact shall be submitted to arbitration, and the decision of the arbitrators thereon shall be a condition precedent to the right of action on the lease itself."

Appellant contends that two questions of fact arose which required arbitration under the quoted provision of the lease, to wit: What acts were done or not done by appellant which would evidence an abandonment of the lease, and what damages did respondents sustain by reason of the failure of the lessee to execute a quitclaim deed? Fourteen months before respondents gave notice of default appellant had done all that could possibly be done to indicate its abandonment of the lease and its intention to abandon. Its failure to produce oil, its failure to drill the well to a deeper oil sand, its notice to the Division of Oil and Gas of its intention to abandon, and its plugging the well so as to make it unuseable constituted a complete abandonment, thus removing that question from any possibility of arbitration.

Moreover, at the trial of the action appellant relinquished any claim that it might have had to arbitration of the question of damages alleged to have been suffered by respondents by reason of appellant's occupancy of the property, and practically gave its consent to a judgment of abandonment and for damages. At the conclusion of the trial the court announced its intention to render judgment annulling the lease and for the sum of $2500 damages, representing the cost of removing the drilling material from the property and restoring the premises to the condition they were in at the time appellant took possession. Thereupon counsel for appellant stated "I have one suggestion * * * I understood that plaintiffs are more interested in having the equipment removed from the property. I would make the suggestion * * * that perhaps we should allow the defendant a limited period of time in which to haul it off the lease," meaning the equipment and debris then remaining on the property. The court inquired how much time the defendant would require, to which its attorney responded "About 35 days."

The court directed counsel for plaintiffs to prepare findings and judgment and the latter's attorney stated: "My understanding is the form the judgment for damages will take is they will pay $2500 unless the property—unless the equipment is removed from the property and the condition restored to the condition it was in prior to the execution of the lease, prior to the 9th of November." To this statement appellant's counsel made no response.

It is stated in respondents' brief and not questioned by appellant that pursuant to the suggestions made by counsel at the close of the trial appellant removed the derrick and other equipment that had been placed by it upon the premises but failed to restore the property to the condition in which it had been prior to appellant's possession. That appellant did remove the equipment, as stated in the brief, is made evident by the fact that although the court announced its intention to render judgment for $2500 damages, the findings and conclusions as signed were to the effect that respondents were entitled to judgment for $425 and judgment was rendered for that amount. By its conduct appellant waived arbitration and consented to a judgment that rendered arbitration unnecessary.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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82 Cal.App.2d 901

ALSPACH v. LANDRUM.

Civ. 16123.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1947.

1. Quieting title ⇨10(1)

Plaintiff in action to quiet title must depend on strength of his own title and not on weakness of defendant's title.

2. Quieting title ⇨44(3)

In absence of evidence of either possession by plaintiff or his predecessors of realty involved in action to quiet title, or a deed to plaintiff from one under whom defendant claims, duly signed, acknowledged, and recorded, together with proof that plaintiff purchased and paid for realty, or a sheriff's deed under foreclosure of a mortgage, and evidence of possession under deed, plaintiff must introduce evidence of a patent from the government and mesne transfers to himself, or of a certificate of purchase from a governmental authority in order to establish a prima facie case.

3. Quieting title ⇨44(3)

In action to quiet title, evidence was insufficient to make out even a prima facie case in plaintiff's favor.

4. Taxation ⇨764(2)

Tax collector's deed was not rendered void on ground of uncertainty because of inclusion therein of phrase "Ex of Mining Right", since it was clear that deed conveyed state's interest in and to the realty with the exception of mining rights.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex".

5. Appeal and error ⇨916(1)

Where a trial court does not formally grant permission to file a cross-complaint which brings in new parties, its action in overruling a demurrer thereto or a motion to strike on ground that a new party has been introduced without permission of the court will, on appeal, be considered as evidence that trial court considered pleading to be on file with its consent.

6. Appeal and error ⇨916(1)

Where trial court did not make a formal order granting defendant permission to bring a new party into the action when he filed his cross-complaint, but, when case was called for trial, plaintiff objected to cross-complaint on ground that it did not state a cause of action against plaintiff, and objection was overruled, District Court of Appeal considered that cross-complaint was filed with trial court's permission.

Appeal from Superior Court of Los Angeles County; Stanley Mosk, Judge.

Action to quiet title to realty G. D. Alspach against Mori B. Landrum, wherein defendant filed a cross-complaint. From a decree in favor of the defendant, the plaintiff appeals.

Decree affirmed.

Oscar S. Elvrum, of Los Angeles, for appellant.

Harold E. Prudhon, of Los Angeles, for respondent.

McCOMB, Justice.

From a decree in favor of defendant and cross-complainant, hereinafter referred to as defendant, and against plaintiff and cross-defendant, hereinafter referred to as plaintiff, in an action to quiet title to real property, plaintiff appeals.

These are the essential facts:

Plaintiff filed an action to quiet title to 115 acres of land described in the tax collector's deed mentioned below. Defendant filed an answer and a cross-complaint seeking to quiet title in himself to the same property.

At the time of the trial plaintiff offered, in support of his title, the following documents: (1) A deed of mineral rights in the property from Robert F. O'Brien to Southern Trust Company, a corporation; (2) a quit-claim deed from the Security-First National Bank of Los Angeles, as successor to Southern Trust Company, to Mr. Alspach of the mineral rights in the property; (3) a quitclaim deed dated October 24, 1945, to the property executed by Lucile A. Whipple to Mr. Alspach; and (4) a tax receipt from the tax collector of Los Angeles county showing the property in question and other property assessed to Mr. Alspach in the year 1946.

On behalf of defendant there was received in evidence: (1) A stipulation that in the year 1938 the property described in the cross-complaint was deeded to the state of California for taxes; (2) a deed dated April 15, 1941, executed by H. L. Byram, tax collector, county of Los Angeles, state of California, to Mr. Landrum, describing the property in question.

There are three questions presented for our determination:

First: *Did plaintiff introduce evidence which would have sustained a finding that the title to the property in question was vested in him?*

[1, 2] This question must be answered in the negative, and is governed by these pertinent rules of law:

(1) Plaintiff in a quiet title action must depend on the strength of his own title and not on the weakness of that of defendant. Thus if he fails to prove title in himself he is not entitled to recover. (Swann v. Carson, 56 Cal.App.2d 502, 504, 132 P.2d 863.)

(2) In the absence of evidence of either (a) possession by plaintiff or his predecessors of the property in dispute, (b) a deed to plaintiff from the person under whom his adversary claims, duly signed, acknowledged and recorded, together with proof that plaintiff purchased and paid for the property, or (c) a sheriff's deed under a foreclosure of a mortgage, and evidence of possession under the deed, it is necessary for plaintiff, in order to show ownership, to introduce evidence of a patent from the government and mesne transfers to himself, or of a certificate of purchase from a governmental authority in order to establish a prima facie case. (See 22 Cal.Jur., 1925, p. 178, sec. 49, notes 4, 5, 6, and 7.)

[3] Applying the foregoing rules to the facts in the instant case it is apparent that plaintiff's evidence failed to meet any of the requirements of any of the foregoing rules. Hence he failed to introduce evidence to make out even a prima facie case in his favor, and the trial court properly gave judgment against him on his complaint.

Second: *Was there any uncertainty or ambiguity in the tax collector's deed to defendant which described the property in question as situated in the county of Los Angeles, state of California, to wit, "115 Acs N ½ of NW ¼ and N ½ of SE ¼ of NW ¼ and E 15 Acs of S ½ of SE ¼ of NW ¼ (Ex of Mining Right) of Sec. 15 T 8 N. R. 15 W."?*

[4] Plaintiff's contention that the description is made uncertain because of the inclusion therein of the phrase "(Ex of Mining Right)" is without merit. It is clear that the deed conveyed the state's interest in and to the described property with the exception of the mining rights. Therefore there was neither a latent nor a patent ambiguity in the description in the deed.

Third: *Was defendant's cross-complaint properly before the court in view of the fact that the trial court did not make a formal order granting defendant permission to bring a new party into the action when he filed his cross-complaint?*

This question must be answered in the affirmative. When the case was called for trial plaintiff objected to the cross-complaint on the ground that it did not state a cause of action against plaintiff. This objection was overruled by the trial court.

[5] Where a trial court does not formally grant permission to file a cross-complaint which brings in new parties, its action in overruling a demurrer thereto or a motion to strike upon the grounds that a new party has been introduced without

permission of the court will, on appeal, be considered as evidence that the trial court considered the pleading to be on file with its consent. (Syvertson v. Butler, 3 Cal. App. 345, 347, 85 P. 164.)

[6] The action of the trial court in overrulinng plaintiff's objection to the cross-complaint in the instant case clearly falls within the purview of the aforesaid rule, and we consider the cross-complaint which brought in a new party as having been filed with the permission of the trial court.

The decree is affirmed.

MOORE, P. J., and WILSON, J., concur.

82 Cal.App.2d 723

DICKEY v. THORNBURGH et al.

Civ. 3472.

District Court of Appeal, Fourth District, California.

Dec. 4, 1947.

Rehearing Denied Dec. 22, 1947.

Hearing Denied Jan. 29, 1948.

1. Collision 🔑149

In action for death of plaintiff's son in motorboat collision at night, evidence was insufficient to require giving of instruction on last clear chance doctrine.

2. Counties 🔑55

The use of the words "and/or" in county ordinance was improper.

3. Counties 🔑55

County ordinance, making it unlawful for any person to operate a motor propelled boat in excess of 12 miles an hour between 5 p.m. and 10 a.m. "and/or" within 250 feet of any boat not propelled by motor or any boat not in motion, was not unconstitutional on ground that it was confusing and ambiguous.

4. Appeal and error 🔑243

Where county ordinance was received in evidence without objection, and plaintiff was relying on provisions of ordinance to assist him in establishing defendant's negligence, plaintiff could not complain on appeal because the ordinance was embodied in an instruction.

5. Trial 🔑228(3)

Repetitious use by court in instructions of the phrases "contributory negligence", "the mere happening of the accident is not negligence", and "then you must find for defendants", was not error on ground that jury gained impression that judge expected jury to find contributory negligence of plaintiff, where court instructed that no emphasis was intended by judge in instructing with respect to one rule in varying ways.

6. Appeal and error 🔑1064(1)
Trial 🔑109

Instruction that the law required of defendant that degree of care which a boy of the same age, "to wit 15 years", would use under the similar circumstances, was not prejudicially erroneous, though defendant was 16 years old at time of accident, where plaintiff inferentially alleged that defendant was 15 years old, and plaintiff's counsel stated in opening statement and in colloquy with court that defendant was 15 years old. Const. art 6, § 4½.

Appeal from Superior Court, San Bernardino County; Atwell Westwick, Judge Assigned.

Action by C. D. Dickey, Jr., against Laselle Thornburgh and others to recover for the death of plaintiff's son in a motorboat collision. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Forrest A. Betts and William J. Currer, Jr., both of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondents.

GRIFFIN, Justice.

Action for damages for claimed wrongful act resulting in death. Decedent, Jack Dickey, aged 20, son of plaintiff C. D. Dickey, Jr., had been working for the Lake Arrowhead Yacht Club. On September 5, 1942, plaintiff was a regular member of the club and owned a Criss-craft 100 horsepower 19 foot motorboat named "Doc." Defendant, Laselle Thornburgh, husband of defendant Emily Thornburgh, was also a member thereof and owned a similar 125 horsepower Criss-craft motorboat named the "Lazy M," and both he and plaintiff were permittees and authorized to drive said boats on Arrowhead Lake.

About 9 p. m., after dark, on September 5, 1942, plaintiff's motorboat was being operated by his son Jack, in a general northwesterly direction from the boat landing toward the northerly shore of the lake. At a certain described point the motorboat of defendants, operated by defendant Richard Thornburgh, son of Laselle Thornburgh, aged 16, approached the motorboat of plaintiff. The two motorboats collided. As a result of this plaintiff's boat sank to the bottom of the lake. Jack Dickey received fatal injuries and his body was subsequently found in the lake. The Thornburgh boat likewise sank to the bottom. One of the passengers was killed but the remaining passengers were rescued before drowning. This action followed.

Plaintiff claimed negligence of defendant Richard Thornburgh, the one remaining defendant in the case, who denied the allegations in the complaint and claimed contributory negligence on the part of plaintiff and also on the part of the deceased, Jack Dickey. The jury found for defendant. This appeal followed.

Plaintiff first claims error of the trial court in failing to instruct the jury on the doctrine of "last clear chance". To determine this question it will be necessary to relate a résumé of the evidence bearing on that issue.

The deposition of Robert McIntosh, aged 17, was read into evidence. He was the only passenger riding with the deceased, Jack Dickey. He testified that Jack and he left the boat dock at the village yacht harbor shortly before 9 p.m.; that Jack turned on all the lights on the boat; that a partitioned bow light (green to starboard and red to port) with a white stern light located on the upper end of an 18-inch masthead or flag pole inserted in a socket were on the boat at the time and were lighted; that the evening was "very dark" and no moon was shining; that the lake was comparatively calm; that they swung the boat around and "proceeded" to go in a "direction towards the north shore"; that as they pulled out of the dock he, Robert, put his feet up under the light on the dashboard and remarked "that the shoe shine boy had given me an excellent shine"; that he did not observe whether Jack was looking at his shoes or not; that he, Robert, was looking for other boat drivers on the lake but did not see any; that his speedboat was then planing and going about 32 miles per hour; that Jack was sitting down driving and looking through the windshield; that about one and one half minutes later they changed their course from north to east on account of clearing rocks at Movie Point; that they then changed their course again and started to go west; that he did not "see the Thornburgh boat prior to the accident at all" and "the next thing I remember I woke up * * * in the water about 250 feet from shore"; that as he was swimming around he could not see who the people were but he recognized Dick Thornburgh's voice and they asked each other "what had happened and how it happened and neither of us could explain it."

Plaintiff was out of the state and did not testify at the trial. Three living guests in the Thornburgh boat gave their depositions in an action instituted by one of them against Thornburgh. These depositions were read into evidence in this case, by stipulation.

William Slaby, aged 19, riding in the Thornburgh boat, testified that his party of four was invited to ride with Richard Thornburgh to the village; that about 100 yards from shore Richard started driving about 40 miles per hour "in circles and in a zig zag course back and forth across the lake * * * to give everyone a thrill"; that it was "very dark"; that they heard a man's voice cry out; that "there was not very much to see only I thought I could see this boat almost directly in front and to our right * * * it couldn't have been very far, and then there was a collision"; that there didn't "seem to be any change in the speed, maneuvering and course of the (Thornburgh) boat from the time he heard the outcry until the impact * * * there was not any time for change in speed"; that Thornburgh said at one time that he "couldn't see very good when he was driving"; that he didn't know whether it was darkness or spray from the boat on the windshield but that Richard stood up for a while while driving the boat; that they were cruising about 200 yards from the shore of the lake at the time of the collision.

The depositions of other passengers corroborated the testimony related by this witness. One witness testified that she was riding in the front seat and saw the lights on plaintiff's boat "about 18 to 20 feet before they hit it"; that at that time one passenger cried out to Richard: "Oh, my God"; that Richard was looking out his side of the boat; that as she remembered it they were making a left turn at the time and they collided "kind of at an angle."

Considerable evidence was given by other witnesses as to the condition of the two boats after being removed from the bottom of the lake. Pictures were in evidence showing the damage and their condition. Opinions were given as to the possible position of the boats at the time of the collision. Also, the throttles of both boats were found in a nearly wide open position when recovered from the 115 foot depth of water. The rear light mast on Thornburgh's boat was found in the bottom of his boat. The rudders on both boats were found turned "hard to the right." The Dickey boat, from the pictures, appeared to be cut from its left side about at the driver's seat to its bow, by the cutting portion or the bow and right front portion of the Thornburgh boat.

Richard Thornburgh testified generally that it was a "very dark night"; that he was driving his guests in the boat around the lake; that he did not "spin" or "zig zag" with the boat, but only turned it in and out "in following around the shore line"; that he was traveling about 30 to 32 miles per hour and "didn't see any boat * * * I kept on my course until just the instant before the collision, I didn't notice, I didn't know where it came from but it was there, a boat (with lights), not quite the distance to the end of the room—somewhere near 20 feet—and my first reaction was to turn the wheel as fast as I could and I did. I turned the wheel, but it didn't have enough time, and we collided—it was almost head-on—it was going toward the northwest * * * and I was going southeast"; that there were shore lights of the same color burning; that the lights on his boat were burning too; that he "wouldn't say which one," the red or green light on the Dickey boat, was more visible to him when he first saw it.

There was received in evidence, without objection, "Rules of the Road" on Lake Arrowhead, prescribed by Lake Arrowhead Yacht Club, and "Boat Regulations on the Waters of Lake Arrowhead, Issued in Conformity of Boat Permits," as well as San Bernardino County Ordinance No. 449. The rules and boat regulations of the lake contained the following provisions:

"A. When power boats are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; in other words, pass to the right in this situation.

"B. Between sundown and sunrise (the hours of darkness) motor boats approaching head on, or nearly so, shall pass red light to red light (that is, on the right); approaching each other from the direction other than head on, that is when the RED LIGHT of the approaching boat is mainly visible, the boats shall pass red to red or to the right of each other; when the GREEN LIGHT is mainly visible they shall pass green to green or to the left of each other.

"C. When two power boats are approaching each other at right angles, or obliquely, so as to involve risk of collision, other than when one boat is overtaking another, the power boat which has the other on her port side shall hold her course and speed; the power boat which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other boat, or if necessary to do so, slacken her speed or stop or reverse. In other words, unless otherwise specified, the boat approaching from the right has the right of way."

Rule 9 thereof prescribed that "A strip surrounding the lake bounded by a line 300 feet out from shore shall constitute a safety zone inside of which the maximum speed at all times shall be limited to 10 miles per hour. * * * A speeding fairway is established outside the 300 foot line * * * within which area the speed limit of all craft shall be governed by the common rules of safety and consideration for lives and comfort of all other traffic but not to exceed 20 miles per hour * * *."

The County ordinance, in effect at that time, provided, in section 2 thereof:

"It shall be unlawful for any person * * * within the County of San Bernardino * * * outside of municipal corporations to operate a motor propelled boat in excess of twelve miles per hour between the hours of five o'clock p. m. to ten o'clock a. m. and/or within two hundred and fifty (250) feet of any boat not propelled by motor or any boat not in motion.

"Section 3. This ordinance is hereby declared to be an emergency measure for the reason that it is necessary for the immediate preservation of the public peace, health and safety; for the reasons that the peace of the citizens of the County of San Bernardino is being disturbed daily by the use of unmuffled motor boats and that the safety and peace of persons using the lakes of said county are daily endangered by the operation of motor boats at a fast rate of speed near boats not in motion."

[1] It is argued that plaintiff was entitled to have the jury instructed on his theory of the case and that the refusal of the trial court to give the proffered instruction on the doctrine of last clear chance was error because the evidence showed that deceased, Jack Dickey, by his own negligence, placed himself in a position of danger; that he was unaware of the impending danger and that defendant had actual knowledge of plaintiff's perilous situation and had a clear opportunity to avoid the accident by the exercise of ordinary care but did not do so, citing such cases as Girdner v. Union Oil Co., 216 Cal. 197, 203, 13 P.2d 915, and cases therein correlated.

It seems clear to us, in view of the evidence presented, that the trial court was fully justified in refusing to give such an instruction. The evidence is most convincing that it was a "dark" or "very dark" night; that there was no substantial evidence that defendant had actual knowledge of the perilous situation of deceased prior to the time he was within 18 to 20 feet of plaintiff's boat, or that after acquiring such knowledge he had a clear opportunity to avoid the accident and could have done so by the exercise of ordinary care. In fact, all the substantial evidence points to the opposite conclusion. The facts in the instant case are clearly distinguishable from the facts in the cases cited by defendant and bring them well within the rule laid down in Bramble v. McEwan, 40 Cal.App.2d 400, 412, 104 P.2d 1054; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; and Jones v. Yuma Motor F. Terminal Co., 45 Cal.App.2d 497, 114 P.2d 438; Ravettino v. City of San Diego, 70 Cal.App.2d 37, 160 P.2d 52; Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595. The next complaint is directed toward an instruction, given by the court, to the effect that a violation of an ordinance is negligence per se, and that if the jury found from a preponderance of the evidence that plaintiff's son violated the county ordinance in evidence in "traveling in excess of the speed limit therein set out under the conditions therein prescribed" he would be negligent as a matter of law, and that if the collision was proximately caused "by a violation of the ordinance on the part of plaintiff's son and Richard Thornburgh with respect to speed then plaintiff cannot recover damages." Following this another instruction was given as follows:

"Conduct which is in violation of a county ordinance such as has been introduced in evidence constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence * * *.

"However, in this action, a violation of law is of no consequence unless it was a proximate cause of or contributed in some degree as a proximate cause, to the accident and death complained of."

This instruction was followed by a proper and more specific instruction, requested by both plaintiff and defendant, on the subject of negligence, contributory negligence, proximate cause and burden of proof. As modified, the court instructed the jury, at plaintiff's request, that the issues were

"First: Was the defendant Richard Thornburgh negligent? If you answer that question in the negative, you will return a verdict for the defendant Richard Thornburgh. If you answer it in the affirmative, you have a second issue to determine, namely: Was the negligence of Richard Thornburgh a proximate cause of the death of Jack Reeves Dickey and of damages, if any, to the plaintiff, C. D. Dickey, Jr.? If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then must find on a third question: Was the plaintiff C. D. Dickey himself negligent, as alleged in the complaint, or was Jack Reeves Dickey negligent as alleged? If, after having found in plaintiff's favor on the other two issues you also find that neither C. D. Dickey, Jr. nor Jack Reeves Dickey was negligent, you must then fix the amount of plaintiff's damages and return a verdict in his favor. If, however, you find that either plaintiff was negligent or that Jack Reeves Dickey was negligent, as alleged, then you must determine a fourth issue, namely: Did such negligence on the part of either C. D. Dickey. Jr. or Jack Reeves Dickey contribute in any degree as a proximate cause of the accident? If you find that negligence on the part of C. D. Dickey, Jr. or on the part of Jack Reeves Dickey, as alleged, contributed in any degree as a proximate cause of the accident, your verdict must be for defendant, but if you find that it did not, and you previously have found that there was negligence on defendant's part which proximately caused plaintiff's injury, you must then fix the amount of plaintiff's damages and return a verdict in his favor."

[2-4] In this connection it is argued by plaintiff that the instruction adopting the ordinance by reference is confusing and ambiguous because one section of the ordinance uses the words "and/or," which expression has been condemned by our Supreme Court in In re Bell 19 Cal.2d 488, 122 P.2d 22. We concur in the conclusion there reached. The ordinance here involved is subject to criticism, but it here appears that in neither event was the ordinance unconstitutional or invalid, i. e., operating a motor-propelled boat in excess of 12 miles per hour between 5 p. m. and 9 a. m., or within 250 feet of any boat not propelled by motor, or any boat not in action. A breach of any one of those provisions would constitute a violation of law. The court interpreted the ordinance as applicable to the conduct of both plaintiff's son and Richard Thornburgh, and that if there was a violation of the ordinance introduced in evidence it would be negligence per se. The question whether the ordinance had been violated "under the conditions therein prescribed" was left to the jury to determine. The ordinance was received in evidence without objection. Apparently plaintiff was relying upon its provisions to assist him in establishing negligence of the defendant. In this connection plaintiff alleged in his complaint that the Thornburgh boat was being operated in a careless manner and in violation of the rules of navigation applicable to said waters. We do not see how plaintiff may now complain about the instruction, as given. Holahan v. McGrew, 111 Cal.App. 430, 295 P. 1054.

[5] Complaint is next made by plaintiff that the court emphasized, by reiterating and repeating, to his prejudice, instructions in reference to "contributory negligence," and the repetitious use of the words "The mere happening of the accident is not negligence," and "then you must find for defendants."

Counsel refers to these several instructions merely by setting forth in his brief the number of such instructions involving these passages. Suffice to say in this respect that an examination of the reporter's transcript discloses that many of the instructions on the subject were offered by plaintiff and were given by the court. Others were offered by defendant. The trial court gave some instructions on the subject to clearly present the issues to the jury. Our examination of the instructions given would not make them subject to the interpretation placed thereon by counsel for plaintiff, i. e., that by repeating the general proposition in the several instructions as given that the jury gained the impression that the judge "expected" it to find contributory negligence on the part of plaintiff. In fact, the trial judge gave, at plaintiff's request, an instruction that "If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others but you are to consider all of the instructions as a whole and regard each in the light of all of the others."

Error is claimed in giving an instruction that:

"In weighing the conduct of * * * Thornburgh to decide whether or not he was negligent, you must bear in mind that the law required of Richard Thornburgh that degree of care which a boy of the same age, *to wit fifteen years,* would use under the same or similar circumstances, in the exercise of ordinary care. In weighing the conduct of the deceased, Jack Dickey, the plaintiff's son, the law required of him that degree of care that a boy of the age of twenty years would exercise under the same or similar circumstances."

[6] Richard Thornburgh testified that he was 16 years of age at the time of the accident. If the instruction was limited to a boy of 15 years of age, to that extent it would be erroneous and not a proper measure of conduct of a boy of the age of 16 years. It appears that *plaintiff* may have led the court into that error. In his complaint he inferentially alleges that Richard was of the age of *15 years* or younger at the time of the accident. In his opening statement to the jury counsel for plaintiff stated: "I might say here it is my understanding * * * Richard, at the time of the accident was about *15 years of age.*" He again referred to Richard as being *15 years of age* or younger in a colloquy with the court in the presence of the jury, after which the court read the charge in the complaint as above mentioned. The record itself discloses that Richard did testify that he was then (at the time of trial) 18 years of age, but did testify that he was 16 at the time of the accident. However, on cross-examination by counsel for plaintiff, he testified that he had been going up to the lake from the time he was 11 years old until he was approximately 15. The exact date of birth of Richard was not brought out in the record. If his age was 16 years at the time, the instruction nevertheless covered the situation. It required him to use that degree of care "which a boy of the same age * * * would use." We do not believe that by the use of the added words, "to wit fifteen years", the jury was misled as to the degree of care required, or that the plaintiff can, under the circumstances, claim prejudicial error in this respect.

We have examined the entire record, including the instructions given and refused and find no error that would not be cured by the application of Article VI, section 4½ of the Constitution.

Judgment affirmed.

BARNARD, P. J., and MARKS J., concur.

31 Cal.2d 104

ALLEN et al. v. CALIFORNIA WATER & TELEPHONE CO. et al. (CITY OF CORONADO, Intervener).

L. A. 20263.

Supreme Court of California.
Dec. 10, 1947.

1. Waters and water courses 🔑107(3), 152(5)

In action by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, complaint in intervention filed by city as customer of water company, 11 years after commencement of action and 7 years after trial, was not timely because not filed "before trial" within statutory requirement. Code Civ.Proc. § 387.

2. Appeal and error 🔑1201(7), 1210(1)

Modification of judgment by Supreme Court to reserve jurisdiction in trial court to take new evidence on application of any party or successor in interest did not constitute such a reversal of decree as would permit retrial in ordinary sense nor bringing in of additional parties for adjudication of their rights.

3. Waters and water courses 🔑107(3), 152(5)

In action by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, city which became customer of water company after action was commenced should have attempted prior to trial to unite with water company in resisting claims of owners, if it so desired.

4. Parties 🔑42

Generally, right to intervene should be asserted within reasonable time and intervener must not be guilty of unreasonable delay after knowledge of suit.

5. Waters and water courses 🔑107(3), 152(5)

Where action was brought by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, and city which became customer of company after action was commenced was informed of pendency of litigation, issues involved, and progress of suit, city was not justified in delaying until some time after judgment before seeking to intervene regardless of the possible commencement of a dry cycle.

6. Parties 🔑40(2)

The "interest" giving statutory right to intervene in suit between other persons must be in the matter in litigation and of such a direct, rather than consequential, and immediate character that intervener would either gain or lose by direct legal operation and effect of judgment. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

7. Parties 🔑47

An intervener is bound by record of action at time intervention is sought.

8. Waters and water courses 🔑107(3), 152(5)

Where action was brought by owners of lands overlying underground waters of river basin to enjoin water company from transporting underground waters from basin, the "interest" of city which became customer of company after action was commenced was indirect and consequential and was not such an "interest" in supplemental proceedings under jurisdiction reserved after judgment as would give city right to intervene. Code Civ.Proc. § 387.

◆

Appeal from Superior Court, San Diego County; Raymond Thompson, Judge.

Action by Marvin L. Allen and others against the California Water & Telephone Company and others to enjoin water company from transporting underground waters from river basin in which plaintiffs were the owners of overlying lands, wherein the City of Coronado intervened. From order vacating prior order granting leave to intervene and striking complaint in intervention, the City of Coronado appeals.

Affirmed.

J. R. Goodbody, City Atty. (Coronado), and Arthur F. H. Wright, both of San Diego, for appellant.

Charles C. Crouch and Phil D. Swing, both of San Diego, for respondents.

SHENK, Justice.

The city of Coronado, a municipal corporation, appeals from an order vacating a prior order granting it leave to intervene in this action and striking its complaint in intervention from the files.

Section 387 of the Code of Civil Procedure permits intervention "at any time before trial" by "any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." The present action was commenced in 1936, the trial began in 1940, and continued over a five months period. Thereafter various supplemental proceedings and hearings were had, resulting in the entry in December, 1942, of a decree declaring the extent of the paramount rights of the plaintiffs and appearing cross-defendants to water for their respective parcels of land; the extent of defendant's riparian right; and also the extent to which defendant would be entitled to take water from the Tia Juana basin for exportation under its appropriative right.

In December, 1946, the decree was affirmed by this court, with a slight modification. Allen v. California Water & Tel. Co., 29 Cal.2d 466, 176 P.2d 8. The effect of the modification was (1) to permit the defendant to export water under certain conditions; and (2) to reserve to the trial court jurisdiction "over the parties and the subject matter so that on the application of any party hereto, or the successor in interest of any party, it may take new evidence on the amount of water seeping or released from the Rodriguez Dam and the amount of return waters from the Rodriguez Project reaching and crossing the line between Mexico and the United States either in the underground sands or by the surface flow of the Tia Juana River; also on the subject of any change in conditions of water supply in the portion of the Tia Juana Basin in the United States since the date of the judgment; and with the right to make modified or additional findings of fact and conclusions of law, and to modify the decree accordingly."

In March, 1947, eleven years after the commencement of the action and seven years after the trial, the city of Coronado filed its complaint in intervention. Permission so to do was granted by an ex parte order limiting the intervention "to those issues left open by the Supreme Court as between the original parties in said action," and denying to the intervenor "the right to raise de novo questions which have been litigated and decided between the original parties hereto."

The pleading alleges that the city is wholly dependent upon the purchase of water from defendant for its requirement of 1,500,000 gallons a day; that defendant supplies it from three sources, (1) purchase from the San Diego Otay system pursuant to a written contract of 1912, which stipulates that in the event of a water shortage the water will be equitably apportioned among all consumers to the end that defendant shall receive for its consumers, especially the city of Coronado, the same equitable proportion of impounded waters as San Diego receives: (2) Otay Valley wells; (3) such water as defendant shall be allowed to pump from Tia Juana Basin under its permits of 1924 and 1932 and the decision of this court.

The pleading further alleges that pursuant to the decision of this court application has been made to take evidence on the amount of the Mexican waters and on the subject of change of conditions since the date of the judgment; that for more than five years defendant has furnished water to Coronado from its Tia Juana development and that by such development and use there has been a dedication of the Tia Juana waters to Coronado; that Coronado has an interest in the matter in litigation because the major portion of its supply comes from Tia Juana Basin sources and if these are shut off, the only source will be the San Diego Otay system, which is also dedicated to other areas and servitudes; that it is of vital importance to Coronado that any other available water be developed and determined, and for that reason Coronado has an interest in the success of defendant in this action; that since June, 1946, there has been no appreciable run off of waters into the reservoirs comprising the San Diego system and the rainfall has been far below normal and insufficient to replenish the impounded supply.

The prayer of the intervenor is that its rights and the right of other parties to Tia Juana Basin waters be declared; that reasonable regulations be made for the use of such waters, with jurisdiction reserved in the court to modify its orders and decrees as the occasion may demand; and that the intervenor have any other relief deemed meet and right in equity; together with costs.

It may be assumed without discussion, that the court had power in the first instance to permit the filing of the complaint in intervention by an order granted without notice or service as required by Rule XIV of the San Diego superior court. However it appears from a study of the pleading and the record on plaintiffs' motion to vacate that the court properly concluded that the ex parte order should be set aside and correctly struck the complaint in intervention from the files.

[1-3] The complaint in intervention was not timely; it was not filed in the trial court "before trial" as that term is used in section 387. Although the modification of the judgment by this court permits the taking of certain additional evidence and jurisdiction in the trial court is reserved to make modified or additional findings, it does not constitute such a reversal of the decree as would permit a retrial in the ordinary sense nor contemplate the bringing in of additional parties for an adjudication of their rights. The modification expressly limits the reservation of jurisdiction to "the parties and the subject matter so that on the application of any party hereto, or the successor in interest of any party, it may take new evidence * * *." The intervenor is neither a party nor the successor in interest of any party. The fact that the ex parte order purported to limit the intervention to those issues left open between the original parties is of no particular significance. The cause has been tried and has proceeded to final judgment. If the intervenor desired to unite with the defendant in resisting the claims of the plaintiffs (sec. 387, supra), it should have made that attempt prior to the trial in 1940. Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009; Baines v. West Coast Lumber Co., 104 Cal. 1, 37 P.2d 767.

[4, 5] Aside from the statutory limitation upon the time of intervention, it is the general rule that a right to intervene should be asserted within a reasonable time and that the intervenor must not be guilty of an unreasonable delay after knowledge of the suit. Hibernia, etc., Society v. Churchill, 128 Cal. 633, 636, 61 P. 278, 79 Am.St. Rep. 73; Mack v. Eummelen, 31 Cal.App. 506, 160 P. 1096; 20 Cal.Jur. pp. 520-522, sec. 25; 39 Am.Jur. pp. 943-945, sec. 71, 72; School Dist. of City of Ferndale v. Royal Oak Tp. School Dist. No. 8, 293 Mich. 1, 291 N.W. 199, 127 A.L.R. 668, 672. The record here (affidavit in support of motion to vacate) shows that at various times between the commencement of the action and the entry of judgment officials of the city of Coronado were informed of the pendency of the litigation, the issues involved, and of the progress of the suit. This information was given in connection with discussions over water rates and as a reason for defendant's inability to reduce the rates in Coronado. The litigation was also given much local publicity. Nevertheless the city delayed action from 1936 until it became alarmed over the scanty rainfall in the 1946-1947 season. The possible commencement of a dry cycle following a cycle of wet years was to be anticipated. Such a contingency would in no way change the status of the intervenor or furnish excuse for the delay in seeking to intervene.

[6] The "interest" mentioned in section 387 which entitles a person to intervene in a suit between other persons must be "in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment" (Elliott v. Superior Court, 168 Cal. 727, 145 P. 101, 105); it must be "direct, and not consequential" (Isaacs v. Jones, 121 Cal. 257, 261, 53 P. 793, 794, 1101). See also Bechtel v. Axelrod, 20 Cal.2d 390, 392, 125 P.2d 836; La Mesa, etc., Irr. Dist. v. Halley, 195 Cal. 739, 235 P. 999; Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co., 111 Cal.App. 707, 296 P. 942; 20 Cal. Jur. p. 520, sec. 25; 39 Am.Jur. p. 935, sec. 61; 30 Calif.L.Rev. 478.

[7, 8] Here the city of Coronado has not such an "interest" in the supplemental

proceedings under reserved jurisdiction as would give it a right to intervene. It has no direct interest or claim to any of the waters involved in the litigation. Although it alleges a dedication to it of Tia Juana waters based on a five year use, the record shows that the present injunction suit was filed against defendant in 1936 before any delivery of water had been made by it to Coronado, and that thereafter pumping and delivery of water was permitted subject to the outcome of the litigation. Defendant is in no position to claim and never has asserted the attachment of a public use. The city of Coronado, one of its customers, cannot claim and in fact has no greater right in the waters than has defendant itself. An intervenor is bound by the record of the action at the time intervention is sought. 20 Cal.Jur. p. 526, sec. 29; McNeil v. Morgan, 157 Cal. 373, 377, 108 P. 69; 39 Am.Jur. p. 950, sec. 79. The city stands in the same position as that of other water users whose needs are served by defendant either partially or wholly from Tia Juana basin sources. Its interest is indirect and consequential. Such an interest may not properly be asserted in the supplemental proceedings. It may not therefore serve as a proper subject for intervention.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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31 Cal.2d 157

In re HALL'S GUARDIANSHIP.

SHEEDY v. HATCH et al.

L. A. 19767.

Supreme Court of California.

Dec. 16, 1947.

1. Insane persons 🔑42(1)

Annual account of incompetent's guardian was not insufficient because it merely listed cash receipts and disbursements during year without any statement of property on hand or report of other facts showing actual condition of ward's estate.

2. Insane persons 🔑64

Under petition by guardian of incompetent mother for monthly allowance alleging among other things that there would be ample income to permit continuance of $800 per month allowance from mother's estate for family expenses as in the past, court was warranted in recognizing guardian as next of kin whom mother would have aided if she had been of sound mind and in approving continuance of monthly allowance as a disbursement of surplus income from mother's estate. Probate Code, §§ 1557, 1558.

3. Insane persons 🔑64

Order authorizing monthly allowance to guardian of incompetent was not void because made ex parte and although order was silent regarding notice, it would be presumed that court had dispensed with notice by guardian as authorized by statute. Probate Code, § 1557.

4. Insane persons 🔑64

The court in the exercise of its discretion under statute may grant allowances from surplus income of incompetent to the incompetent's next of kin, with or without conditions, as the facts warrant, thus permitting recourse to principles of equity responsive to interests of both ward and next of kin. Probate Code, § 1558.

5. Insane persons 🔑42(1)

Award to guardian personally from incompetent mother's estate of $800 per month to meet household and living expenses contemplated that guardian in her accounting for expenditure of trust funds should present evidence that she paid monthly sums to herself but did not require her to account for her use of monthly allowance after receiving it, in absence of court requirement of such detailed report.

6. Insane persons 🔑64

Under award to guardian personally from incompetent mother's estate of $800 monthly to maintain household as in the past, items of expenditure reasonably classifiable as household and living expenses were not proper charges against the estate because included in personal award and award would not permit guardian to maintain and operate household on new and unusual scale. Probate Code, §§ 1557, 1558.

7. Insane persons 🔑61½

Neither a general guardian nor a court has power to dispose of incompetent ward's property by way of gift except where allowances from surplus income of estate are sought as donations for charitable and religious purposes and with object of carrying out presumed wishes of incompetent.

8. Insane persons 🔑61½

"Gifts" by guardian of incompetent in amount of several hundred dollars from estate's funds, to individuals, to charities and to a political organization were improper in absence of prior court authorization and of evidence bringing the "gifts" within limitations governing the propriety of such allowances.

9. Insane persons 🔑42(2)

Where court found that attorneys were entitled to receive a certain sum as reasonable compensation for services rendered guardian and estate of incompetent, and order provided that guardian was authorized and directed to pay the stated sum to attorneys for the services so rendered, order was not void on ground that it ran directly in favor of attorneys and was objectionable as a direct judgment for money in favor of a person not a party to proceeding.

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Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Proceeding in the matter of the guardianship of the person and estate of Frances Clapp Hall, an incompetent person. From an order settling the second annual account of Rosalie G. Sheedy, guardian of the person and estate of Frances Clapp Hall, an incompetent person, Anna Pearson Hatch, objector, and Frances Clapp Hall, an incompetent person, by and through Anna Pearson Hatch, her guardian ad litem, appeal.

Order reversed and matter remanded for further hearing.

Prior opinion, 181 P.2d 118.

Clarence Harden, of San Diego, and Henry F. Walker, of Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

SPENCE, Justice.

This is an appeal from an order settling the guardian's second annual account herein. The disputing parties are daughters of the ward, the guardian being Rosalie G. Sheedy and the objector being Anna Pearson Hatch. Their differing positions as to applicable accounting principles stem in large measure from their divergent views as to the import of a previous order in this proceeding. However, other points of challenge are also urged against the propriety of the order here subject of appeal. In view of the present unsatisfactory state of the record with regard to certain evidentiary essentials, we have concluded that it is necessary for the probate court to undertake a further hearing and redetermination of the matter in the light of the following discussion.

On May 21, 1943, without notice to Mrs. Hatch, Mrs. Sheedy was appointed guardian of the person and estate of their mother, Mrs. Hall, on a petition alleging that the latter "by reason of her age and present physical condition" was "unable unassisted to properly manage and take care of her property," and was "liable to be deceived or imposed upon by artful or designing persons." Mrs. Hall was the beneficiary of a trust in an eastern bank—the principal source of her income. Sometime in 1941 she had gone to live in the San Diego home of her daughter Mrs. Sheedy, the latter's husband and four children. Then in May, 1942—about a year before the guardianship proceeding was begun—Mrs. Hall bought a ranch near Alpine in San Diego County, giving a trust deed for part of the purchase price; and thereafter she and the Sheedy family made their home there together.

On June 22, 1943, Mrs. Sheedy, as guardian, filed a "petition for monthly allowance." She alleged that her mother, Mrs. Hall, had been living "as a member of her household" and "under her care and supervision" for "approximately two years"; that the Alpine ranch had been purchased for the benefit of her mother's health; that petitioner, her family and her mother had lived on the ranch for about a year; that her mother had been receiving an average annual income of $15,000 or more from a trust created by her parents; that since they had been living together, her mother had "contributed approximately $800.00 per month to the household and family expenses of herself" and "petitioner and her family"; that there was "ample income" to "permit the continuance of [such] allowance for the maintenance and family expenses" of "petitioner and her family"; and that there had been and would continue to be "additional expenses in connection with the maintenance and operation of the ranch." The prayer was for the specified monthly allowance for the purposes mentioned and for authority to "continue the maintenance and operation of the ranch as in the past." On the same day the court entered an ex parte order decreeing that "Rosalie G. Sheedy, Guardian of the person and estate of Frances Clapp Hall, an incompetent person, is hereby granted an allowance of $800.00 per month, with which to meet the household and living expenses of said petitioner, her family and her mother, to be used and expended to maintain and conduct the household of said petitioner, with whom said incompetent resides, in the same manner as said household has been conducted in the past, and that said Guardian is hereby relieved from filing a detailed account of the expenditure of said sums." The order "further * * * authorized" the guardian "to continue the operation of the Alpine, California, ranch and to expend such additional sums as may be necessary for that purpose out of the income of the incompetent; provided * * * that the expenditure of said sums * * * shall be more particularly set forth and itemized in the annual accounts of said Guardian herein."

On August 6, 1945, the guardian filed her second annual account. The account showed total receipts of $42,137.19 and total expenses of $40,964.36, with a balance on hand of $1,172.83. The receipts consisted of the following items:

Cash on hand following settlement of the first annual account	$ 512.22
Income from the eastern trust	31,571.83
Income from the ranch	1,877.08
Insurance for fire loss of ranch buildings	1,137.30
Liquidation of eastern assets	3,538.76
Advance by bank for tax and trust deed payments	3,500.00

The listed expenses showed that only $2,000 principal and $31.95 interest had been paid on the $3,500 bank loan, so that an analysis of the account actually discloses a deficit rather than a surplus. Omitting the amount on hand at the beginning of the accounting period in question and disregarding the $3,500 bank loan and the payments thereon, the report discloses—in round figures for convenient reference—that the actual receipts for the year were $38,000, including approximately $1,900 from the ranch, and that the actual expenses claimed were $39,000.

Of this $39,000 disbursement, payments amounting to $9,639 are not questioned. They include $1,075 for cost of administration, $5,773 paid on the trust deed on the ranch, and $2,791 for taxes, $312 of which was paid on the ranch home. A further sum of $7,070 was spent to rebuild the buildings which had burned on the ranch. While no permission to make this expenditure was obtained, this item is not attacked. This leaves some $22,291 which was expended in paying $9,600 as the annual sum due to Mrs. Sheedy, pursuant to the authorized monthly allowance of $800, and $12,691 for operation of the ranch and for incidentals. Mrs. Sheedy testified that each month she withdrew $800 from the ward's funds for deposit in her own bank account. With the approval of the court, she refused to account for her use of said money other than to say that she paid "household expenses" therefrom. According to the account and her testimony, the remaining sum of $12,691, used in large part in operating the ranch, was spent as follows: $3,665 for labor; $2,000 for animals purchased, including three blooded riding horses and a dog; $4,000 for feed and equipment for animals; $800 for gasoline and repairs for four automobiles; $400 for the cost of several automobiles trips taken by the ward, the guardian, the latter's husband and one child; $300 for clothes and ordinary medical expenses for the ward; $230 for individual gifts and group donations; and the balance for various supplies for the ranch and home.

Objections to the account were filed by Mrs. Hatch, the guardian's sister. At the hearing it developed that in operating the ranch the guardian had bought and maintained several riding horses, which were used exclusively by the members of her family other than the ward, who, as a woman seventy-six years old, was described as "too old to ride." It also appeared that a considerable part of the ranch activity was concerned with the production of food for the family. Thus cattle and hogs were bought and fattened, a few for subsequent sale but most for butchering, storage in deep freezers and later use; cows were kept to produce milk and butter; and chickens were bought and raised both for food and to furnish eggs for the family. The court, in its findings and order, disallowed $300 spent on buying and feeding the dog, and decreed that the guardian thereafter should not maintain, at the expense of the estate, "any live stock in excess of two milk cows, two work horses and a reasonable number of chickens in the operation of the Alpine ranch." All other items in the account as rendered were allowed. From this order Mrs. Hatch personally and the ward through Mrs. Hatch, as guardian ad litem, have appealed.

[1] Appellants' points of objection will be considered in their order of presentation on this appeal. The first to be noted is their challenge of the adequacy of the second annual account as filed. They claim that it is legally insufficient because it merely lists cash receipts and disbursements during the year, with no statement of the property on hand or report of other facts showing the actual condition of the ward's estate. But granting that the account was not so complete as might be desirable, the absence of the added detail suggested by appellants does not negative its sufficiency for consideration as a "current" report. In re Estate of Hovland, 38 Cal.App.2d 439, 446, 101 P.2d 500.

[2] Appellants' second and major point of argument concerns the order of June 22, 1943, in authorization of the $800 monthly allowance to respondent and her continued operation of the ranch. As a preliminary proposition, they claim that it is invalid and void because (1) it was made without notice and (2) the court had no authority to include therein provision for the living expenses of the guardian and her family. But such dual attack upon the validity of the order overlooks the power conferred upon the court by section 1558 of the Probate Code. That section expressly declares: "On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would in the judgment of the court, have allowed said next of kin, had said ward been of sound mind. Notice of the hearing of said application shall be given as provided in Section 1557 of this code."

It is quite evident from the language used in respondent's "petition for monthly allowance" and the order made in conformity therewith that a distribution of surplus income was sought and granted as authorized by the above-quoted section. Thus respondent presented to the court these considerations: "the condition of life" to which she and her mother had been accustomed for the past two years as members of the same household; her mother's contribution during that period of "approximately $800.00 per month to the household and family expenses"; and the claim that from the "approximately $15,000.00" or more received "per year" by the mother as a trust beneficiary, there would be "ample income" to permit the continuance of the $800 per month allowance from her mother's estate for "family expenses" as "in the past." In the light of these pertinent circumstances bearing upon such parties' established living and financial arrangements, the court unquestionably was warranted in recognizing respondent as "the next of kin whom the ward would * * * have aided, if said ward had been of sound mind" and in approving the continuance of the monthly allowance as a "disbursement of surplus income" from the estate of respondent's mother and ward. Probate Code, sec. 1558.

[3] Nor is such order vulnerable to the objection that it was made ex parte. This procedural point is governed, as above indicated, by section 1557 of the Probate Code, which provides, in general, for the five days' notice preceding the hearing except that *where "the application is by the guardian, the court or judge may order the notice* to be given for a shorter period or *dispensed with.*" (Emphasis added.) While the order is silent upon the point, it must be presumed that the court "dispensed with" notice by the guardian. The rule is well stated in 15 Cal.Jur. at page 68, sec. 150, as follows: "Where the record is silent as to what was done it will be presumed in favor of the judgment [or order] that what ought to have been done was not only done but rightly done. Even though the existence of a jurisdictional fact be not affirmed on the record, it will be presumed. Service of process or notice or *facts rendering it unnecessary,* and proof of service are presumed where necessary to sustain jurisdiction, unless the record shows the contrary." (Emphasis added.) Frequently cited as early instance of the application of this rule is the case of Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742, and it has been consistently "followed in every decision since having to do with the same question." People v. Smith, 17 Cal.App.2d 468, 475, 62 P.2d 436; see, also, Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 40, 152 P.2d 625; Rico v. Nasser Bros. Realty Co., 58 Cal.App.2d 878, 882, 137 P.2d 861.

[4, 5] Accepting then the validity of the order of June 22, 1943, appellants next raise the question of its interpretation, and particularly the significance of the monthly allowance provision. They argue that such stated allowance to respondent should be regarded as "guardianship funds" so that she should be held chargeable for an accounting as to her proper use of the money. On the other hand, respondent asserts that the monthly allowance was ordered paid to her as "next of kin", that is, daughter, and not as guardian of the ward; that when so paid, these amounts became her absolute property; and that she could not be required to make any account as to what she did with such moneys. In view of these opposing positions by the parties, it becomes necessary to analyze the terms of the order in question and their import in relation to respondent's execution of her trust.

In the exercise of its discretion under authority of section 1558 of the Probate Code, the court may grant allowances from the "surplus income" of the incompetent to the latter's next of kin, with or without conditions, as the facts warrant. Such "statute's endorsement of a policy of flexible procedure, resting in the sound discretion of the court, permits recourse to principles of equity responsive to the interests of both the ward and next of kin." Guardianship of Hudelson, 18 Cal.2d 401, 407, 115 P.2d 805, 809; see, also, annotations 59 A.L.R. 653; 160 A.L.R. 1435. So here the order of June 22, 1943, awarded to respondent personally from her mother's estate "an allowance of $800.00 per month" for a stated purpose—"to meet the household and living expenses of" herself as "petitioner, her family and her mother" so as "to maintain and conduct the household * * * in the same manner as * * * in the past"—but "relieved" her "from filing a detailed account of the expenditure of said sums." Such award contemplated that respondent, as guardian in her accounting for the expenditure of trust funds, should present evidence that she paid the monthly sums to herself as the designated "next of kin" sharing in the "surplus income" of her ward's estate.

But the mere fact that respondent was also the guardian of such estate would not obligate her, any more than another daughter of the ward, to account for her use of the monthly allowance after having received it, in the absence of the court's requirement of such "detailed" report. The dual status of respondent in relation to her mother, because of natural as well as legal considerations, was an immaterial factor insofar as her beneficial standing under the court's order was concerned.

[6] However, the limitations of the order of June 22, 1943, had a definite bearing on the second annual account thereafter submitted by respondent. By virtue of that order, items of expenditure reasonably classifiable as "household and living expenses" of respondent, her family and her mother would not be proper charges against the estate, for the liberal monthly allowance to respondent was expressly made for those purposes and the estate could not be twice charged therefor, unless it was shown that the allowance was insufficient to that extent. Likewise there is the further provision of that order allowing respondent as "Guardian * * * to continue the operation of the Alpine, California, ranch," but "as in the past" consistent with the prayer of her petition. Such authorization would not permit her to extend in any great manner the activities of the ranch, or to maintain and operate it on some new and unusual scale. These all were considerations requiring, as appellants maintain, a careful investigation of respondent's account at the hearing.

The account shows that several hundred dollars expended for clothes, dressmaker bills, beauty shop treatments, and ordinary medical care for the ward were charged as ranch expenses or as incidentals. Yet these items would appear to be a part of the "living expenses" for which the monthly allowance to respondent for maintenance of the joint household was specifically made. Likewise some explanation was due from respondent as to the insufficiency of her monthly allowance which would authorize her charging as ranch expenses sums paid with respect to certain public utility expenses—such as "flamo gas used in main dwelling and caretaker's house"—and live stock purchases and maintenance to furnish food for the use and benefit of the combined household. Similarly, in line with respondent's monthly allowance, it would seem some adjustment should be made so as to allocate to "household and living expensses" some of the expense listed for food, supplies, and lodging in conjunction with the several automobile trips taken by the ward, respondent, the latter's husband and one child. Then the large sums spent for the purchase and maintenance of blooded saddle horses obviously constituted a departure from the way the ranch had previously been run, and were for the personal pleasure of respondent and her family. While at the account hearing the court recognized the impropriety of this unauthorized expansion of ranch activity by restricting such operations in the future, all amounts expended in that connection during the year in question were approved. Other large expenses associated with the operation of the ranch were allowed without any inquiry or evidence as to whether they were reasonable and in accordance with the previous court limitation placed upon respondent in that regard. Then nearly $1,000 in charges for gasoline and other automobile maintenance items, including the regular annual rental of parking space in San Diego, were separately listed as ranch expenses and so approved when the evidence indicates that some portion thereof should have been borne personally by respondent or, at best, included as part of the "household and living expenses" of the joint family as contemplated by respondent's monthly allowance. Still other items for supplies and equipment were scheduled as expenses of operating the ranch despite evidence which either classified them as household expenses or failed to show them to be of a different nature or reasonably necessary to the continued operation of the ranch in the same manner.

It requires no extended argument or citation of authorities to establish the merit of appellants' objections to respondent's account in the light of the record. The discrepancies and deficiencies in the evidence undoubtedly stemmed from respondent's persistent position, which was adopted by the court at the hearing, that a correlating inquiry into respondent's use of the $9,600 taken as a monthly allowance was not proper and that a sufficient explanation of any other expenditure was its assignment as a cost of operating the ranch. In short, the whole situation indicates that no real hearing was had on the account under the general objection that large amounts had been improperly used, that exceptions taken to specific items were considered on the wrong theory, and that evidence material to these issues was excluded as inadmissible. However, on the present record many of the items summarily allowed cannot be segregated and a proper correction here made. Accordingly, the account must be returned to the probate court for reexamination in the light of the principles hereinabove discussed.

[7, 8] Appellants specify as their third point on appeal their objection to allowances made in the account for "gifts," in the amount of several hundred dollars from the estate's funds, to individuals, to charities and to a political organization. While appellants argue that "neither a general guardian nor a court has the power to dispose of a ward's property by way of a gift" (39 C.J.S. Guardian and Ward, § 79), such rigid principle has its exception where allowances from the surplus income of the estate are sought as "donations for charitable and religious purposes" and with the object of "carrying out the presumed wishes of" the incompetent person, 25 Am.Jur. 52, sec. 79; In re Brice's Guardianship, 233 Iowa 183, 8 N.W.2d 576, 579. However, such exception does not aid respondent where it not only appears that no previous court authorization for the "gifts" was obtained, but, in addition, none would seem proper in view of her failure to offer sufficient supporting evidence therefor in the light of the noted limitations governing the propriety of such allowances. So to this extent also the account requires further examination.

[9] Appellants' fourth and final objection relates to the form of the allowance of the attorneys' fees in this proceeding. They claim that the order therefor is void in that it runs directly in favor of the attorneys and so as "a direct judgment for money in favor of a person not a party to the proceeding," it comes within the condemnation of Garra v. Superior Court, 58 Cal.App.2d 588, 590, 137 P.2d 31, 32. But their argument is without merit. While the court found that the attorneys were "entitled to receive [as] reasonable compensation for services rendered [the] Guardian and the estate" during the year "the sum of $600.00," the order provided that the Guardian [was] authorized and directed to pay" the stated sum to the attorneys "for [the] services [so] rendered." Thus here, contrary to the situation in the Garra case, the order *did* "provide that said amount should run as an allowance to the guardian for the purpose of paying the attorney[s]" (58 Cal.App.2d 589, 137 P.2d 32), and its form is not open to challenge. See In re Guardianship of Copsey's Estate, 10 Cal.2d 748, 751, 76 P.2d 691.

The order subject of this appeal is reversed and the matter is remanded for a further hearing in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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31 Cal.2d 110

FICKETT v. RAUCH.

L. A. 19831.

Supreme Court of California.

Dec. 12, 1947.

Rehearing Denied Jan. 8, 1948.

1. Appeal and error 🔑**110**

Order denying defendant's motion for a new trial under the statute was appealable where reporter died before proceedings were transcribed. Code Civ.Proc. §§ 953e, 963.

2. New trial 🔑**93**

Under the statute providing that the court shall have power to order a new trial where reporter's transcript of proceedings becomes unavailable, the court's power is discretionary. Code Civ.Proc. § 953e.

3. Appeal and error ⚷980

Under the statute providing that the court shall have power to order a new trial where reporter's transcript of proceedings becomes unavailable, the court's discretion is not unlimited but is reviewable for abuse dependent on the facts of the particular case. Code Civ.Proc. § 953e.

4. New trial ⚷98

Under the statute providing that the court shall have power to order a new trial where reporter's transcript becomes unavailable, that substantial controversial issues concerning which a judgment on the merits would depend are affected should be indicated to invoke the court's discretion to grant a new trial. Code Civ.Proc. § 953e.

5. New trial ⚷93

Rule 4e providing that if transcript is unavailable through fault of reporter, appellant may on notice ask leave to file a settled statement of the missing proceedings "in addition to any remedy given by law," does not require a settled statement, but saves appellant's right to demand a new trial under the statute if existing data is insufficient to prepare a statement. Rules on Appeal, rule 4(e); Code Civ.Proc. § 953e.

6. New trial ⚷98

In action for establishment of a partnership and an accounting, where reporter died after trial of partnership issue and a transcript became thereby unavailable, and outcome of trial on the accounting depended on existence of partnership, refusal to order new trial on partnership issue under the statute was an abuse of discretion in absence of lack of diligence by moving party, since substantial controversial issues on the merits were affected. Code Civ.Proc. § 953e.

7. New trial ⚷96

Under the statute providing that the court shall have power to order a new trial where reporter's transcript becomes unavailable, delays by a moving party in failing to have testimony transcribed before judgment is not lack of due diligence sufficient to justify denial of a new trial. Code Civ.Proc. § 953e.

8. New trial ⚷96

Under statute providing that court shall have power to order a new trial where reporter's transcript becomes unavailable, respondent's contention that appellant at the time the last testimony was taken, knew he would be in military service with resultant delay and failed to have trial proceedings transcribed with due diligence, was not sustainable since no duty to transcribe with due diligence arose until after judgment. Code Civ.Proc. § 953e.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edward L. Fickett against Philip J. Rauch to establish a partnership and for an accounting. From the order denying defendant's motion for a new trial, defendant appeals.

Order reversed.

Prior opinion, 177 P.2d 661.

Gordon M. Snyder, of Los Angeles, for appellant.

Paul R. Hutchinson, of Los Angeles, for respondent.

SHENK, Justice.

[1] This is an appeal from an order denying the defendant's motion for a new trial. The motion was pursuant to section 953e of the Code of Civil Procedure and was made on the ground of the death of the court reporter. Such an order is appealable. Section 963, Code Civ.Proc.; Conlin v. Coyne, 15 Cal.App.2d 569, 59 P.2d 884. The question presented is whether the denial of the motion was an abuse of discretion.

[2] Until 1931 the only grounds of motion for new trial were those specified in section 657 of the Code of Civil Procedure. Prior to 1931 the death or other disability of a reporter who took notes on the trial and other proceedings could not be urged as grounds for a new trial. Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. In order to change the rule the Legislature in 1931 added section 953e to the Code of Civil Procedure. Stats.1931, p. 410. That section as amended in 1943 (Stats.1943, p.

2957) provides: "When it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

Rule 4(e) of the Rules on Appeal (22 Cal.2d 1, 4) provides: "If, without fault of the appellant, the reporter refuses or becomes unable or fails to transcribe all or any portion of the oral proceedings designated by the parties, the clerk shall mail notice to the parties specifying the portions of the oral proceedings which the reporter refuses, is unable, or fails to transcribe. At any time prior to the expiration of 10 days after mailing of such notice, the appellant may serve and file a notice of motion for leave to prepare a settled statement of such portions of the oral proceedings. If the superior court grants the motion, the statement shall be served, filed and settled * * *. This remedy is in addition to any remedy given by law."

The reviewing courts have uniformly held that there is no compulsion upon the trial court to grant a new trial under section 953e, that the exercise of the power by the court under that section is discretionary, and that an order denying a motion made pursuant thereto should not be reversed except for an abuse of discretion. Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 514, 144 P.2d 570; Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 665, 18 P.2d 82; Conlin v. Coyne, 19 Cal.App.2d 78, 83, 64 P.2d 1123; Norris v. Norris, 50 Cal.App.2d 726, 735, 123 P.2d 847; Kroeker v. Jack, 51 Cal.App.2d 272, 274, 124 P.2d 619; Smith v. Orange Belt Supply Co., 58 Cal.App.2d 848, 849, 137 P.2d 845; Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 45, 161 P.2d 990; Delafield v. Searle Aero Industries, 76 Cal.App.2d 862, 871, 174 P.2d 455; see also Comey v. Comey, 8 Cal.2d 453, 454, 66 P.2d 148.

[3] Whether the court has abused its discretion depends on the facts of the particular case. The discretion is not unlimited, but is a legal discretion the exercise of which is reviewable. Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345.

In the present case the plaintiff sued the defendant for the wrongful taking of alleged partnership property, for an accounting and one half the profits of the partnership. Issues as to the existence of the partnership were tendered and the trial proceeded on those issues during July 26 and 27, 1943. On July 27th the trial judge orally announced his opinion favorable to the plaintiff; whereupon, at the suggestion of plaintiff's counsel the trial on the accounting issues were continued to August 23d in order that the parties might have the benefit of an audit of the defendant's books. After an investigation of the defendant's accounts the parties were unsuccessful in reaching a satisfactory result. Before the date set for a further hearing the defendant was inducted into military service. Upon that showing and the possibility that he might nevertheless be available the trial was continued to September 23d. Thereafter, due to the defendant's military service, the trial was continued eight times and on June 28, 1944, it was ordered off calendar. On October 15, 1944, it was ordered placed on the calendar for trial on January 15, 1945. Thereafter three more continuances brought the trial date to April 12, 1945, when the defendant, still in military service, was in Los Angeles.

In the meantime and on July 24, 1944, the court reporter died without having transcribed his notes of the two days of trial in July, 1943, at which evidence was introduced on the issues of the existence of the partnership. The death of the reporter was not discovered by the parties until the defendant's attorney learned of it in November, 1944. He immediately made a request to the secretary of the Court Reporters of the Los Angeles Superior Court for a transcript of the testimony taken by the deceased reporter on July 26 and 27, 1943, and received notice that there had been no transcription of the testimony or proceedings on those trial days with the exception of the opinion announced by the trial judge in open court, and that it would be impossible to obtain a transcript because the deceased reporter had his own system of shorthand and none of the transcribers could read his notes.

A trial of the accounting issues was commenced on April 12, 1945. At that time by stipulation the cause was ordered off calendar on a showing that the parties might settle their differences. On May 3, 1945, the attempt failing, the stipulation was ordered vacated and the cause restored to the calendar. On August 13, 1945, a substitution of attorneys for defendant was effected. The trial on the accounting issues was concluded in the same month. During the progress of the trial the defendant moved to re-open the case on the ground of the reporter's death so that a record of the testimony regarding the existence of the partnership might be obtained. The motion was denied.

Judgment for the plaintiff was entered on November 1, 1945. A motion for new trial based upon the statutory grounds specified in section 657 of the Code of Civil Procedure was denied. An appeal was duly noticed and a request made for a transcript. Rule 4(a), Rules on Appeal, 22 Cal.2d 1, 2, formerly section 953a, Code of Civil Procedure. On January 8, 1946, the defendant noticed a motion for an order appointing a court reporter to read the shorthand notes of the deceased reporter for the trial days of July 26 and 27, 1943, and for a transcription thereof. The affidavits filed on this motion showed conclusively that such a transcript could not be obtained for the further reason that the reporter's notes for those days could not be located. That course was therefore abandoned and on January 25, 1946, the defendant noticed a motion for a new trial on the partnership issues based on the death of the reporter subsequently to the trial on those issues, and the impossibility of obtaining a transcription of his notes. The hearing thereon was continued to March 8, 1946, to afford the defendant an opportunity to prepare a proposed bill of exceptions. The parties thereafter filed affidavits reciting conferences between their attorneys, and their efforts, with the assistance of the defendant's former trial counsel, to prepare a bill of exceptions. This was unsuccessful due to lack of existing data showing the witnesses' testimony other than pretrial statements of what was expected to be proved. The affidavits also showed that the respondent (plaintiff) offered to obtain affidavits of his witnesses as to their testimony, but the offer was rejected by the appellant. The motion for a new trial under section 953e was denied on March 26, 1946.

The appellant relies on the case of Weisbecker v. Weisbecker, supra ([1945] 71 Cal.App.2d 41, 161 P.2d 990), where the order denying the motion pursuant to section 953e was reversed on the ground that the trial court abused its discretion. In the other cited cases an order denying such a motion was affirmed on the ground that the statute did not then authorize it or that no abuse of discretion was made to appear.

In the Weisbecker case the defendant wife appealed from an interlocutory decree of divorce granted to the husband. Within the same month after the notice of appeal was filed the husband paid for the preparation of a reporter's transcript and the reporter promised to transcribe the record as soon as he could; upon a second reminder he obtained an extension; but three months after the filing of the notice of appeal he died suddenly from a heart attack without having transcribed any portion of the testimony, which fact was not discovered until a month later. Within a few days after the discovery the appellant moved pursuant to section 953e, specifying grave questions concerning the sufficiency of the evidence. It further appeared that there was no substantial existing data which could be substituted for the transcript in the preparation of a settled statement. The District Court of Appeal very properly refused to follow the Diamond case, supra (189 Cal. 732, 210 P. 36), for the obvious reason that after that case was decided in 1922, the Legislature had in 1931 enacted section 953e thereby specifically providing that the death of the court reporter might serve as a ground for a new trial. In the Weisbecker case the court concluded that since the appellant had proceeded in the customary manner to perfect the appeal, had acted with reasonable promptness upon learning of the reporter's death, and the contentions to be presented on the appeal were shown to be dependent upon the evidence taken at the three day trial as to which substantial data was nonexistent, the denial of the motion was an abuse of discretion. It was also said that if the result were otherwise under the facts of that case the relief afforded by section 953e would be as effectively denied as if the statute had not been enacted.

[4] Certainly it is incumbent upon the trial court in resolving the merits of the motion pursuant to section 953e to consider the rights of the appellant as well as of the respondent, otherwise the rule of the Diamond case would be perpetuated. The appellant should of course indicate substantial controversial issues concerning which a judgment on the merits would depend; but it is not required that he show that on a retrial the result would be different. It is not to be assumed that on a retrial on the same evidence, prior to a review by an appellate court, the errors alleged to have been committed on the first trial will necessarily be corrected. In other words, the purpose of such a retrial is not to make the trial court change its mind but to obtain a record upon which to urge a correction of the errors claimed to have been committed.

The affidavits of the parties show substantial controversial issues concerning factual elements necessary to constitute a partnership and the beginning and termination dates thereof—questions which the trial court refused to re-open on the trial of the accounting because of the supposed existence of other remedies and because the accounting might resolve some of the differences. It is not contended that the accounting did so resolve them.

[5] The appellant is not necessarily required to prepare a settled statement pursuant to Rule 4(e) of the Rules on Appeal. That remedy, as stated in the rule, is in addition to any remedy given by law. Therefore in the absence of a transcript it would be unreasonable to require an appellant to prepare a settled statement from insufficient data. The respondent does not contend that existing data is sufficient. He is content to rely on possible notes taken at the trial and his offer made to appellant's counsel to procure affidavits of his witnesses setting forth their recollection of what their testimony was—an offer which the appellant was certainly within his rights to reject.

[6] The affidavits of the parties indicate that all of the facts were present which would render the denial of the motion an abuse of discretion unless it may be said that the delays pointed out by the respondent would support the denial of the motion. In this connection it must be remembered that no judgment was rendered until November 1, 1945, which was more than a year after the death of the reporter who took the notes on the trial of the partnership issue in July, 1943. Unquestionably the appellant moved promptly upon discovery of the reporter's death. Immediately and before completion of the trial he sought to obtain a transcript of the deceased reporter's notes from a reading by other reporters. He moved promptly after judgment to perfect his appeal, and in his further attempts to obtain a transcription of the notes by others. In lieu thereof, with the assistance of his former counsel, he attempted without success to obtain sufficient data upon which to base a bill of exceptions.

The respondent is relying mainly upon the delays which occurred before the trial was completed and the judgment rendered. He is apparently contending that the appellant should have moved to obtain a transcript while the reporter was alive and before the completion of the trial and entry of judgment.

[7, 8] As pointed out in the Weisbecker case (71 Cal.App.2d at page 48, 161 P.2d at page 990), there is no existing policy or principle of law which would predicate a want of due diligence upon a lack of omniscience regarding the impending decease of a reporter who to all intents and purposes was able to carry out his obligations. The respondent feels himself prejudiced because of the delay in the completion of the trial due to the appellant's military service.

He avers that the appellant knew at the time of the trial on the partnership issues that he was about to enter military service and that he kept his knowledge from court and counsel; that he could have made himself available for trial during alleged furloughs which were spent in Los Angeles, but that he preferred to pursue a policy of delay by invoking the indulgence of the court to obtain continuances due to his military service. The alleged insincerities are more properly to be addressed to the trial court in exercising its power to expedite the trial of cases or in granting continuances because of military service or otherwise.

The record sufficiently shows that the trial court should have granted the motion.

The order is reversed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

Rehearing denied; TRAYNOR, J., dissenting.

31 Cal.2d 178

GORBACHEFF et al. v. JUSTICE'S COURT OF CITY OF BERKELEY, ALAMEDA COUNTY et al.

S. F. 17565.

Supreme Court of California, in Bank.

Dec. 16, 1947.

Rehearing Denied Jan. 12, 1948.

1. Prohibition 🔑3(1)

Whether Emergency Price Control Act limited time within which tenants might bring action to recover treble damages for alleged rent overcharges to 30 days after overcharges were made could be tested by prohibition only if time limitation in act went to jurisdiction of court, and petitioners had no plain, speedy and adequate remedy in ordinary course of law. Emergency Price Control Act of 1942, § 205(e), as amended by the Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A.Appendix, § 925(e); Code Civ.Proc. §§ 1102, 1103.

2. War 🔑4

Expiration of period fixed by Emergency Price Control Act within which tenants may bring action for treble damages for alleged rent overcharges extinguishes not only the remedy but also the right of action itself, and jurisdiction of court is limited to actions commenced within prescribed period. Emergency Price Control Act of 1942, § 205(e), as amended by the Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A.Appendix, § 925(e).

3. Prohibition 🔑3(5)

The fact that an appeal from justice's court to superior court is available does not preclude resort to prohibition to restrain further proceedings in justice's court, if remedy by appeal is inadequate. Code Civ.Proc. §§ 1102, 1103.

4. Prohibition 🔑3(5)

Generally, an appeal to superior court is an adequate remedy so as to preclude resort to prohibition, but no hard and fast rule can be prescribed to determine in advance whether it fully meets requirements of justice in a particular case. Code Civ. Proc. §§ 1102, 1103.

5. Prohibition 🔑3(5)

Remedy by appeal to superior court after the superior court on appeal had already overruled objection to jurisdiction of justice's court was not an adequate remedy, and application for writ of prohibition to restrain justice's court from proceeding further in suit by tenants to recover treble damages for alleged rent overcharges would be entertained. Emergency Price Control Act of 1942, § 205(e), as amended by the Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A.Appendix, § 925(e); Code Civ.Proc. §§ 1102, 1103.

6. War 🔑4

A tenant's right of recovery for an overcharge is not limited to 30 day statutory period following violation, and tenant may institute action at any time within one year unless after expiration of 30 days, administrator has instituted such action. Emergency Price Control Act of 1942, § 205(e), as amended by the Stabilization

Extension Act of 1944, § 108(b), 50 U.S.C.A.Appendix, § 925(e).

7. War ⟹4

The purpose of provision in Stabilization Extension Act of 1944 relating to actions which may be brought by administrator only after tenant has failed to institute an action within 30 days was to limit retroactive application of statutory changes and should not be given any broader effect, and since it was not incorporated in Emergency Price Control Act, the provision is not within the phrase "except as hereinafter provided" appearing in price control act permitting tenant to bring action for overcharges within one year "except as hereinafter provided". Emergency Price Control Act of 1942, § 205(e), as amended by the Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A.Appendix, § 925(e); Stabilization Extension Act of 1944, § 108(c), 50 U.S.C.A.Appendix, § 925 note.

◆

Original proceeding in prohibition by Theodore T. Gorbacheff and another against the Justice's Court of the City of Berkeley, County of Alameda, State of California and others, to restrain further proceedings in a suit by tenants to recover treble damages for alleged rent overcharges.

Alternative writ discharged and petition denied.

F. H. Dam, of San Francisco, for petitioners.

A. D. Ericksen, of Oakland, for respondents.

Edwin D. Dupree, Jr., Asst. Gen. Counsel, Hugo V. Prucha, Irving M. Gruber and Nathan Siegel, Sp. Appellate Atty., all of Washington, D. C., and Sidney Feinberg, of San Francisco, for intervenor.

GIBSON, Chief Justice.

Petitioners seek a writ of prohibition to restrain a justice's court from proceeding further in a suit by tenants to recover treble damages for alleged rent overcharges. The action was brought under section 205 (e)[1] of the Emergency Price Control Act of 1942 (56 U.S. Stats. 23, 34), as amended in 1944 (58 U.S.Stats. 632, 640), 50 U.S.C.A. Appendix, § 925(e). Petitioners, defendants in that action, take the position that section 205(e) limits the time within which the tenants may bring an action to 30 days after the overcharge is made, and that, since the complaint was not filed within that time, the justice's court is without jurisdiction.

The tenants filed their complaint on January 14, 1946, and sought to recover rent overcharges occurring within one year next preceding the commencement of the action. The objection to the jurisdiction of the justice's court, here urged as the basis for the issuance of the writ of prohibition, was first raised by demurrer to the complaint. The demurrer was sustained on that ground without leave to amend, and a judgment of dismissal was entered. Plaintiffs appealed, and the superior court reversed the judgment with directions that the demurrer be overruled. The justice's court entered its order accordingly, and thereafter the plaintiffs filed a memorandum of costs on appeal. Defendants moved to strike the memorandum on the same jurisdictional ground, and at this juncture of the proceedings the alternative writ of prohibition was issued.

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[1] Section 205(e), Emergency Price Control Act of 1942, as amended in 1944 by section 108(b) [58 Stats. U.S. 640] reads: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. * * * For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. * * *"

[1] The question which petitioners raise may be tested by prohibition only if the time limitation in section 205(e) goes to the jurisdiction of the justice's court, and petitioners have no plain, speedy and adequate remedy in the ordinary course of law. Code of Civil Procedure, §§ 1102, 1103.

[2] The nature of the time limitation as affecting the jurisdiction of the court must be determined by an examination of the federal statute under which suit is brought. It has been held that when the period fixed by section 205(e) has expired, not only is the remedy no longer available, but also the right of action itself is extinguished, and that the jurisdiction of the court is limited to actions commenced within the prescribed period. Matheny v. Porter, 10 Cir., 158 F.2d 478, 479; Thompson v. Taylor, D.C., 62 F.Supp. 930, 931; Bowles v. American Distilling Co., D.C., 62 F.Supp. 20, 22; State v. Olson, Or., 151 P.2d 723, 728, 730. Accordingly, if the complaint in this action was filed after the time provided for in section 205(e), the justice's court did not have jurisdiction.

[3-5] It also appears that petitioners do not have an adequate remedy in the ordinary course of law. The fact that an appeal to the superior court is available does not, in and of itself, necessarily preclude resort to prohibition. Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8. Section 1103 of the Code of Civil Procedure authorizes the issuance of that writ, even though an appeal may be taken, if the remedy by appeal is inadequate. In the usual situation an appeal is considered an adequate remedy, but no hard and fast rule can be laid down to determine in advance whether it fully meets the requirements of justice in a particular case. Rescue Army v. Municipal Court, supra, at page 467 of 28 Cal.2d, 171 P.2d 8. We are confronted here on one hand with the constitutional inhibition of the review by appeal in courts, other than the superior court, of the decisions of inferior courts, and on the other hand with the duty of properly exercising our powers of review by the extraordinary writs. Petitioners' contention has once been rejected by the Appellate Department of the superior court, and they point out that the only way that they can obtain relief from that assertedly erroneous determination is through the exercise of our discretion in entertaining this proceeding. The statute involved has been and for some time will remain a source of litigation, and the settlement of the issue by this court may prevent conflicting decisions below thereby serving the interests of the public as well as the parties to this suit.

[6] We come now to petitioners' contention that section 205(e) of the Emergency Price Control Act must be interpreted to limit a tenant's right of recovery for an overcharge to the 30 day period following the violation, and that thereafter only the Administrator can sue. This contention is not supported by the language of section 205(e). It is there expressly provided that a *tenant* "may, *within one year,* from the date of the occurrence of the violation, except as hereinafter provided, bring an action * * * on account of the overcharge." (Italics added.) Under this specific provision the tenant has a full year to bring his action unless, because of the words "except as hereinafter provided," his case falls within some later provision of the Act which prohibits him from suing. Petitioners rely on the subsequent sentence of section 205(e) stating that if the tenant "either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period." They assert that under this language the original exclusive right of the tenant is transferred *in toto* to the Administrator at the end of the 30-day period, leaving the tenant no right to sue.

The only case which we have found passing squarely on this point holds to the contrary. In Haber v. Garthly, D.C., 67 F.Supp. 774, the defendants contended that, since plaintiffs did not institute their action within 30 days, the Administrator was the only party who might maintain the action. The court quoted the provisions of section 205(e) that a tenant may sue within one year from the date of the violation and that, if he fails to bring the action within 30 days, the Administrator may do so, and then said (page 776 of 67 F.Supp.): "Defendants would construe this language to mean that since the Administrator *may* institute an action after the thirty-day period has elapsed, therefore plaintiffs *may not.* I can find no support, either in law or in reason, for that proposition. With respect to the Administrator, the above-quoted language from section 205(e) of the Act is clearly permissive, and in my opinion its effect is to make the landlord liable to an action by either the tenant *or* the Administrator after thirty days from the occurrence of the violation, and within the one-year period."

This decision, in our opinion, correctly construes the statute. The interpretation urged by petitioners would in effect read out of the statute the express provision that a tenant can sue "within one year" and would substitute in every case a limitation of 30 days on his cause of action. Petitioners' interpretation would also render meaningless and surplusage the sentence of section 205(e) that "If such action is instituted by the Administrator, the [tenant] shall *thereafter* be barred from bringing an action for the same violation or violations." (Italics added.) If the tenant were limited to 30 days in which to bring suit, his cause of action would not "thereafter" exist, and there would then be no reason for barring him from bringing an action. This sentence, however, serves a useful purpose if the section is construed as permitting the tenant to sue "within one year" unless he is barred because the Administrator has already brought suit.

It is the position of petitioners that there can be no "concurrent right of action" in the Administrator and the tenant at the same time, and, therefore, that section 205 (e) must be construed to limit the tenant's right to the 30-day period immediately following the violation. We know of no reason why both parties may not have a concurrent right to *commence* an action, and no reason has been suggested why Congress could not have so provided. The question of the right to *maintain* concurrent actions is not before us. As we have seen, the more reasonable construction of section 205(e) gives the tenant a right for a full year unless the Administrator first commences an action.

Petitioners rely on Bowles v. Trowbridge, D.C., 60 F.Supp. 48, wherein it is stated, at pages 49–50, "As originally enacted, the statute permitted the buyer to sue within a year of the violation. By amendment of June 30, 1944 * * *, the limitation of the buyer's action has been reduced to thirty days after the violation, and at the end of that time the Administrator may sue in the buyer's stead on behalf of the United States, and such suit by the Administrator operates as a bar to any subsequent action by the buyer for damages for the same violation." That case does not aid petitioners. The question of the time when the buyer might sue was not in issue, and it is clear that the court did not intend to state that the buyer was limited to 30 days in all cases, otherwise there would have been no point in saying that the Administrator may sue at the end of 30 days and that "such suit by the Administrator operates as a bar to any *subsequent action* by the buyer * * *." (Italics added.)

[7] Petitioners further contend that the tenant's right of action is limited to 30 days because of the provisions of subsection (c) of section 108 of the amending act of 1944, 50 U.S.C.A.Appendix, § 925 note.[2] It is

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[2] Subsection (c) of Section 108 (58 Stats.U.S. 641) reads:

"(c) The amendment [to section 205 (e)] made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter."

claimed that the clause relating to "actions which may be brought by the Administrator *only* after the [tenant] has failed to institute an action within thirty days" (italics added) should be interpreted as if it read "actions which may be brought *only* by the Administrator after the tenant has failed to institute an action within thirty days," that the word "only" must be read as "exclusively," and that the intent was to limit the tenant's right of action to 30 days. As we have seen, however, the construction urged by petitioners would be directly contrary to part of section 205(e) and would render other portions surplusage. On the other hand, subsection (c) is subject to a reasonable interpretation which will give full effect to all the language used in that subsection and in section 205(e). The word "only" was apparently used to emphasize the distinction between suits which may be brought by the tenant or the Administrator and the entirely different type of action relating to goods sold for use in trade or business which the Administrator had the exclusive right to maintain under both the original act and the 1944 amendment. Accordingly, the word "only" should be read as modifying the clause "after the buyer has failed to institute an action within thirty days."

Moreover, it is obvious that subsection (c) was not intended to describe the respective rights of the tenant and the Administrator. This subsection, which was not made a section of the Emergency Price Control Act, was merely a collateral part of the amending act. Its sole purpose was to limit the retroactive application of the statutory changes, and it should not be given any broader effect. Also, since it was not incorporated in the Act, it does not come within the meaning of the phrase in section 205(e), "except as hereinafter provided," so as to limit the right of a tenant to sue "within one year."

It is not claimed that the Administrator has filed suit with respect to any of the overcharges sought to be recovered, and, in the absence of such a suit, plaintiffs were entitled to recover for any overcharges made within one year prior to the filing of the complaint.

The alternative writ is discharged, and the petition is denied.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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31 Cal.2d 43

Ex parte BRAMBLE.

Cr. 4755.

Supreme Court of California.

Dec. 2, 1947.

1. Arson 🔑2

At common law, "arson" was the willful and malicious burning of the dwelling house of another, but "arson" has been extended by statute to include many acts of burning not involving special danger to the person. Pen.Code, §§ 447a, 448a, 449a, 450a, 451a, 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Arson".

2. Criminal law 🔑995(3)

Judgment and sentence as punishment "for the crime of arson as charged" in indictment, if otherwise uncertain, became reasonably certain by reference to indictment and record. Pen.Code, §§ 447a, 448a.

3. Habeas corpus 🔑85(1)

Any reasonable doubt as to whether defendant pleaded guilty to, or judgment sentences defendant for, a greater or lesser offense than that charged and to which defendant pleaded guilty, must be resolved in his favor on habeas corpus.

4. Habeas corpus 🔑85(1)

The rule that on habeas corpus court will presume validity of judgment does not require court to presume the harsher of two equally reasonable constructions of judgment.

5. Criminal law 🔑991

Judgment and sentence as punishment "for the crime of arson as charged" in indictment were not void for inconsistency on ground that sentence was for an offense different from that alleged in indictment in that such sentence was for arson, defined at common law as burning of a dwelling house, whereas indictment charged burning of store building. Pen.Code, §§ 447a, 448a.

6. Evidence ⚷29, 35

Judicial notice would be taken that conviction of grand larceny in North Dakota might, in California, be either grand theft or petty theft.

7. Criminal law ⚷1202(1)

Grand larceny in North Dakota, amounting at time of commission to only petty larceny in California, was not available to support determination that accused was an habitual criminal. Pen.Code, §§ 488, 644.

8. Criminal law ⚷1202(1)

Conviction of grand larceny in the first degree in Minnesota, amounting at time of commission to grand theft in California, could be considered in determining defendant's status as an habitual criminal. Pen. Code, §§ 488, 644.

9. Pardon ⚷3

Petitioner who, upon his conviction for arson by burning other than a dwelling was sentenced as an habitual criminal but who, under amended statute, could not have been so sentenced, and who had already served term exceeding statutory minimum of seven years, was no longer ineligible as an habitual criminal for release on parole and was entitled to have request for parole considered and determined by Adult Authority. Pen.Code, §§ 447a, 448a, 3048-5; § 644, and as amended by St.1945, p. 1747; § 487, as amended by St.1923, p. 271.

SPENCE, EDMONDS, and TRAYNOR, JJ., dissenting in part.

Habeas corpus proceeding by Clifford Bramble.

Writ discharged and petitioner remanded to custody.

Clifford Bramble, in pro. per., and C. K. Curtright, of Sacramento, for petitioner.

Robert W. Kenny, of San Francisco, and Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner, in this habeas corpus proceeding, challenges (1) the validity of four substantially identical 1939 judgments (entered on successive counts in a single proceeding) under which he is confined in the state prison at Folsom and (2) the correctness of the ancillary determination that he is an habitual criminal who has suffered three prior convictions.

The conviction as to each of the four substantive offenses was upon petitioner's plea of guilty to the several offenses "as charged" in the indictment. Petitioner was accused in count 1 of the indictment "of the crime of Arson committed as follows: That * * * Clifford Bramble on the 23rd day of December 1936 at the County of Sacramento in the State of California, did then and there willfully, unlawfully and feloniously and maliciously set fire to and burn and cause to be burned the *store building* located at 718 K Street, in the City of Sacramento, California, commonly known as Woolworth's." (Italics added.) Counts 2, 3 and 4 in similar language charge the burning of other specifically identified *store buildings* in Sacramento on December 23, 1936, and January 11 and February 12, 1937, respectively.

The respondent warden in his return to the writ sets forth, as an exhibit, a certified copy of the minutes of the superior court showing the arraignment of the petitioner (as defendant) for judgment, and the pronouncement of judgment on each of the four counts of the indictment. The minutes recite that "The defendant was duly informed by the Court of the Second Amended Indictment filed against him for the crime of Arson and three prior convictions"; that the defendant was asked if he had any "legal cause" to show why judgment should not be pronounced, and answered that he had none; that "thereupon the Court renders its judgment: That whereas the said Clifford Bramble has been duly convicted in this Court of the crime of *Arson as charged* in Counts 1, 2, 3, and 4 as *charged* in the Second Amended Indictment * * * [and has also admitted the prior convictions of felony] as charged in" such indictment, "It is the judgment and sentence of the Court as punishment for the crime of *Arson as charged* in Count 1 * * * for which said defendant * * * was convicted * * *, said defendant having been previously three times convicted upon charges of Grand Larceny, Burglary and Grand Larceny of the First Degree, separately brought and tried, and said defendant served separate terms therefor, that the said defendant * * * be imprisoned in the State Prison * * * for the term of his natural life." (Italics added.) A separate judgment, in substantially identical language, was pronounced on each of the four counts.

It is thus apparent that the trial court adjudicated conviction of the substantive offenses of four counts of "Arson as charged," and that each judgment refers to three prior convictions of offenses the names of which correspond to the names of crimes enumerated in section 644 of the Penal Code. We have concluded that the judgments of conviction of the substantive offenses are valid but that the adjudicated elements of only two of the three prior offenses are equivalent to the essential elements of offenses enumerated in section 644 of the Penal Code; that petitioner is not presently entitled to an order for his release from custody but that he is not as a matter of law ineligible for release on parole.

The Substantive Offenses.

Relative to the judgments of conviction of the four substantive offenses petitioner urges as to each "that the said purported judgment of said Superior Court * * * was and is void, for the reason that the same was and is without the jurisdiction of said Superior Court to give or make in said * * * action, it being neither alleged nor proven in said action that said crime of Arson had been committed by petitioner." There is no merit in this contention.

The argument advanced by petitioner in support of such contention is to the effect that he stands sentenced for the crime of arson and that such crime was not charged in the indictment, hence the judgment was beyond the jurisdiction of the court. He urges that the word "arson," both at common law and by the statutes of California, has a limited technical meaning; i.e., the wilful and malicious "burning of any *dwelling-house,* or * * * parcel thereof" (italics added), and that the specification in the indictment as to each count that the crime was "committed as follows: That * * * Clifford Bramble on the [date and at the place alleged in the respective counts] * * * did then and there * * * maliciously set fire and burn * * * the *store building* located at [a street address as specified in the respective counts] * * * in the City of Sacramento, California, commonly known as ["Woolworth's," in count 1; "Grant's," in count 2; "F. Lagomarsino & Sons," in count 3; "Marcus Auto Supply Co.," in count 4]" (italics added), renders the pleading not only insufficient to charge the burning of a "dwelling-house or * * * parcel thereof" but effectively establishes that the offense was something other than the burning of a "dwelling-house, or * * * parcel thereof"; i.e., the burning of a store building, and, hence, as above noted, that the court was without jurisdiction to sentence him for the crime of arson.

The above epitomized argument of petitioner is wholly untenable. Of course, if an indictment charged one offense and the court undertook to sentence the defendant for a different offense not that, or included in that, charged the sentence pronounced could not be sustained. But we have no such case here. As appears from the previously quoted excerpts from the judgments the court in rendering the same and as a part thereof declared them to be for "the crime of Arson *as charged* in Counts 1, 2 3, and 4 *as charged* in the Second Amended Indictment" (italics added), and in pronouncing the sentence as to each count stated, "It is the judgment and sentence of the Court as punishment for the crime of Arson *as charged* in Count [specifying the number] * * * that the said defendant * * * be imprisoned in the State Prison," etc. In the light of the quoted language there can be no doubt here but that the defendant was sentenced as to each count for the precise offense, and only the offense, with which he was charged.

There is no contention that the indictment is insufficient to state a public offense —violation of section 448a[1], Penal Code— neither is there any contention by either petitioner or the State that such indictment states any offense other than violations of section 448a. As above stated, petitioner urges merely that he is sentenced for an offense different from that alleged in the indictment; i.e., that while the pleading charges him with violations of section 448a the judgments, through the use therein of the word "Arson," sentence him for violations of section 447a.[1] This contention is based on an untenably (in California) narrow meaning of the word "Arson."

History and Evolution of the Word "Arson."

[1] It is true that at common law the offense of arson was "the wilful and malicious burning of the dwelling house of another. It was an offense against the security of habitation and * * * was considered an aggravated felony and of greater enormity than any other unlawful burning because it manifested in the perpetrator a greater recklessness and contempt of human life than the burning of a building in which no human being was presumed to be." 4 Am.Jur. 87. It is also true that at the present time in California in the several code sections defining various crimes of malicious burning of property the word "arson"[2] appears in only one. (Penal Code, § 447a.) But the history of legislation on the subject shows that in this state the word, for more than 97 years, has had a broader signification than it had at common law. From 1850 until 1929 "arson" included the wilful and malicious burning not only of dwelling houses but also of "any * * * storehouse, warehouse, or other building, the property of any other person" (Comp.Laws of California, 1850–1853, p. 646, Sixth Div., Section 56). In 1856 (Stats.1856, p. 132) those acts of arson which consisted of wilfully and maliciously burning "any dwelling house, the property of another, *in the daytime,* or in the night or daytime, wilfully burn[ing] * * * any kitchen, office, *shop,* barn, stable, *storehouse,* warehouse *or other building* [other than a dwelling house], or stacks or stocks of grain * * *" (italics added) were declared to be "arson in the second degree." With the adoption of the codes in 1872 section 447 of the Penal Code defined arson as follows: "Arson is the willful and malicious burning of a building, with intent to destroy it." Section 454 provided that "Maliciously burning in the night-time an inhabited building in which there is at the time some human being is arson of the first degree. All other kinds of arson are of the second degree" and section 455 fixed the punishment for arson in the first degree as imprisonment in the state prison "for not

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[1] See footnote 2 for quotations of material parts of section 447a and 448a.

[2] Its usage is as follows (Penal Code, § 447a): "Any person who willfully and maliciously sets fire to or burns or causes to be burned * * * or procures the burning of any dwelling-house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof * * * whether the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years."

Section 448a (Penal Code) provides that "Any person who willfully and maliciously sets fire to or burns or causes to be burned or who * * * procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, *not a parcel of a dwelling-house; or any shop, storehouse, warehouse,* factory, mill *or other building,* whether the property of himself or of another; or any church, meeting-house, courthouse, workhouse, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not less than one nor more ten years." (Italics added.)

Sections 449a and 450a provide in quite similar language varying punishments for, respectively, the malicious burning of personal property and the burning of insured chattels with the intent of defrauding the insurer. Then follows section 451a which enacts that "Any person who wilfully and maliciously attempts to set fire to or attempts to burn * * * or procure the burning of any of the buildings or property mentioned in the foregoing sections * * * shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than two years * * *."

less than two years" while for arson in the second degree the penalty was like imprisonment "for not less than one nor more than ten years." Except for substituting "twenty-five" for "ten" in the provision for punishment of second degree arson in 1901 (Stats.1901, p. 664) these sections stood as the law of California until 1929 when (Stats.1929, p. 46), they, together with other sections concerning arson, were repealed and the present sections 447a, 448a, 449a, 450a and 451a, were adopted. The chapter of the code (Chap. 1, Tit. 13, Pt. 1), for whatever significance it may have, still bears the title "Arson." The code commissioners' notes say: "the statutes of this state have enlarged the use of the term to include many acts of burning not involving special danger to the person. Thus, burning stacks of grain, standing crops, bridges, etc., is arson in the second degree * * *. The commissioners recommend that the term 'arson' be confined to the offense of setting on fire buildings (including ships and vessels). Other criminal acts of burning are not properly classified under the title of 'arson,' but under the title of 'malicious mischief.'" Our code sections on arson as originally adopted were based on the New York code. The New York code commissioners say: "Originally, arson was the burning of a human habitation. The term has been, in this state, and in other jurisdictions, extended by statute, to embrace the burning of other descriptions of property not involving danger to human life." In People v. Angelopoulos, 1939, 30 Cal.App.2d 538, 541, 551, 86 P.2d 873, the offense of burning a "store building" was charged as a violation of section 448a of the Penal Code and was denominated "arson."

[2] It thus appears that there are ample historical and legal bases for designating the acts enumerated in section 448a as "arson." The real purpose of differentiating the acts listed in section 448a from those included in 447a is apparently not to change the nomenclature but to provide a convenient method of pleading and identifying the two classes of acts which are deemed to merit different punishments. The penalty for violating section 447a (burning a dwelling house) is "not less than two nor more than twenty years" imprisonment while for violating section 448a (burning "any * * * building * * * not a parcel of a dwelling-house") the term of imprisonment is "not less than one nor more than ten years." Section 644 impliedly recognizes that arson may be committed by violating section 448a as well as by violating 447a, for it distinguishes between the classes of arson by including, of the malicious burning offenses, only "arson as defined in Section 447a of this code" among the substantive offenses upon conviction of which a person may be held to be an habitual criminal if he has also previously been convicted and served terms of imprisonment for the offenses therein enumerated as a basis for such determination. For the foregoing reasons it is obvious that the use of the word "arson" in the indictment and in the judgments is not inconsistent with the specification that the offenses were committed by the burning of store buildings.

As previously mentioned there is no contention that the indictment fails to state a public offense or any offense other than violation of section 448a. Even if the judgments were otherwise uncertain they become reasonably certain by reference to the indictment and record. (In re Basuino, 1943, 22 Cal.2d 247, 251, 138 P.2d 297.) We have before us no question such as would arise if section 447a were the only statute defining a crime of malicious burning. If it were the only section on that subject then the question would be one of sufficiency of pleading to state a public offense and the effect of the rules limiting the scope of inquiry on habeas corpus in such cases (see 13 Cal.Jur. 232–233, § 14; In re Leach, 1932, 215 Cal. 536, 547, 12 P.2d 3; In re Wilson, 1925, 196 Cal. 515, 518, 238 P. 359; In re Kavanaugh, 1919, 180 Cal. 181, 182, 180 P. 533; In re Ruef, 1907, 150 Cal. 665, 666, 89 P. 605) would have to be considered. But here the only possible uncertainty would relate to the identity of the offense pleaded (as being a violation of section 448a or of 447a, Penal Code), not to sufficiency of the pleading.

[3, 4] As to identity of the offense the Attorney General concedes in his brief that the indictment charges violation of section

448a and not violation of section 447a, and there can be little doubt as to the soundness of his concession. If the pleader had intended to charge violation of section 447a rather than violation of section 448a and if the facts had justified the graver charge, it would have been easy to aver that the buildings burned were used in part or in whole, or as parcels, of dwelling houses. The words "store building" are certainly not synonymous with "dwelling house or parcel thereof." As already mentioned the burning of a "store building" has heretofore in this state been charged as a violation of section 448a and the case is referred to as "prosecution for arson" (People v. Angelopoulos, 1939, supra, 30 Cal. App.2d 538, headnote [1] and pages 541, 551, 86 P.2d 873.) Furthermore, if there be any reasonable doubt as to identity of offense we are bound to resolve that doubt in favor of petitioner. As declared in People v. Ralph, 1944, 24 Cal.2d 575, 581, 150 P.2d 401, 404, "'the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.'" (See also In re McVickers, 1946, 29 Cal.2d 264, 278, 176 P.2d 40.) The rule applies equally in determining any question as to the identity of the offense charged and to which the defendant pleaded guilty where upon the whole record there is a reasonable doubt as to whether the defendant pleaded guilty to, or the judgment sentences the defendant for, a greater or lesser offense. The rule that on habeas corpus we will presume the validity of a judgment does not mean that we shall presume the harsher of two equally reasonable constructions of the judgment.

[5] Both the indictment and the judgments might well have designated by number the code section which the petitioner was charged with and convicted of violating but we are satisfied that the defect is of artificiality rather than of substance; that the judgments, by reference to the pleadings, are amply certain to identify the offenses and that they constitute valid adjudications of conviction of the four substantive offenses of violation of section 448a of the Penal Code as charged in the indictment.

It may also be observed that petitioner's contention that he was sentenced for an offense other than that charged could in no event benefit him under the circumstances of this case. It has already been shown that the sentence pronounced is in no instance broader than the charge; for each count it was "for the crime of Arson as charged" in the particular count under consideration. But if in fact the judgments had been given for offenses other than those charged and to which the petitioner pleaded guilty, he would not be entitled to release but only to be returned to the superior court and resentenced for the charged and admitted offenses, with possible loss of credit for the time he has already served. (13 Cal.Jur. 281; In re Ralph, 1946, 27 Cal.2d 866, 872, 168 P.2d 1.)

The Prior Convictions.

[6, 7] Petitioner contends that the prior conviction, alleged and admitted, "of a felony, to-wit: Grand Larceny," in North Dakota is not available to support a determination that he is an habitual criminal. The charge against him in the indictment does not allege that he was convicted in North Dakota of any offense which meets the requirements of California's section 644. It charges him merely with the conviction of grand larceny in North Dakota, which, we are bound to judicially notice, in California might be either grand theft or petty theft. Looking beyond the face of the record, it appears from copies of the North Dakota information and judgment that petitioner in 1917 was charged with, pleaded guilty to, and was convicted of larceny of personal property of the value of $47. At that time the commission of such an offense in California would have amounted only to "petit larceny" (Pen.Code, § 488), a crime not mentioned in section 644 of the Penal Code at the time the substantive offenses were committed. Therefore, the contention of petitioner last above stated is correct. (In re McVickers, 1946, supra, 29 Cal.2d 264, 269, 176 P.2d 40; In re Seeley, 1946, 29 Cal.2d 294, 299, 176 P.2d

24, and cases there cited.) However, as hereinafter explained, the correctness of such contention does not affect the minimum term of petitioner's imprisonment prescribed by the habitual criminal act as it now reads.

[8] Petitioner does not dispute the competency of an alleged and admitted prior conviction of burglary in California to support a determination of habitual criminality. The third alleged and admitted prior conviction is "of a felony, to-wit: Grand Larceny in the first degree," in Minnesota. The conviction, it appears from copies of the Minnesota information and judgment, occurred in 1925 upon petitioner's plea of guilty to a charge of stealing personal property of the value of $562. The conviction, therefore, was of a crime equivalent to the then California offense of grand theft (Pen.Code, § 487, as Am. Stats.1923, p. 271) and as such was a competent element to be considered in determining petitioner's status as an habitual criminal.

Term of Imprisonment and Eligibility to Parole.

[9] Petitioner's minimum term of imprisonment is presently prescribed by section 3048.5 of the Penal Code. That section provides that every person who was determined to be an habitual criminal under either paragraph (a) (two prior convictions) or paragraph (b) (three prior convictions) of section 644 of the Penal Code as such section read before the effective date of "this act" (Stats.1945, ch. 934, which amended section 644 and added section 3048.5), and who could not be determined to be an habitual criminal under section 644 as amended by the 1945 act, "shall be deemed to be imprisoned for life and shall be eligible for release on parole after he shall have served a minimum term of seven calendar years." Under section 644 as amended in 1945 petitioner could not be adjudged an habitual criminal, for that section now enumerates not only the prior convictions but also the substantive crimes, convictions of which can form the basis of a determination of habitual criminality; and the substantive crimes of which petitioner was actually convicted (violations of section 448a) are not so enumerated. (Violation of section 447a is so enumerated.)

It appears that petitioner has served a term exceeding the minimum of seven calendar years from the date of his delivery to the warden at Folsom State Prison and therefore, so far as his status as an habitual criminal is concerned, he is not as a matter of law ineligible for release on parole. Since, however, he has not presently been admitted to parole and the term of his sentence perdures, he is not entitled to an order of this court that he be released from custody, but it is his right to have a request for parole considered and determined by the Adult Authority in the regular course of its proceedings and in the light of the law and the construction of the judgments as hereinabove declared.

The writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur with the conclusion that the writ should be discharged and that the petitioner should be remanded to custody, but I cannot concur with certain other conclusions reached in the majority opinion.

It is conceded by petitioner that the indictment uses the word "arson" in describing the offenses of which he stands convicted, and that it "purports to charge the crime of arson"; that he entered his plea of guilty to the crime of "arson as charged" in each of four counts of the indictment; that the judgments of conviction recited his "plea of guilty of arson as charged" in each of said four counts; and that he was sentenced on each of said four counts "for the crime of arson as charged." It is further conceded that at the present time, as well as at all times pertinent to this discussion, "the only statute defining the crime of arson is section 447a of the Penal Code enacted in 1929"; and that the offense denounced by section 448a of the Penal Code "is not arson."

While making these concessions, petitioner nevertheless relies upon an alleged defect in the allegations of the indictment to charge him with "arson" and contends that "the conviction and sentence of petitioner are void." The majority opinion does not sustain petitioner's contention in toto but does sustain it in part. The conclusion reached in the majority opinion is that the judgments of conviction cannot be permitted to stand as judgments of conviction for the crime of "arson" but that they may be permitted to stand as judgments of conviction for the crime denounced by section 448a of the Penal Code. While the majority opinion attempts to deny the implication, it necessarily follows from the reasoning of the majority opinion that if there were no catch-all section similar to section 448a of the Penal Code, upon which reliance is there placed, petitioner would be entitled to his absolute release in this proceeding.

The actual effect of the majority opinion is to permit petitioner to use this proceeding on habeas corpus as a substitute for a direct attack upon the indictment by demurrer and as a means to strike down petitioner's convictions on four counts of "arson" (Pen.Code, sec. 447a) merely because of an alleged defect in the indictment. The extension of the use of habeas corpus to cover the situation presented by the record before us has been uniformly condemned by the prior decisions of this court.

In the early case of Ex Parte Williams, 121 Cal. 328, at pages 330, 331, 53 P. 706, this court said: "* * * the proceeding [habeas corpus] may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. Ex parte Whitaker, 43 Ala. 323; Matter of Prime, 1 Barb. 340." This rule has been consistently followed in the later decisions. In re Leach, 215 Cal. 536, 12 P.2d 3; In re Wilson, 196 Cal. 515, 238 P. 359; In re Kavanaugh, 180 Cal. 181, 180 P. 533; Matter of Ruef, 150 Cal. 665, 89 P. 605; In re Simmons, 71 Cal.App. 522, 235 P. 1029; see, also, 13 Cal.Jur. 232. The scope of inquiry upon habeas corpus into the sufficiency of an indictment "is limited" (In re Leach, supra, 215 Cal. at page 547, 12 P.2d at page 7) and "where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus." Matter of Ruef, supra, 150 Cal., at pages 666, 667, 89 P. at page 605.

As above stated, petitioner concedes that the indictment "purports to charge the crime of arson," and it is clear that the facts alleged do more than merely "squint at a substantive statement" of that offense. The sole defect to which attention has been called is the allegation in each of the four counts that petitioner did wilfully, unlawfully, feloniously, and maliciously set fire to and burn a certain "store building." Petitioner contends that as "arson" can be committed only by burning "any dwelling-house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto" (Pen. Code, sec. 447a), he is entitled to relief on habeas corpus.

In my opinion, there is no merit in petitioner's contention. It may be assumed for the purpose of this discussion that the indictment is defective and that it would have been subject to direct attack (see, however, People v. Russell, 81 Cal. 616, 23 P. 418), but such assumption does not determine the question before us in this proceeding. Upon direct attack, the prosecution would have had the opportunity of amending to allege the fact, if it were a fact, that each alleged "store building" was likewise used as a "dwelling-house." No such opportunity can now be afforded in the event that the judgment finding petitioner guilty of "arson" upon an indictment purporting to charge "arson," which judgment has long since become final, should be held in this proceeding to be insufficient as a judgment of conviction of "arson." It is a matter of common knowledge that many store buildings are likewise used as dwelling houses. The burning of such buildings has been held to constitute "arson" under statutes similar to our own. People v. Oliff, 361 Ill. 237, 197 N.E. 777; Wade v. State, 195 Ga. 870, 25 S.E.2d 712. It therefore does not affirmatively appear from the face of the indictment that the offense charged did not constitute "arson," and, in my opinion, the allegations of each count were ample, under the rules set forth in the above-mentioned authorities, to withstand the attack now made in this proceeding on habeas corpus. To hold otherwise, as does the majority opinion, has the effect of declaring, contrary to the rule of the above-mentioned authorities, that the scope of the inquiry on habeas corpus into the sufficiency of the indictment is unlimited rather than limited.

It is significant to note that not a single authority cited in the majority opinion sustains the conclusion that the indictment in this case should be held insufficient in this proceeding to sustain the judgments of conviction on four counts of "arson." On the contrary, the reasoning found in the cases above cited clearly shows that the indictment here should be held sufficient for the purpose mentioned. As is said in In re Simmons, supra, 71 Cal.App. 522, at page 530, 235 P. 1029, at page 1033: "It is claimed that the pleading states no offense known to the law, because it fails to allege that the liquor contained one-half of 1 per cent or more of alcohol by volume, or that it was fit for use for beverage purposes. There is nothing in the complaint which tends to negative the idea that the liquor in petitioner's possession contained at least as much as one-half of 1 per cent of alcohol. The allegation that it contained 'more than one-third of 1 per cent alcohol by volume' is entirely consistent with the fact that its alcoholic content was as much as or more than one-half of 1 per cent." So here, the allegations that petitioner burned four "store buildings" do not negative, and are entirely consistent with, the fact that such buildings may have likewise been used as "dwelling-houses." Petitioner made no point at the time of his conviction in 1939 that he had not in fact committed four offenses of "arson" but, on the contrary, he pleaded guilty to each of the four offenses denominated in the indictment as "arson." In this proceeding on habeas corpus he merely rests upon an alleged defect in the allegations of the indictment upon which he was convicted, and in my opinion he should not be permitted to prevail.

The majority opinion alludes to the history of the offense called "arson." It is clear, however, that since 1929 there has been but one offense known in this state as "arson," being the offense defined as "arson" in section 447a of the Penal Code. In view of the express statutory definition of "arson" found in that section and in view of the fact that the indictment purported to charge the offense of "arson" and cannot be held in this proceeding to be insufficient to charge that offense, all reference to the early history of the offense called "arson" becomes immaterial in this discussion. Nor does the case of In re Basuino, 22 Cal.2d 247, 138 P.2d 297, lend support to the conclusions reached in the majority opinion. In that case there was no claimed defect in the indictment or information which charged petitioner with a violation of the State Narcotic Act. The only question there was whether petitioner's maximum term was six years or ten years, which question in turn was dependent, under the terms of the act, upon whether petitioner had suffered a prior conviction of a felony. See sec. 6, Stats. 1929, p. 385, as amended by sec. 5b, Stats. 1935, p. 2203, at p. 2207. The judgment of conviction was silent on this subject, but it appeared from the face of the record that petitioner had been charged with and had admitted such prior conviction. Under such circumstances, it was properly held that petitioner's maximum term was ten years rather than six years despite the failure of the trial court to mention the prior conviction of a felony in the judgment of conviction. That case is in no way inconsistent with the above-cited authorities dealing with alleged defects in the information or indictment, and it sheds no light on the problem before us.

If petitioner may not prevail upon his technical claim relating to the sufficiency of the indictment, then he stands convicted of four primary offenses of "arson." He was also charged with, and he admitted, the following three prior convictions: (1) Grand larceny in North Dakota; (2) burglary in California; and (3) grand larceny in the first degree in Minnesota. He was therefore adjudicated to be an habitual criminal. The question arises as to his eligibility for parole.

I cannot agree with the conclusion reached in the majority opinion that petitioner is now eligible for parole by reason of having served a term exceeding seven calendar years from the date of his delivery to the warden at Folsom. That conclusion is based upon the premise that petitioner does not stand convicted of the primary offense of arson, and that therefore petitioner falls within the class of persons covered by the second sentence of section 3048.5 of the Penal Code. In my opinion, petitioner does stand convicted of the primary offense of arson, which offense still remains one of the primary offenses upon which an habitual criminal adjudication may be based. See Stats.1945, ch. 934, amending sections 644, 3047, and 3048, and adding section 3048.5 of the Penal Code. Under the present section 3048.5 (Stats. 1945, ch. 934) petitioner is therefore a person "heretofore adjudged" to be an habitual criminal and "who would have been adjudged or determined to be an habitual criminal under * * * Section 644 of said code as amended by this act * * *"; and the time at which such a convicted person may be eligible for release on parole is dependent upon whether he has suffered two or three prior convictions within the meaning of section 644 of the Penal Code. As the determination of this question does not involve an attack upon the habitual criminal adjudication but merely determines the effect of such adjudication in its relation to eligibility for release on parole, I agree that petitioner should be accorded the widest latitude in this proceeding in proving that one of the three prior convictions was for an offense which, if committed in this state, would not have constituted one of the felonies specified in section 644 of the Penal Code. See concurring and dissenting opinion in Re McVickers, 29 Cal.2d 264, 281, 176 P.2d 40. Petitioner has successfully assumed the burden of proving that fact in this proceeding. He has shown, and it is conceded, that his conviction of grand larceny in North Dakota was upon an information in which the value of the property was definitely specified and the total value was affirmatively alleged as "making a total value of all property taken of $47.00." His North Dakota offense would have constituted only petit larceny rather than grand larceny if committed here, and, under the circumstances, he is therefore entitled to be treated as one who has suffered two rather than three prior convictions of felonies specified in section 644 in determining his eligibility for parole. This brings petitioner within the provisions of the first sentence of section 3048.5 of the Penal Code rather than the second sentence of said section as declared in the majority opinion.

As petitioner was sentenced on December 26, 1939, and it does not appear that he has served the minimum time required to make him eligible for a release on parole under the provisions of the first sentence of section 3048.5 of the Penal Code, I believe that the writ should be discharged and that petitioner should be remanded without any declaration that he has a present "right to have a request for parole considered and determined by the Adult Authority in the regular course of its proceedings."

EDMONDS and TRAYNOR, JJ., concur.

RATLIFF v. LAMPTON et al. *

Civ. 16000.

District Court of Appeal, Second District,
Division 2, California.

Dec. 16, 1947.

Rehearing Denied Jan. 5, 1948.

Hearing Granted Feb. 11, 1948.

1. Automobiles 🔑144

The surrender referred to in statute providing that, on revocation or suspension of a license to operate a motor vehicle, the operator shall "surrender" the license, means an immediate surrender, and not after time in which to demand a hearing had expired or a hearing has been had. Vehicle Code, §§ 269(e) 306, 311, 316.

See Words and Phrases, Permanent Edition, for all other definitions of "Surrender".

2. Automobiles 🔑144

The director of motor vehicles had the power to revoke operator's license to operate motor vehicle on ground that operator was unable to operate a vehicle safely on the highways because subject to a condition causing momentary lapses of consciousness or control. Vehicle Code, § 306.

3. Constitutional law 🔑253

The due process clause of the federal Constitution does not prevent states from exercising their legitimate police power. U.S.C.A.Const.Amend. 14.

4. Constitutional law 🔑292

The right to operate a motor vehicle on the public highway is not a natural right but is a privilege that is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare without violating the due process clause of the federal Constitution. U.S.C.A.Const.Amend. 14.

5. Automobiles 🔑5(1)

The legislature has plenary power over highways, and may impose the conditions under which the limited right of use of the highways may be exercised, and may regulate the manner and circumstances under which automobiles may be operated thereon.

6. Automobiles 🔑144
Constitutional law 🔑101

An operator's license to operate a motor vehicle does not confer a vested right on the operator, but bestows a mere privilege to drive a motor vehicle on the highways and may be revoked or suspended for the reasons and in the manner prescribed by the legislature.

7. Automobiles 🔑132
Constitutional law 🔑287

Sections of the Vehicle Code authorizing suspension or revocation of an operator's license to operate a motor vehicle, without a previous hearing, do not violate the due process clause of the federal Constitution. Vehicle Code, §§ 306, 311; U.S C.A.Const.Amend. 14.

8. Automobiles 🔑132
Constitutional law 🔑287

Sections of the Vehicle Code that an operator whose license has been revoked or suspended may demand a hearing before the Director of Motor Vehicles by making a demand therefor within 60 days after notice is given him that his license has been revoked or suspended, and requiring the director after a review of the records, evidence and findings, to render his decision sustaining, modifying or reversing order of revocation or suspension, and giving right to have court review director's order, provide due process even if it be deemed that the right to operate a motor vehicle on the public highways is a property right. Vehicle Code, §§ 315–317; U.S.C.A.Const. Amend. 14.

9. Administrative law and procedure 🔑302
Constitutional law 🔑318

When an aggrieved person is given the right to resort to the courts and to have the action of the administrative officer there reviewed, he is not denied due process. U.S.C.A.Const.Amend. 14.

10. Automobiles 🔑144

Section of the Vehicle Code authorizing Department of Motor Vehicles to conduct investigation to determine whether license should be revoked or suspended, and authorizing re-examination of licensee, does not contemplate notice to holder of an operator's license and a hearing before the license may be revoked or suspended. Vehicle Code, § 314.

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* Subsequent opinion 195 P.2d 792.

11. Automobiles ⟹144

Section of the Vehicle Code authorizing Department of Motor Vehicles to conduct investigation to determine whether license should be revoked or suspended, and authorizing re-examination of licensee, does not permit arbitrary action. Vehicle Code, § 314.

12. Administrative law and procedure ⟹205
Constitutional law ⟹318

If a statute requires an administrative officer to determine the existence or nonexistence of necessary facts before making a decision, it does not violate the due process clause of the federal constitution nor vest uncontrolled discretion, because under such a statute the officer may not act arbitrarily. U.S.C.A.Const.Amend. 14.

13. Administrative law and procedure ⟹209
Constitutional law ⟹62

The standards set up by statute for the guidance of an administrative officer in making decisions, even though general in terms, are not necessarily objectionable because of uncertainty.

14. Evidence ⟹83(1)

It is presumed that officials will carry out their duties in the administration of a statute with justice and with discrimination.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Sidney Arthur Ratliff against Edgar E. Lampton, as director of Motor Vehicles of the State of California, and others, for declaratory relief and for a judgment that plaintiff was entitled to the privilege of operating a motor vehicle on the highways of the state until the Department of Motor Vehicles and its officials should determine by competent evidence produced at a hearing that plaintiff's license to operate a motor vehicle should be revoked. From a judgment for plaintiff, the defendants appeal.

Judgment reversed with directions to sustain defendants' demurrer to complaint and to enter judgment for defendants.

Fred N. Howser, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for appellants.

Arthur C. Fisher, of Los Angeles, for respondent.

WILSON, Justice.

Section 306 of the Vehicle Code empowers the Department of Motor Vehicles to revoke an operator's license upon any of the grounds that authorize the refusal to issue a license. Section 269 provides that the department shall not issue an operator's license to any person "(e) When it appears by examination or other evidence that such person is unable to operate a motor vehicle upon a highway safely because of physical or mental defect or lack of skill."

By an order dated January 2, 1946, the Director of Motor Vehicles revoked respondent's operator's license on the ground that he "is unable to operate a motor vehicle safely upon the highways because of physical or mental disability or lack of skill as shown by examination or other evidence; and in particular because he is subject to a condition causing momentary lapses of consciousness or control." In the same order demand was made on respondent to surrender his license (see sec. 311) and he was notified that a written demand on the director for a hearing might be made within 60 days. See sec. 315.

Respondent refused to surrender his license and on February 15, 1946, made written demand for a hearing before the director. He was advised that a hearing would be had and was again notified that he was required by law to surrender his license. He then filed this action for declaratory relief and for a judgment that he is entitled to the privilege of operating a motor vehicle on the highways of California until the department and its officials should determine by competent evidence produced at a hearing that his license should be revoked. Appellants filed a general demurrer to the complaint which was overruled. Electing to stand on their demurrer they refused to answer. Judgment was entered against them from which they have appealed.

Section 314 of the Vehicle Code provides that the department may conduct an investigation to determine whether the license of any person should be suspended and revoked, such investigation to be made upon receiving information "(6) That any ground exists for which a license might be refused" and that whenever the department determines upon any such investigation that good cause exists therefor it may suspend or revoke the privilege of the person to operate a motor vehicle on a highway.

[1] Upon revocation or suspension the operator shall surrender his license. (Sec. 311.) That this means an immediate surrender is made manifest by the legislative history of this and other sections. When the Vehicle Code was adopted (Stats.1935, ch. 27, p. 93) section 311 (p. 139) provided that whenever the department revoked or suspended a license it should be surrendered to the department. At the same time section 316 (p. 141) contained the provision that if no hearing was demanded or if after a hearing the director declared in favor of a suspension or revocation "the licensee must thereupon surrender the license." Sections 311 and 316 obviously conflicted and it remained uncertain whether the license should be surrendered immediately upon its suspension or revocation (sec. 311) or not until after the time in which to demand a hearing had expired or a hearing had been had. Sec. 316. In 1939 section 316 was amended by the deletion of the language that was in apparent conflict with section 311 (Stats.1939, ch. 662, pp. 2115, 2121), indicating the clear intent of the legislature that the surrender of the license should take place when revoked or suspended and should not await a hearing.

[2] This is as it should be. An automobile is an instrument of danger to every person who uses the highways unless it is under the control of a competent operator. One who is unable to operate a motor vehicle safely because of physical or mental disability or who, as found by the director and charged against respondent in the instant case, is subject to "monetary lapses of consciousness or control," is a potential menace to the public and, unfortunate though it may be for him, he should not be permitted to operate an automobile where he may cause injury or death to others.

[3-5] The due process clause of the Fourteenth Amendment does not prevent the states from exercising their legitimate police power. Pacific Gas & Electric Co. v. Police Court, 251 U.S. 22, 25, 40 S.Ct. 79, 64 L.Ed. 112, 117. The right to operate a motor vehicle on the public highways is not a natural right but is a privilege that is subject to reasonable regulation under the police power in the interest of public safety and welfare. Watson v. Division of Motor Vehicles, 212 Cal. 279, 283, 298 P. 481. The right to use the public highways for travel or transportation is not unrestricted. The legislature has plenary power over the highways, may impose the conditions under which the limited right of use may be exercised, and may regulate the manner and circumstances under which automobiles may be operated thereon. Commonwealth v. Funk, 323 P. 390, 186 A. 65, 67.

[6, 7] An operator's license does not confer a vested right, but bestows a mere privilege to drive a motor vehicle on the highways and may be revoked or suspended for the reasons and in the manner prescribed by the legislature. Sleeper v. Woodmansee, 11 Cal.App.2d 595, 599, 54 P.2d 519; People v. Cohen, 128 Misc. 29, 217 N.Y.S. 726, 728. Such privilege may be valuable but it is not a right and it is not property. Statutes that authorize the suspension or revocation of an operator's license without a previous hearing do not violate the due process clause. LaPlante v. State Board, 47 R.I. 258, 131 A. 641, 642; Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408, 410; Heart v. Fletcher, 184 Misc. 659, 53 N.Y.S.2d 369, 373.

Since a license to drive a car is merely a privilege the suspension of the license does not deprive the licensee of property or of rights without due process of law. A licensee's privileges are no greater than the rights of business organizations that the legislature has authorized to be suspended when conditions warrant such action. When it appears to the Insurance Commissioner that any of the conditions enumerated in the statute exist he may, without notice and without order of the court, forthwith take possession of the business, books and records of an insurance company (Insurance Code, sec. 1013) and may require the assistance of the sheriff or police department in making the seizure (sec. 1014). Whenever the Superintendent of Banks deems it necessary for the conservation of the assets of a bank he may appoint a conservator who shall take possession of its books, records and assets. Bank Act, sec. 135a; Stats.1913, ch. 104, pp. 136, 191; 1 Deering's Gen.Laws, 1944 Ed., Act 652, p. 294. If the Building and Loan Commissioner shall find that a building and loan association's business is in an unsafe condition or is being conducted in an unsafe or injurious manner he may forthwith take possession of the association's business and assets. Building and Loan Act, sec. 13.11; Stats.1931, ch. 269, pp. 483, 539; 1 Deering's Gen.Laws, 1944 Ed., Act 986, p. 590. Such statutory provisions are a proper exercise of the police power of the state (Engel v. O'Malley, 219 U.S. 128, 136, 31 S.Ct. 190, 55 L. Ed. 128, 136; Noble State Bank v. Haskell, 219 U.S. 104, 111, 31 S.Ct. 186, 55 L. Ed. 112, 116, 32 L.R.A.,N.S., 1062, Ann. Cas.1912A, 487) and are not in contravention of the constitutional inhibition upon the depriving of persons of property without due process of law. State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 446, 132 P. 755, L.R.A.1915E, 675, affirmed 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488; North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 101, 56 P.2d 1221; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 81, 37 L.R.A.,N.S., 877, Ann.Cas. 1913A, 254.

An operator whose license has been revoked or suspended may demand a hearing before the director or his representative by making a demand therefor within 60 days after notice is given him that his license had been revoked or suspended. Sec. 315. After a review of the records, evidence and findings the director is required to render his decision sustaining, modifying or reversing the order of revocation or suspension. Sec. 316.

[8, 9] The procedure authorized by the statute provides due process even if the case were one involving a property right. A fair trial before an impartial tribunal satisfies the demands of due process. Under the provisions of the Vehicle Code the licensee is entitled to a hearing before the director (secs. 315, 316) but his decision is not a final determination of the issue. If the licensee is not content with the decision of the director he has the right to have the order reviewed by a court of competent jurisdiction. Sec. 317. The provisions of this section answer any contention that judicial power has been delegated to the director or that there is a possibility of any operator's license being taken from him by an arbitrary or unwarranted act of an administrative official. When an aggrieved person is given the right to resort to the courts and to have the action of the administrative officer there reviewed he is not denied due process. Heart v. Fletcher, 184 Misc. 659, 53 N.Y.S. 2d 369, 374; Commonwealth v. Funk, 323 Pa. 390, 186 A. 65, 68; La Forest v. Board of Com'rs., 67 App.D.C. 396, 92 F.2d 547, 548.

[10] Section 314 of the Vehicle Code does not, as contended by respondent, contemplate notice to a holder of an operator's license and a hearing before the license may be revoked or suspended. It provides in subdivision (a) of that section that the department may conduct an investigation for the purpose of determining whether the license should be revoked or suspended upon receiving information or upon a showing by its records that certain facts exist; in subdivision (b) that he may require the reexamination of the licensee, shall give 10 days' notice of the time and place of the reexamination, and may peremptorily suspend the license in the event the licensee fails to submit to reexamination; in subdivision (c) that whenever good cause exists the privilege of operating a motor vehicle upon a highway may be suspended, but the order of suspension shall not become effective until 10 days after giving notice of the suspension to the person affected. Nowhere is a hearing required or notice to the licensee made a prerequisite to the investigation provided for in subdivision (a) of section

314 or to the revocation or suspension of a license for any of the causes enumerated in that subdivision.

Since respondent's license granted a privilege and not a property right the cases of Hogg v. Real Estate Com'r, 54 Cal.App.2d 712, 129 P.2d 709, Hall v. Scudder, 74 Cal. App.2d 433, 168 P.2d 990, and Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545, relied on by respondent, have no application to this case.

[11] Respondent contends that section 314 authorizes the director to act arbitrarily and to revoke an operator's license without any indication of the nature or character of the information on which his order is based. On the contrary, that section does not contemplate or permit arbitrary action. It authorizes an investigation when the department has received information concerning any one or more of six items enumerated therein and a reexamination of the licensee. A license may be suspended or revoked when it is determined from such investigation or reexamination that good cause exists therefor.

[12-14] Discretion must be exercised by the department in proceeding pursuant to section 314 and a standard for its actions is fixed by the statute. It will be assumed that the authority granted will be exercised with care and caution. If a statute requires an administrative officer to determine the existence or nonexistence of necessary facts before making a decision it does not collide with the due process clause nor vest uncontrolled discretion. Under such a statute the officer may not act arbitrarily. People v. Globe Grain & Milling Co., 211 Cal. 121, 126, 294 P. 3. The standards set up by statute for the guidance of an administrative officer in making decisions, even though general in terms, are not necessarily objectionable because of uncertainty. Butterworth v. Boyd, 12 Cal.2d 140, 149, 82 P.2d 434, 126 A.L.R. 838; Riley v. Chambers, 181 Cal. 589, 595, 185 P. 855, 8 A.L.R. 418. It is presumed that the officials will carry out their duties in the administration of the statute with justice and with discrimination. In re Porterfield, 63 Cal.App.2d 518, 528, 147 P.2d 15. The courts are always open for the correction of unjust or arbitrary official acts.

Respondents' reliance on People v. Noggle, 7 Cal.App.2d 14, 45 P.2d 430, is misplaced. He cites it as authority that a hearing must be had before a licensee may be deprived of his license. The defendant in that case was notified that his license had been revoked on information that he was subject to spells causing loss of consciousness. At that time the statute did not authorize the officials of the department to revoke a license for that reason except upon receiving a verified complaint stating that the licensee was afflicted with a mental or physical infirmity that would constitute ground for refusal of a license. The chief of the division was given power to determine the sufficiency of the complaint and to fix a time for hearing. No such requirement appears in the present law. Section 314 of the Vehicle Code authorizes the department to make its own investigation without a previous complaint and to act on the facts thereby ascertained. For the reasons hereinbefore stated there is nothing unreasonable or oppressive in this provision.

The judgment is reversed with directions to sustain the demurrer to the complaint without leave to amend and to enter judgment in favor of defendants.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 876

HAIG v. HOGAN et al.

Civ. 15981.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1947.

Rehearing Denied Jan. 5, 1948.

Hearing Denied Feb. 9, 1948.

1. **Landlord and tenant** ⚿278½
War ⚿4

Unlawful detainer to obtain possession of housing accommodations which were being operated by occupant as boarding house in violation of zoning ordinance could be maintained without complying with federal Rent Regulations for Housing, § 6 a (3) (ii).

2. **Landlord and tenant** ⚿291(14)

Damages awarded in unlawful detainer action for withholding possession are not "rent" but are in fact damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Rent".

3. **Landlord and tenant** ⚿291(14)
War ⚿4

Rent control regulations have no application to an award of damages for unlawfully withholding property.

4. **Evidence** ⚿571(7)

In unlawful detainer action, expert testimony that fair rental value of property on open market at time of trial was $1,000 per month sustained finding that damage for withholding the property was $870 per month, notwithstanding that "ceiling price" of the property was $300 per month.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Unlawful detainer action by Manuel H. Haig against Patricia Noblesse Hogan, also known as Patricia Noblesse, and others. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Mason & Howard and Shafer & Grimm, all of Los Angeles, for appellant.

J. Marion Wright and Owen Kupfer, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for unlawful detainer defendant, Patricia Noblesse Hogan, appeals.

The facts are these:

The property herein involved consists of a dwelling used for housing accommodations. Prior to 1942 it was sold to the state of California because the taxes assessed against it had become delinquent. After 1942 defendant entered into two leases concerning the property, one lease being with the controller of the state of California, and the other lease being with a former title holder of the premises. Defendant went into possession of the premises under these leases.

On February 11, 1946, defendant entered into an agreement with the city of Los Angeles wherein she was recognized as the tenant in occupancy of the premises, and agreed that she would vacate them within 90 days after demand for possession. On February 20, 1946, the city of Los Angeles, at an auction sale, sold the property to plaintiff, and thereafter on February 25, 1946, the state of California deeded it to the city of Los Angeles and cancelled the lease. Defendant was given notice of the sale of the property to plaintiff and demand was made for possession.

Defendant has not paid any rent to plaintiff, and on May 31, 1946, a three day notice to vacate the property was served upon defendant. Upon defendant's refusal to vacate it the present action was commenced. The property was located in an "R-1" zone which permits use for single family residence only. Defendant in violation of the zoning ordinance operated the premises as a hotel, rooming and boarding house.

There are two questions presented for our determination:

[1] First: *Was plaintiff entitled to maintain the unlawful detainer action without complying with the federal rent regulations?*

This question must be answered in the affirmative. Under the federal rent control laws it was unnecessary to comply with the provisions of the acts mentioned by defendant before bringing an action of unlawful detainer if the party in possession was using the housing accommodations for an illegal purpose. (Section 6 a (3) (ii) of the Rent Regulations for Housing.)

In the present case defendant admitted that she was operating the premises as a boarding house. This was contrary to the zoning ordinance of the city of Los Angeles which provides that it is a misdemeanor for a person to use premises in violation of the provisions of such ordinance. (Sec. 11.00 (m) of the Los Angeles Municipal Code.)

Defendant had been served with a notice to cease and desist by the city of Los Angeles which she disregarded to and including the date of the trial. Notice of the time and place of the trial and a description of the action were duly served upon the office of price administration in accordance with the federal regulations existing at that time.

In view of the fact that defendant was using the property for an illegal purpose the foregoing facts show a sufficient compliance with all applicable federal rent regulations.

[2-4] Second: *Was the award of $870.00 per month for unlawfully withholding the possession of the premises supported by substantial evidence?*

This question must likewise be answered in the affirmative. An expert witness, Mr. Kadletz, testified that a fair rental value of the property on the open market at the time of the trial was $1000.00 per month. This testimony constituted substantial evidence to sustain the trial court's finding that the damage for withholding the property was $870.00 per month. There is no merit in defendant's contention that the amount of damage was limited by the "ceiling price" of the property in the amount of $300.00 per month. It is established that damages awarded by a court in an unlawful detainer action for withholding possession of the property are not "rent" but are in fact damages. McFarland v. Carpenter, 18 Cal.App.2d 205, 210, 63 P.2d 859. It is likewise settled that the rent control regulations have no application to an award of damages for unlawfully withholding property. Bryant v. Marstelle, 76 Cal.App.2d 740, 747, 173 P.2d 846; Greenburg v. Koppelow, 76 Cal.App.2d 631, 634, 173 P.2d 821.

Ricci v. Claire, 33 A.2d 591, 21 N.J.Misc. 266; Jordan v. Moore, Mo.App. 194 S.W.2d 948, are not here in point for the reason that these decisions are from other states and are in conflict with the rulings of our own appellate courts, which, of course, are controlling.

In view of the foregoing it is unnecessary to discuss other points presented.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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82 Cal.App.2d 857

BOARD OF EDUCATION OF CITY OF LONG BEACH v. KING.

Civ. 16008.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1947.

1. Judgment 🔑648

Generally, a judgment of conviction in a criminal prosecution may not be introduced in evidence in a subsequent civil proceeding to establish the truth of the facts upon which the criminal action was predicated.

2. Judgment 🔑648

In action by a board of education for dismissal of a teacher on ground of unprofessional conduct, record of conviction was not admissible in evidence to establish that teacher had driven automobile while under influence of intoxicating liquor. Education Code, §§ 13521–13559; Vehicle Code, §§ 502, 755.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by the Board of Education of the City of Long Beach against Alfred C. King for the dismissal of defendant as a teacher of the Long Beach City College district. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for appellant.

Joseph A. Ball, of Long Beach, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendant in an action commenced pursuant to the provisions of sections 13521 to 13559 of the Education Code (Reasons and Procedure for the dismissal of teachers) for the dismissal of defendant as a teacher of the Long Beach City College district.

The conceded facts are these:

On May 11, 1945, plaintiff notified defendant of its intention to dismiss him as a permanent member of the Long Beach City College district. On May 24, 1945, defendant requested a hearing on the charges contained in the notice which plaintiff had served upon him. Thereupon pursuant to the provisions of section 13529 of the Education Code * plaintiff filed an action in the superior court, alleging as grounds for removal of defendant, "unprofessional conduct in that said Alfred C. King on or about January 7, 1945, drove a motor vehicle on Cherry Street in the City of Long Beach while under the influence of intoxicating liquor in violation of Section 502 of the Motor Vehicle Code of the State of California. That said Alfred C. King was found guilty of said offense on January 30, 1945, in the Municipal Court of the City of Long Beach and sentenced to and did pay a fine of $100.00 for said offense."

Defendant denied in his answer the charge of unprofessional conduct hereinbefore mentioned.

At the trial the only evidence offered by plaintiff as proof of the charge it had made against defendant was the record of conviction of defendant on January 30, 1945, by the municipal court of the city of Long Beach, of the offense of driving a motor vehicle while under the influence of intoxicating liquor in violation of section 502 of the Motor Vehicle Code. An objection to the introduction of such evidence was sustained, and no other evidence having been presented to the court, judgment was entered in favor of defendant.

This is the sole question presented for our determination:

Did the trial court commit prejudicial error in refusing to receive in evidence the record of conviction of defendant of the act alleged in the complaint as amended as grounds for his dismissal?

[1, 2] This question must be answered in the negative. The general rule is that a judgment of conviction in a criminal prosecution may not be introduced in evidence in a subsequent civil proceeding to establish the truth of the facts upon which the criminal action was predicated. (Marceau v. Travelers' Ins. Co., 101 Cal. 338, 344, 35 P. 856, 36 P. 813; Burke v. Wells, Fargo & Co., 34 Cal. 60, 62; Burbank v. McIntyre, 135 Cal.App. 482, 485, 27 P. 2d 400. See also, Tapley v. Abbott, 111 Cal.App. 397, 295 P. 911; 5 Wigmore on Evidence, 1940, p. 687, sec. 1671a; also Sec. 755 of the Vehicle Code making inadmissible as evidence in any civil action the record of a conviction of violating a provision of such code.)

In view of the foregoing rule established in California the trial court properly sustained an objection to the proffered evidence. Since no other evidence was offered to support the charge preferred against defendant, the trial court properly gave judgment in his favor.

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* Section 13529 of the Education Code reads thus: "Rescission of action or filing complaint on demand for hearing. When any employee who has been served with notice of the governing board's intention to dismiss him demands a hearing, the governing board shall have the option either (a) to rescind its action, or (b) to file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

The judgment is affirmed.

MOORE, P. J., concurs.

WILSON, Justice.

I concur in the judgment solely by reason of the provision of section 755 of the Vehicle Code that "No record of the conviction of any person for any violation of this code, * * * shall be admissible as evidence in any court in any civil action." Since that section renders the judgment of respondent's conviction inadmissible and since there was no other evidence that he had violated any provision of that code, the judgment must be affirmed for that reason alone.

The general statement in the majority opinion to the effect that a judgment of conviction is inadmissible in a civil proceeding to establish the truth of the facts upon which the criminal action was predicated is not warranted by the authorities and, in the absence of a differentiation of the situation in the instant case from that in the cases cited, will inevitably lead to confusion.

In each of the cases of Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 P. 856, 36 P. 813, and Burke v. Wells, Fargo & Co., 34 Cal. 60, cited in the majority opinion, the person convicted of the crime was not a party to nor involved in the civil action in which the record of conviction was offered in evidence and was not in privity with either of the parties. The record of conviction was held in each instance to be inadmissible to prove an issue arising between the parties to the respective actions. In the Marceau case the issue was whether the convicted person was insane at the time of the murder. In the Burke case the question was whether the person who had pleaded guilty had actually committed the crime.

These cases are not authority for a statement that the record of conviction of a person in a criminal case is never admissible against the same party in a civil action in which the same facts or acts are involved. It is the rule that where a person has pleaded guilty to a criminal charge and is later a party to a civil action growing out of the same acts the record of the plea of guilty may be received in evidence not as a judgment establishing the fact but as an admission against interest—a solemn confession of the very matter charged in the civil action. Langensand v. Obert, 129 Cal.App. 214, 218, 18 P.2d 725; Burbank v. McIntyre, 135 Cal.App. 482, 486, 27 P.2d 400 and cases cited. These decisions obviously have no application to the instant case since it is not alleged that respondent pleaded guilty to the crime with which he was charged. They are mentioned only for the purpose of showing that the statement in the majority opinion is more inclusive than the citations warrant. Its applicability should not be extended beyond permissive bounds but should be limited to the class of cases to which it belongs.

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82 Cal.App.2d 851

BALDWIN v. BALDWIN et al.

BALDWIN et al. v. LISSNER.

Civ. 15842.

District Court of Appeal, Second District, Division 1, California.

Dec. 12, 1947.

Hearing Denied Feb. 9, 1948.

1. **Receivers** 🔑40

A trial court making an ex parte appointment of a receiver may assume that the sworn statements of the applicant justifying such a drastic remedy are true, and that the application is made in good faith, and cannot regard the allegations as mere formal statements.

2. **Receivers** 🔑200

Where receiver's appointment procured by wife in her divorce suit was unnecessary, and substantially all of the material allegations in wife's petition for appointment of receiver proved to be untrue, wife, and not husband, should be the one charged with the fees, and expenses connected with improvident receivership.

3. Appeal and error ⚷984(1)
Receivers ⚷200

Courts are generally vested with large discrimination in determining who shall pay the cost and expenses of receiverships, and may assess costs against the fund or property in receivership or against applicant for receivership, or may apportion them among the parties, depending upon the circumstances, and, if no abuse of discretion appears, there can be no interference by an appellate court.

4. Receivers ⚷200

Receiver, who was improvidently appointed in wife's divorce suit as result of untrue allegations in wife's petition, was not entitled to payment of costs and expenses of receivership from husband on ground that husband acquiesced in the appointment, where husband had challenged propriety of receivership at every stage of proceedings.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit for divorce by Rowena Schneider Baldwin against Baldwin M. Baldwin and others, wherein Louis M. Lissner was appointed receiver. From an order discharging the receiver and finding that no fees, costs, or expenses of the receiver should be paid out of property belonging to Baldwin M. Baldwin, the receiver appeals.

Order affirmed.

Loeb and Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for appellant.

Meserve, Mumper & Hughes, Roy L. Herndon, Frank P. Doherty and William R. Gallagher, all of Los Angeles, for respondent Baldwin M. Baldwin.

DORAN, Justice.

The matter here presented has had a long judicial history and has previously been before the Supreme Court on three occasions, namely, in Re Estate of Baldwin, 21 Cal.2d 586, 134 P.2d 259; Lissner v. Superior Court, 23 Cal.2d 711, 146 P.2d 232; and in Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670.

Rowena Schneider Baldwin and Baldwin M. Baldwin were married on October 21, 1937, and on October 25, 1939, Anita M. Baldwin, the defendant's mother, died, bequeathing to Baldwin M. Baldwin the sum of $1,500 per month. Two days later the wife, Rowena Schneider Baldwin, instituted a divorce action, and secured, ex parte, the appointment of Louis M. Lissner as receiver. The appointment of a receiver was predicated upon the wife's verified complaint alleging in substance that the parties were possessed of a large amount of community property, and that the husband had so commingled community and separate property that the same could not be segregated; that the defendant "threatened to secrete, sell and encumber the community property * * * threatened to take out of the State of California all the community property, * * * threatened to hypothecate, assign and secrete his properties both real and personal so that he would be judgment proof * * * all for the purpose of embarrassing, hindering and delaying the satisfaction or payment of any orders * * * for the support of the plaintiff, and for the support and maintenance of plaintiff's minor children" (by a former marriage). It was further alleged that defendant intended to assign any and all interest in Anita M. Baldwin's estate; that defendant had fraudulently established a pretended residence in Nevada for the purpose of evading the California laws and defrauding the plaintiff; and that the wife "should have her just share of community property and be allowed a lump sum settlement of at least $250,000."

On June 1, 1940, the receiver petitioned the probate court for a rateable distribution seeking payment to the receiver of $1,500 per month from commencement of the probate proceedings in the Anita M. Baldwin Estate. This petition was contested by the executors, of which Baldwin M. Baldwin was one; the petition was denied but upon the receiver's appeal in 21 Cal.2d 586, 134 P.2d 259, a reversal was obtained. Upon a further petition for ratable distribution, Judge Stutzman in the Superior Court refused to assume jurisdiction; a writ of mandate was issued by the Supreme Court in 23 Cal.2d 711, 146 P.2d 232 compelling the lower court to take jurisdiction. Eventually the receiver's petition was granted and the Baldwin executors ordered to pay to the receiver the sum of $82,500 plus $1,500 per month until distribution.

In the divorce case, on August 3, 1944, Judge Henry M. Willis ordered judgment for the defendant Baldwin M. Baldwin. The trial court found that at no time prior to the appointment of the receiver and the confirmation thereof, did the court "have jurisdiction of the person of the defendant * * * or of his property, either by service of summons, process, order to show cause, notice or by his voluntary appearance, of seizure or said defendant's property, or otherwise." These findings further recite that the defendant was a bona fide resident of Nevada; that there was no community property and consequently no commingling thereof with separate property; that defendant had not threatened to sell, secrete or encumber either separate or community property, or to take any property out of the State of California, etc.; and that "It is not true that any threats, acts or conduct of defendant required the appointment of a receiver." An appeal from that judgment resulted in an affirmance thereof by the Supreme Court on June 25, 1946, in 28 Cal.2d 406, 170 P.2d 670, 676. The reviewing court there held that allowances made to the wife pendente lite without notice to the husband, and ordered paid by the receiver, "are ineffectual as personal judgments against [him] where he has neither voluntarily appeared nor been personally served with process"; and that "Inasmuch as service had not been had on defendant nor had the receiver taken into his possession or the court attached property of the defendant at the time of the making of the order of January 5, 1940, such order was correctly held by the trial court to be void and of no effect."

Thereafter, the defendant filed a motion to discharge the receiver, and the receiver filed a report and petition for payment of fees out of the defendant's share in the Baldwin estate. The defendant's objections to the receiver's report and petition alleged that the ex parte appointment of receiver was made in reliance upon plaintiff's false allegations, and that the receivership was unnecessary, improvident, wrongful and inequitable. On September 20, 1946, Judge Willis sustained the defendant's contentions, ordered discharge of the receiver, and found that "it would be unjust, inequitable and unlawful to charge the defendant with any of the fees, costs or expenses of the receiver or of the receiver's attorneys, or to require that any of such fees, costs or expenses be paid out of property belonging to said defendant"; and that the receiver should "look to plaintiff for his compensation." It is from this order that the receiver now appeals.

The appellant argues that "A receiver whose appointment is not void is entitled to compensation out of the property in his custody," and that the appointment of the receiver in this case was not void or irregular. According to the respondent's brief, however, the following question is squarely presented: "When a plaintiff has induced a court of equity to appoint a receiver by making false and unwarranted allegations of fact in a verified pleading, and when it has been determined that plaintiff's action was wholly without merit, upon whom should the costs of such receivership be imposed?"

To sustain the appellant's contentions herein would, in effect, amount to a holding that once a plaintiff secures the appointment of a receiver, even by the making of totally false and unwarranted allegations, such receiver possesses an absolute right to saddle a defendant's property with the burden of paying the receiver's fees, the fees of attorneys for the receiver and all expenses connected with the receivership. The cases cited by appellant by no means support such a proposition and to countenance such a rule would place in a plaintiff's hands a weapon which might easily result in the complete ruin of an innocent defendant.

[1, 2] Certainly, a trial court making an ex parte appointment of a receiver as in the present case, may assume that the sworn statements of the applicant justifying such a drastic remedy, are true, and that the application is made in good faith. Such allegations cannot be regarded as mere formal statements. But in the instant litigation, Judge Willis, who heard all of the evidence in the divorce case as well as that relating to the receivership, has stated that "substantially all of the material allegations * * * have been found and determined to be untrue; that the false allegations * * * were made by plaintiff without any information or reasonable ground sufficient to cause her reasonably to believe the same to be true"; and that "the appointment of said receiver herein was unnecessary, wrongful, improvident and without reasonable or probable cause." As hereinbefore indicated, the judgment for defendant in the divorce case has now been affirmed by the Supreme Court in 28 Cal.2d 406, 170 P.2d 670. Under these circumstances it appears evident that the plaintiff, and not the defendant, should be the one charged with the fees and expenses connected with the "improvident" receivership.

The rule is stated in Andrade v. Andrade, 216 Cal. 108, 13 P.2d 676, 677, 110 as follows: "As a general proposition the costs of a receivership are primarily a charge upon the property in the receiver's possession and are to be paid out of said property. *However, this is not an invariable rule.* In many cases a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver." (Italics added.) Cited in this opinion is Ephraim v. Pacific Bank, 129 Cal. 589, 592, 62 P. 177. Likewise, the language of Lewis v. Hall, 38 Cal.App. 329, 336, 176 P. 171, 174, is directly applicable to the present situation: "The court in its findings declared that the appointment of the receiver was improvidently and erroneously made. Under these circumstances it would have been manifestly unjust to charge the defendant's property with the compensation of the receiver, and, on the other hand, such expense could legitimately be imposed upon the plaintiff, at whose instance the receiver was appointed."

The appellant avers that "The receiver had property in his custody sufficient to provide for his compensation." The appellant's brief admits, however, that the receiver never actually had in possession any money or tangible property of any kind, but sets forth that "On July 28, 1944 a formal judgment had been entered ordering the executrix of Anita M. Baldwin, deceased to pay to the receiver the sum of $82,500 and certain additional monthly sums, by way of partial distribution of the defendant's interest in that estate." Appellant's insistence that this judgment constituted a chose of action which can be considered property in the receiver's possession even though the same had not been collected, and therefore that the receiver's fees should be borne by defendant, presents nothing which can warrant a reversal under the facts as hereinbefore set forth.

[3] As stated in the respondent's brief, "Appellant has wholly failed to show that the trial court abused its discretion in holding that the receiver should be required to pursue his remedies against the plaintiff for the recovery of his fees and expenses." Each case of this kind must, of necessity, rest upon its own facts. In the words of 45 Am.Juris. 224: "Courts generally are vested with large discretion in determining who shall pay the cost and expenses of receiverships. The court may assess the costs of a receivership against the fund or property in receivership or against the applicant for the receivership, or it may apportion them among the parties, depending upon circumstances." Since the matter is clearly one of discretion and no abuse of such discretion appears, there can be no interference by an appellate court.

[4] There is no merit in the appellant's contention that "the record here justifies, if in fact it does not compel the inference that the defendant acquiesced in the appointment (of the receiver) and thereby lost his right to object to it." On the contrary, as respondent's brief points out, "The record shows that defendant chal-

lenged the propriety of the receivership at every stage of the proceedings, both in the divorce action and in the probate proceedings."

The long judicial controversy in the divorce case was finally disposed of by the trial court's judgment in defendant's favor, which was affirmed in 28 Cal.2d 406, 170 P.2d 670. In respect to the order now appealed from, this also should be given finality and the entire matter set at rest.

The order is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

82 Cal.App.2d 757

In re SOMERS' ESTATE.

SOMERS v. BANK OF AMERICA et al.

Civ. 13591.

District Court of Appeal, First District,
Division 2, California.

Dec. 8, 1947.

Rehearing Denied Jan. 7, 1948.

Hearing Denied Feb. 5, 1948.

1. Wills 🔑307

The statute dealing with dismissal and nonsuit is applicable in will contest. Probate Code, § 370; Code Civ.Proc. § 581, subd. 1.

2. Dismissal and nonsuit 🔑7(1)

A voluntary dismissal may be filed at any time before submission of cause. Code Civ.Proc. § 581, subd. 1.

3. Dismissal and nonsuit 🔑19(1)

An answer does not seek "affirmative relief" within meaning of statute providing for dismissal and nonsuit if affirmative relief is not sought by defendant, unless it contains affirmative allegations or introduces new affirmative matter entitling pleader to such relief. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Relief".

4. Pleading 🔑72

A prayer cannot aid a defective pleading.

5. Wills 🔑307

Mere repetition of prayer for admission of will to probate in answer to will contest before probate, unsupported by any new allegations of fact, did not constitute prayer for "affirmative relief" operating to prevent voluntary dismissal of the contest. Probate Code, § 370; Code Civ.Proc. § 581, subd. 1.

6. Wills 🔑307

Where contestant voluntarily dismissed her will contest before probate, no action of court could reinstate it and contestant's only recourse would be filing of a new contest. Probate Code, § 370; Code Civ. Proc. § 581, subd. 1.

7. Wills 🔑319

A showing that contestant's counsel, without any inquiry as to whether will contest would actually come to trial on date for which it was set for trial, failed to subpoena necessary witnesses in reliance on alleged fact that a large percentage of cases set for trial did not actually go to trial on date originally set established such a lack of proper diligence as to justify order denying continuance.

8. Wills 🔑307

After dismissal of will contest before probate by contestant, there was nothing to prevent court's hearing original petition to probate the will. Probate Code § 370; Code Civ.Proc. § 581, subd. 1.

9. Witnesses 🔑240(1)

In absence of will contest, leading questions could be properly asked attesting witnesses who were sworn for purpose of giving testimony tending to establish prima facie the due execution of will and competency of testator.

10. Wills 🔑52(1)

The legal presumption is always in favor of testator's competency.

11. Wills 🔑300

Evidence sufficiently supported order admitting will to probate after contestant's voluntary dismissal of her contest before probate. Probate Code, § 370; Code Civ. Proc. § 581, subd. 1.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding in the matter of the estate of John Arthur Somers, also known as John A. Somers, deceased. A will contest was filed by Ruth Jensen Somers against Bank of America, National Trust & Savings Association and others. From decree purporting to decide contest and admitting will to probate, the contestant appeals.

Decree affirmed in part and reversed in part.

Phil F. Garvey, Fitz-Gerald Ames, and James A. Himmel, all of San Francisco, for appellant.

Sylvester J. McAtee, of San Francisco, Lane & Case and Glenn A. Lane, all of Los Angeles, and James F. Brennan, of San Francisco, for respondents.

DOOLING, Justice.

Following the filing of a petition for the probate of an alleged last will of the decedent his widow, the appellant, filed a contest before probate under Probate Code, section 370. Issue having been joined by the filing of answers the contest on May 13, 1947 was set for trial on June 10, 1947. On June 2, 1947 respondents served a notice on appellant's counsel that her contest was set for trial on June 10. On the morning of June 10 appellant made a motion for continuance of the trial of a contest to a later date which was denied. Thereupon a jury was impanelled and the further hearing of the contest was continued to the following morning. On June 11 appellant's counsel filed with the clerk a written dismissal of the contest pursuant to Code of Civil Procedure, section 581. When the trial was resumed on June 11 counsel for appellant announced to the court that the dismissal had been filed and handed a certified copy of the dismissal to the judge, and after some colloquy between court and counsel appellant and her counsel left the court room.

The trial court treated the dismissal of the contest as ineffective and after the taking of the testimony of the witnesses to the will made findings that none of the grounds of contest was true and of the due execution of the proposed will and entered its decree against the contestant and admitting the proposed will to probate. The appeal is taken from this decree.

At the outset we are met by the claim of respondents that their answers prayed for affirmative relief and the attempted voluntary dismissal of the contest was for that reason ineffective. Code Civ.Proc., sec. 581, subd. 1 provides, so far as here material: "An action may be dismissed * * * in the following cases: 1. By the plaintiff, by written request to the clerk, filed with the papers in the case * * * at any time before the trial * * * provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant."

[1, 2] It is settled that this section is applicable to will contests. Voyce v. Superior Court, 20 Cal.2d 479, on page 484, 127 P.2d 536 and cases cited. It is also settled that a voluntary dismissal may be filed at any time before the submission of the cause. (9 Cal.Jur. 510.) These rules are not questioned by respondents, their only claim in this regard being that affirmative relief was sought by their answers and hence the proviso of the quoted section forbade the dismissal.

The contest alleged facts showing the incompetency of the petitioner to make the contested will and also lack of the due execution. It further set out an earlier will executed by the decedent and asked the admission to probate of this earlier will. The answers denied the allegations of lack of competency and due execution and alleged that the earlier will offered by contestant for probate was revoked by the later will. The prayers of the answers included a prayer that the earlier will be denied probate and that the later will be admitted to probate. It is these parts of their prayers upon which respondents rely to support their claim that affirmative relief is sought by their answers.

[3, 4] It seems clear that the prayer that the earlier will be denied probate is purely defensive and in no sense a prayer for affirmative relief. The prayer that the later will be admitted to probate is supported by no allegations in the answers setting up any facts entitling the later will to probate. Those allegations are found only in the petition for probate originally filed and this part of the prayer found in the answers amounts to no more than a repetition of the prayer of the original petition. An answer cannot be said to seek affirmative relief within the meaning of Code Civ. Proc., sec. 581, subd. 1 unless it contains affirmative allegations or introduces new affirmative matter entitling the pleader to such relief. Simpson v. Superior Court, 68 Cal.App.2d 821, 158 P.2d 46; Belleau v. Thompson, 33 Cal. 495. If the mere naked prayer for affirmative relief unsupported by any allegations of the answer could prevent the voluntary dismissal of the contest then the insertion of such an unsupported prayer in the answer in any action would accomplish the same result. "A prayer cannot aid a defective pleading." (21 Cal.Jur. 68.)

[5] Respondents rely on Voyce v. Superior Court, supra, 20 Cal.2d 479, 127 P.2d 536; and In re Estate of Matthiessen, 10 Cal.App.2d 323, 52 P.2d 248. In the Voyce case the allegations of a contest were adopted by some of the answers and based on those facts the answering parties joined in the prayer for the revocation of the will. The case is distinguishable on this ground. There is language in the Matthiessen case which seems to support respondents. An examination of the opinion, however, shows this language to be dictum not necessary to the decision since it appears from the statement of facts that no written dismissal was filed with the clerk pursuant to Code Civ.Proc., sec. 581, subd. 1, but instead a motion to dismiss was made pursuant to subdivision 4 of the same section, and the point actually presented for decision was whether the probate judge abused his discretion in denying this motion. The court further pointed out (10 Cal.App.2d page 324, 52 P.2d page 248.) that the answer "set forth an additional ground for the admission of the will to probate." We are satisfied that the mere repetition in the answer, unsupported by any new allegations of fact, of the prayer for admission of the will to probate cannot operate to prevent the voluntary dismissal of a contest under Code Civ.Proc. sec. 581, subd. 1.

[6, 7] This conclusion renders moot the question whether the continuance sought by appellant was properly denied since, appellant having voluntarily dismissed her contest, no action of this court can reinstate it and her only recourse is the filing of a new contest. In re Estate of Hoover, 139 Cal.App. 753, 35 P.2d 188; In re Estate of Cook, 205 Cal. 581, 271 P. 1083. We may add, however, that the showing for a continuance that appellant's counsel, without any inquiry as to whether the contest would actually come to trial on June 10, failed to subpoena the necessary witnesses in reliance on the alleged fact that a large percentage of cases set for trial did not actually go to trial on the date originally set in our view shows on its face such a lack of proper diligence as to fully justify the order denying the continuance.

[8-11] Appellant attacks the order admitting the will to probate as unsupported by sufficient evidence. When appellant dismissed her contest there was nothing to prevent the court's hearing the original petition to probate the will of decedent. The attesting witnesses were sworn and gave testimony establishing prima facie the due execution of the will and the competency of the testator. The fact that leading questions were asked is unimportant. In the absence of a contest that is normal practice and facilitates the routine business of the probate courts. The legal presumption is always in favor of the testator's competency (In re Estate of Henderson, 196 Cal. 623, 636, 637, 238 P. 938) and the evidence on that subject introduced on the hearing was not necessary and only served to reinforce the presumption.

The portions of the decree purporting to decide the contest and to deny admission to probate of the earlier will were withdrawn from consideration of the court by the dismissal and are accordingly reversed. The portion of the decree admitting the will to probate is affirmed. Appellant is allowed her costs on appeal.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

82 Cal.App.2d 774

HENDRICKS v. PAPPAS et al.

No. 13557.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1947.

1. New trial 🔑71

Where there is a substantial conflict in the evidence on disputed issues material to determination of question of liability for damages, trial court may set aside jury's verdict and order a new trial.

2. Appeal and error 🔑979(1)

Where there is substantial conflict in evidence on disputed issues material to determination of question of liability for damages, trial court's order setting aside jury's verdict and granting a new trial will not be disturbed on appeal.

3. Automobiles 🔑245(72)

In action by pedestrian against motorist for injuries sustained by pedestrian when struck by automobile while he was crossing street, wherein it was a disputed question whether pedestrian was crossing in pedestrian lane or outside the lane, weight to be given police officer's testimony which tended to substantiate pedestrian's claim was for jury, though officer did not arrest motorist at the time of the accident for any offense, and investigator testified that officer had told him after the accident that the accident had happened 20 feet from the pedestrian lane.

4. Automobiles 🔑244(50)
New trial 🔑70

In action against motorist by pedestrian for injuries sustained by pedestrian when struck by automobile while he was crossing street, wherein it was a disputed question whether pedestrian was crossing on pedestrian lane or outside lane, evidence was sufficient to support a judgment for pedestrian had one been granted, and therefore trial court was authorized in granting pedestrian a new trial.

5. Automobiles 🔑245(72)

Pedestrian's failure to look either to right or to left while crossing street after receiving "go" signal was not contributory negligence as a matter of law, but was a question for the trier of the facts, and did not preclude recovery from motorist who made a left turn and ran into pedestrian. Vehicle Code, §§ 476, 560(a).

6. Negligence 🔑68, 136(26)

Every person who is himself obeying the law has a right to presume that every other person will perform his duty and obey the law, and while a person may not blindly rely on such presumption but must himself use reasonable care, whether reasonable care is used under the circumstances in relying on such presumption is a jury question.

7. Automobiles 🔑206

A pedestrian who has crossed the center of a street is not guilty of negligence in failing to observe whether vehicles are approaching in a direction in which they have no right to travel.

8. Costs 🔑263

Where frivolous appeal by defendants was taken merely for purposes of delay in the hope that litigation would outlive 81 year old plaintiff, $100 was assessed against defendants and added to costs as a penalty for taking the appeal. Code Civ.Proc. § 957.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Franklin Hendricks against Theophanes Pappas and others to recover for injuries sustained by plaintiff while a pedestrian when struck by an automobile driven by the named defendant. From an order granting a new trial to the plaintiff, the defendants appeal.

Order affirmed.

Leslie C. Gillen, of San Francisco, for appellants.

James C. Purcell, of San Francisco, for respondent.

BRAY, Justice.

[1,2] As shown by the citation in their opening brief of Bayley v. Souza, 55 Cal. App.2d 776, 131 P.2d 584, defendants are aware of the rule that binds this court on an appeal from an order granting a new trial where granted, as here, on the insufficiency of the evidence. "The law is well settled that where there is a substantial conflict in the evidence upon disputed issues which are material to the determination of the question of liability, the trial court may exercise its powers to set aside the verdict of a jury and order a new trial; and that under such circumstances its order will not be disturbed on appeal." 55 Cal.App.2d at page 778, 131 P.2d at page 585. In view of that awareness it is difficult to understand why this appeal has been brought.

The action is for injuries claimed to have been received by plaintiff, a pedestrian, when struck by an automobile driven by the defendant Theophanes Pappas, then a minor of the age of 18 years. The defendants Gust Pappas and Eliza Pappas (sued as Jane Doe Pappas), parents of Theophanes, are joined as defendants because they signed his application for a driver's license. However, for convenience, Theophanes will hereinafter be referred to as the sole defendant.

There were no eye-witnesses to the accident except the parties involved. The accident took place on March 26, 1945, at 9:30 a. m. at the intersection of Sixth and Folsom Streets in San Francisco. Sixth Street runs generally north and south, and Folsom Street east and west. Plaintiff testified that he was walking north on the east side of Sixth Street; that he paused at the southeast corner of Sixth and Folsom for the electrically operated traffic signal to change; that when the signal changed to "Go" he went straight ahead in the marked pedestrian lane; that he looked straight ahead but not to the left or right; that as he crossed a large truck to his left was going in the same direction up Sixth, at the same speed he was walking, and that it afforded him protection; that when he was hit he was crossing the north street car track on Folsom; that after being hit he was picked up from the north street car track but had been knocked off the pedestrian lane by defendant's car; that the car hit him on his left side and that he did not see it until it was right by him and did not observe its speed. There was no truck parked on the north side of Folsom extending into the pedestrian lane, but there was one parked "by" the lane.

Defendant directly contradicts plaintiff's version of the accident. He testified (by deposition as he was then in the Navy) that he was driving south on the west side of Sixth and stopped at the northerly line of Folsom for the signal to change. A truck and trailer going west on Folsom had stopped close to the double line marking the center of Folsom Street. When the light changed in his favor, defendant made a left turn (not prohibited at this intersection) in front of the stopped truck and continued east on Folsom on the south side of that street; that as he passed this truck plaintiff, whom defendant claimed was walking in a southerly direction, stepped out from the rear of that truck and into the left front fender of defendant's car. Defendant saw plaintiff just before he hit him and plaintiff was then about 45 or 50 feet to the east of the pedestrian lane. It was not raining and the streets were dry. (Plaintiff testified that it was raining.)

[3] Defendant claims that plaintiff was crossing Folsom from north to south at a point 45 to 50 feet easterly and down Folsom from the Sixth Street pedestrian crossing, and at that point plaintiff stepped out from behind a truck and trailer and was hit while south of the center line of Folsom. Plaintiff's claim is that he was going north in the Sixth Street pedestrian lane, and was hit while on the north side of the center line of Folsom. Other evidence in the case supports plaintiff's claim rather than

that of defendant. Officer Colligan, who talked to defendant at the scene of the accident, testified from his report made at the time, that defendant told him that plaintiff was walking from the south to the north about 20 feet east of the pedestrian lane when hit. To minimize the effect of Officer Colligan's testimony defendant stresses the fact that the officer did not give defendant a citation for violating the pedestrian's right of way or any other offense. The car had been removed from the point of accident on his arrival, and the officer did not interview plaintiff. Whether his failure to arrest defendant contradicts his testimony is a matter of question. Witness Lewis, an investigator for defendant, who interviewed the officer a month or two after the accident, testified that Officer Colligan told him that the accident had happened 20 feet east of the pedestrian lane; that defendant had then said that plaintiff was walking from north to south; and that if the officer had noted anything in the way of negligence on the part of defendant he would have cited him for a violation. The effect of this testimony, like the officer's failure to arrest defendant, was a matter for the jury. It cannot be said that either or both as a matter of law requires that the officer's testimony be entitled to no weight.

A doctor who examined and took X-rays of plaintiff testified that plaintiff suffered what is commonly referred to as a "bumper fracture" of the left leg. The injury to the left leg is consistent with plaintiff's claim that he was facing north and was hit from his left, and is not consistent with defendant's claim that plaintiff was facing south and was hit from his right. In cross-examination of the doctor the defendant asked the doctor if the injury to plaintiff's left leg could have been sustained by his being hit on the right side and falling to the pavement on his left knee. The doctor answered that the type of fracture plaintiff sustained was caused "by the knee going inward and the foot going outward" and gave as his opinion that a fall would not cause this result, except under circumstances different from any disclosed here.

[4] It is obvious that there was substantial evidence to support a judgment in plaintiff's favor had one been granted. Plaintiff's testimony alone, if believed, would be sufficient. There was no support of defendant's theory, while the testimony of the police officer and the doctor did support plaintiff's theory.

It is true that plaintiff was a difficult witness and on occasion contradicted himself, but he did not contradict himself upon the important phases of his testimony, such as his position in the crosswalk and the place where he was hit. Some of his difficulty on the stand may have been due to his age. He was 79 at the time of the accident and 80 at the time of the trial, and in view of the testimony of the only disinterested witnesses called, plaintiff's testimony stands up better than that of defendant.

[5-7] Defendant briefly, but without stressing the point, suggests the possibility of plaintiff being guilty of contributory negligence because of his testimony that after he received the "Go" signal and started to cross the street he looked neither to the right nor the left. This question would be one for the trial court to decide, under all the circumstances of the case. It cannot be said as matter of law that such conduct constitutes contributory negligence. Section 476 of the Vehicle Code provided, at the time of the accident, that with the "Go" signal "Vehicular traffic facing the signal shall proceed straight through or turn right or left * * *. But vehicular traffic shall yield the right of way * * * to pedestrians lawfully within the intersection or adjacent crosswalks at the time such signal is exhibited." Every person who is himself obeying the law has a right to presume that every other person will perform his duty and obey the law, and while a person may not blindly rely upon this presumption, but must himself use reasonable care, "Whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury." White v. Davis, 103 Cal.App. 531, 545, 284 P. 1086, 1092. See also Mann v. Scott, 180 Cal. 550, 182 P. 281; Carbaugh v. White Bus Line, 51 Cal.App. 1, 195 P. 1066. According to plaintiff's testimony he had crossed the center of Folsom Street when he was hit. Defendant had no right to drive his car in that area." * * * a

pedestrian who has crossed the center of a street is not guilty of negligence in failing to observe whether vehicles are approaching in a direction in which they have no right to travel." 19 Cal.Jur. 596; Jones v. Key, 54 Cal.App. 677, 202 P. 478; Lewis v. Tanner, 49 Cal.App. 271, 193 P. 287. Section 560(a) of the Vehicle Code provided: "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk * * *."

It is obvious that there is no basis for this appeal. That it was taken merely for purposes of delay in the hope that the litigation would outlive the plaintiff appears from the facts of the case as they appear in the transcript and the delay after filing the notice of appeal. Plaintiff is now 81 years of age. The order granting the new trial was filed December 9, 1946; notice of appeal filed December 11, and notice to the clerk to prepare the transcript on appeal was filed December 16. No arrangements were made by defendant to pay the reporter's fees for the preparation of the transcript until after a motion to dismiss the appeal had been noticed for hearing on the April calendar. The clerk's and reporter's transcript was not filed until July 26, 1947. Defendant's opening brief was filed August 26. No excuse is given by defendant for any of this delay. The opening brief is very sketchy, contains an incomplete summary of the evidence, and points out no substantial grounds for appeal. It cites three cases, which while unquestionably containing good law, are merely space-filling in an appellant's brief, as they support the position of the opposite party. The reply brief, likewise, adds nothing to point out to the court any substantial grounds of appeal.

This appeal is obviously frivolous and could have been taken solely for the purposes of delay. The courts will not permit the appellate processes to be abused in this fashion. Not only has this frivolous appeal unjustly affected the rights of the respondent, but the time of a busy court has been unnecessarily consumed in its consideration. This has necessarily adversely affected the rights of other litigants properly before this court. Under such circumstances the case falls directly within the following portion of section 957 of the Code of Civil Procedure: "When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just." See, generally, 2 Cal.Jur. p. 977, sec. 577.

[8] The order granting a new trial is affirmed, and pursuant to the provisions of section 957 of the Code of Civil Procedure the sum of $100 is assessed against appellants and added to the costs as a penalty for the taking of a frivolous appeal for the purposes of delay.

PETERS, P. J., and WARD, J., concur.

McELROY v. McELROY et al. *

Civ. 16030.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1947.

Hearing Granted Feb. 17, 1948.

1. Continuance 🔑46(1), 47

Refusal of a continuance was not an abuse of discretion, where motion therefor was supported only by an affidavit of counsel that one client had stated that the other client had been ill and was unable to travel and there was no effort to support the motion by competent evidence although there was ample time to do so before the commencement of the trial or its conclusion.

2. Divorce 🔑273

The parents of husband could not complain that divorce court was without jurisdiction to adjudicate interest of husband in property involved on ground that defendant husband resided out of the state and had been served only by publication of summons and that the property was outside the state.

3. Divorce 🔑273

A personal judgment rendered against parents of defendant husband in divorce case was proper, where community property had been delivered to them by principal defendant who was served only by publication and notwithstanding that the property involved was outside the state.

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* Subsequent opinion 198 P.2d 683.

4. Divorce 🔑273

In action for divorce where defendant husband had delivered community property to his parents and left the state, it was not necessary that a personal judgment against the husband or a judgment determining that his property within the state was community property be obtained before a judgment could be rendered against the parents based upon their possession of community property.

5. Divorce 🔑273

Under the Civil Code provision giving the husband the management and control of the community personal property, the deposit of the husband's earnings with his parents was not a legitimate exercise of his power under the Code, so far as right of wife to reach such deposit in action for divorce was concerned. Civ.Code, § 172.

6. Husband and wife 🔑267(1)

The code provision giving the husband the management and control of community personal property does not give him power to dispose of the property without a valuable consideration or for a fraudulent purpose. Civ.Code, § 172.

7. Divorce 🔑276(4)

In wife's suit for divorce, evidence supported finding that husband had placed money in his parents' possession with the design to defeat wife's rights, and that wife was entitled to judgment for $3,000 against the parents.

8. Divorce 🔑273

Wife who was granted an interlocutory divorce decree was entitled to personal judgment against husband's parents on account of moneys deposited with parents by defendant husband, since, if moneys were deposited merely for safekeeping, the parents held the money in trust, and wife could recover her interest, and, if the money was intended as a gift to parents, the transaction was void. Civ.Code, § 172.

9. Divorce 🔑273

In wife's action for divorce to which husband's parents were made defendants on ground that they had community funds in their possession, evidence sustained finding that parents had community funds in their possession when the action was commenced.

10. Divorce 🔑273

In wife's action for divorce to which the defendant husband's parents were made parties on the ground that they had community funds in their possession, evidence did not show that the parents had paid the money to their son.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action for divorce by Esther F. McElroy against Benjamin J. McElroy, wherein the defendant's parents, Emma McElroy and James B. McElroy, were made parties defendant on plaintiff's allegations that the principal defendant had delivered community funds to them and that such community funds should be allotted to plaintiff by divorce decree. From an interlocutory decree of divorce and a money judgment rendered in favor of plaintiff against the parents for the sum of $3,000, the parents appeal.

Judgment affirmed.

Brooks Gifford, Delmas R. Richmond, and Frederick G. Stoehr, all of Pasadena, for appellants.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for respondent.

WILSON, Justice.

This is an action for divorce brought by the wife against the husband. The latter's parents are joined as defendants on allegations that the husband had delivered community funds to them which should be allotted to respondent by the divorce decree. Summons was served on the husband by publication. Not having appeared, his default was entered. The parents filed an answer to the complaint. Respondent was awarded an interlocutory decree of divorce and a money judgment was rendered in her favor against the parents for the sum of

$3,000. The parents have appealed from the judgment contending that the court erred in refusing a continuance of the trial and in adjudicating the husband's interest in property not within the State of California, and that there is no evidence to support an inference of fraud on their part.

1. *Did the court abuse its discretion in refusing to grant a continuance of the trial?* An order was made fixing November 6, 1946, as the date of trial. On September 16, 1946, notice of trial was served on counsel for appellants. There had been some negotiations for settlement between the attorneys for the respective parties and on November 4 the negotiations failed. On that date counsel for appellants called his clients, who were then residing in Portland, Oregon, over the long distance telephone. He talked to appellant Emma McElroy, who stated that her husband, James B. McElroy, had been been ill and was unable to travel. With his motion for a continuance appellants' counsel filed an affidavit reciting his conversation with Mrs. McElroy. On November 6, the date of the trial, appellants made a motion for a continuance based on the attorney's affidavit, which was denied. For some reason not shown by the record the cause was continued until November 7, when it was assigned to a department of the court for trial. The cause was not tried on that date but was continued until Friday, November 8. At the beginning of the trial there was no intimation from appellants' counsel that he was not ready for trial or that the evidence of the absent defendants would be needed. In the afternoon of November 8 the trial was continued until Tuesday morning, November 12, Monday, the 11th, having been a legal holiday. Between November 4, when appellants' counsel ascertained over the telephone that Mr. McElroy was ill, and November 12 there was ample time within which affidavits of Mr. and Mrs. McElroy and their physician could have been obtained showing the physical condition of Mr. McElroy and whether he was unable to make the trip to Los Angeles.

The only information furnished to the court was the hearsay affidavit of counsel repeating what Mrs. McElroy had said to him over the telephone. A similar situation arose in Callegari v. Maurer, 4 Cal.App.2d 178, 40 P.2d 883, where the court stated the elementary rule that an application for a continuance is addressed to the sound discretion of the trial court and that its ruling will not be disturbed unless an abuse of discretion clearly appears. The court said that even a telegraphic report from the attending physician would have put the matter in a different light. In Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714, the application for continuance was made at the morning session of the court when the attorney for the absent defendant made a statement that defendant's wife was seriously ill and for that reason the defendant was unable to be present. The case was continued until 2:00 o'clock and at that time the only proof offered was the hearsay affidavit of the defendant's attorney to the effect that the defendant was unable to be present because of the illness of his wife. The continuance was denied and on appeal the order was sustained. Other cases in which applications for continuances were held to have been properly denied on hearsay affidavits are Corbin v. Howard, 61 Cal.App. 715, 716, 215 P. 920; Watson v. Columbia Basin Dev. Co., 22 Cal.App. 556, 559, 135 P. 511.

The cases cited by appellants are dissimilar to the instant case. In Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636, the plaintiff's attorney filed affidavits that were not hearsay but were made by the plaintiff himself and his physician that the plaintiff was in Seattle and too ill to be present at the trial. In Blankman v. Parsons, 73 Cal.App. 218, 238 P. 728, the testimony given by a witness was a surprise that ordinary prudence could not have guarded against and the court held that the plaintiff was entitled to a continuance for the purpose of meeting the testimony. In Re Estate of Stevens, 57 Cal.App. 160, 206 P. 668, it was shown without contradiction that two of the contestants were ill in New York. In Pacific Gas & Electric Co. v. Taylor, 52 Cal.App. 307, 198 P. 651, the application for continuance was made on the affidavit of the defendant's attorney based on a telegram from which it appeared that the defendant was absent from the state and was seriously ill. The opinion states that the defendants had no opportunity to obtain a physician's affidavit.

[1] In the instant case appellants' counsel ascertained on November 4 that Mr. McElroy was ill. The trial date was the 6th, the case was assigned for trial on the 7th, but the trial did not actually commence until the 8th. It was then continued until the 12th. There was ample time for obtaining an affidavit from Portland, Oregon, between the 4th, when the telephone conversation was had, and the 8th, when the trial actually commenced, but no effort was made to obtain one. Four more days elapsed before the completion of the trial. The instant case is not at all similar to the Pacific Gas case on which appellants rely. Since eight days elapsed between the time counsel for appellants ascertained that Mr. McElroy was ill and the twelfth of November, when the trial was completed, and no attempt was made in the meantime to obtain an affidavit from either of the appellants or from their physician, and no reason for such neglect is suggested by appellants, diligence was not exercised and the court did not abuse its discretion in refusing to postpone the trial.

[2-4] 2. *The court had jurisdiction to adjudicate the husband's interest in the property involved.* Appellants maintain that since defendant husband resided out of the State of California and was served by publication of summons the court was without jurisdiction to determine his interest in property outside the state. This contention has two answers: (1) The husband has not appealed from the judgment and therefore no issue between him and respondent is presented to this court. The parents have no cause to complain because of a judgment determining the property rights of their son and his wife. The personal judgment was rendered against them because they were in possession of money which the court found to be community funds that should be divided between respondent and her husband. Appellants had no title to the money and no right to retain it. While the personal judgment against the parents is no doubt objectionable to them, nevertheless they are not injured by the adjudication of property rights between the husband and wife, and it is elementary that one who is not injured by a judgment cannot complain of its provisions on appeal. Nichols v. Nichols, 135 Cal.App. 488, 491, 27 P.2d 414. The judgment merely requires them to pay to respondent the money in their possession that is hers and not theirs. (2) It is not necessary, as contended by appellants, that "a personal judgment against the defendant, or a judgment determining the status of his property within the state to be his community property" be obtained before a judgment can be rendered against appellants based upon their possession of community property. In Nichols v. Nichols, supra, the husband was absent from the state and was not served with summons personally or by publication. A receiver of the community property was appointed and the bank which held the property appealed. The court held that the bank could not urge errors which affected only the defendant husband and notwithstanding the failure to serve the defendant with process, sustained the order appointing a receiver and sequestering the husband's property. In Murray v. Murray, 115 Cal. 266, 271, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97, service by publication was made on the husband and upon his codefendant who was alleged to be holding property for him. The decree adjudicating that the property involved belonged to the husband and was chargeable with the maintenance of the plaintiff and the infant child of the parties, and declaring conveyances of property to the husband's codefendant to be fraudulent, was sustained.

[5, 6] 3. *The deposit of the husband's earnings with his parents was not a legitimate exercise of his power of management and control of community property.* Appellants argue that by reason of section 172 of the Civil Code, providing that the husband has the management and control of the community personal property, his deposit of funds with his parents cannot be attacked. This provision does not give him power to dispose of the property without a valuable consideration or for a fraudulent purpose. The court found that title to no part of the money was ever transferred to the parents; that they had merely the right of possession and custody; that they were bailees and trustees for respondent and her husband; that when they received the money they knew that it was the community

property of the husband and wife; that the husband's purpose in depositing the money with his parents was to knowingly deprive respondent of her interest therein.

In Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557, which involved a similar situation in which the husband's father was holding property in his name which belonged to the husband, the court sustained a judgment declaring the property to be community property and awarding the wife an interest therein. The court held that since the wife's lawful interest in the community property could not be affected by the fraudulent purpose of her husband in transferring the property to his father, she was entitled to recover her community interest. In Nichols v. Nichols, supra, the transfers of community property, made with intent to defeat the wife's rights, were held to be void. Furthermore, appellants do not claim the fund as their own, and since they are therefore not injured by the judgment they cannot complain of it on appeal.

[7] 4. *The evidence supports the finding that the husband placed money in his parents' possession with the design to defeat respondent's rights.* Respondent testified that her husband was in the United States Navy and had made an allotment of $200 per month to his father and mother; that on an occasion in 1943, prior to his going to the Pacific, they were at his parents' home and before leaving he said "I will have to ask my mother for some money." At that time respondent saw in the mail which had been delivered a Navy check which the husband said was the allotment that was going to his mother; respondent saw the check and observed that it was payable to Emma McElroy, her mother-in-law. She also testified that when she looked over the deposit slips there were 31 deposits of $200 each, with the Navy numbers on the deposit slips. This evidence, which was not contradicted, supports the finding that the husband delivered to his parents a total sum of $6,000 which was earned while he was married to respondent and which was community property, and supports the judgment against appellants for $3,000, or one half of the total.

The parents knew that the husband's earnings were community property and that respondent was entitled to her lawful share of the money. From respondent's evidence that the money was deposited with the parents for a period of two and a half years and from the fact that no consideration is shown to have passed from the parents to the husband, the inference is drawn that the parents knew that the deposit of the money with them was done with the purpose on the part of the husband to deprive respondent of her interest therein.

[8] Moreover, whether or not the deposit was made with a fraudulent intent, respondent was entitled to her community interest. (1) If the payments were deposited merely for safekeeping the parents held the money in trust and respondent could recover her interest (Berniker v. Berniker, supra); (2) if the money was intended as a gift by the husband to his parents the transaction was void since the husband was without power to make a gift of community property. Civ.Code, sec. 172.

[9] 5. *The evidence supports the finding that appellants had the community funds in their possession when the action was commenced.* During the trial it was stipulated that $6,000 deposited in the bank account of appellants was community property. Since it is undisputed that the parents received the money and that it was community property their continued possession of it is presumed until the contrary is shown. Appellants' answer does not plead the repayment of the money to the husband. The only evidence of its disposition is that in November, 1945, a portion of it, or possibly all, was withdrawn from the parents' bank account in Whittier and transferred to their account in Portland, Oregon. The transfer of the money from one bank to another does not change its character; it remained community property and was in the parents' possession.

[10] 6. *The evidence does not show that the parents paid the money to respondent's husband.* The very slight amount of evidence to the effect that Emma McElroy, the mother, saw cash deals between James B. McElroy (her husband) and their son,

and that she paid some of her son's bills (amount not stated), is far from being proof that the money was repaid to defendant husband. The "cash deals" between father and son may have been, as far as the court is advised, the deposit of further moneys by the son with his father.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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82 Cal.App.2d 884

ORO NAV. CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13629.

District Court of Appeal, First District, Division 1, California.

Dec. 16, 1947.

Hearing Denied Feb. 9, 1948.

1. Corporations 🔑**668(9)**

Where shipping articles issued by government to Nevada corporation, with offices in San Francisco, designated a certain company as operating manager of Nevada corporation's vessel, and member of crew of vessel was injured June 17, and on July 1st, without any notice to injured crew member, company was displaced as operating manager, and Nevada corporation's offices were removed from San Francisco to New York City, service in San Francisco, by crew member on August 27, of summons on company which had formerly been operating manager, gave Superior Court in San Francisco jurisdiction of crew member's action against Nevada corporation. Code of Civ.Proc. § 1962, subd. 3; Corporations Code §§ 6400–6403, 6504, 6700, 6701; 46 U.S.C.A. §§ 541 et seq. 577, 713.

2. Corporations 🔑**502**

A service of process on a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute.

3. Corporations 🔑**502, 665(1)**

Rule that corporation must be "present" within jurisdiction where service is made at time of service, does not necessarily refer to state wherein articles of incorporation were filed, place of corporation's residence, or main site of its activity, but means where it transacts business which is not merely an isolated transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Present".

4. Corporations 🔑**665(1)**

Whether a corporation is "present" within jurisdiction so service may be made on the corporation, after corporation has discontinued some former activity within the jurisdiction, ordinarily presents a question of fact to be determined by established rules of law controlling the jurisdiction where the corporation was served.

5. Corporations 🔑**668(1)**

The purpose of various sections of the corporation code dealing with service of summons on a foreign corporation, is to give an aggrieved party a means of bringing a foreign corporation into a proper jurisdictional tribunal and to protect the corporation through the enactment of the statutes providing methods and means of security from default judgments. Corporations Code, §§ 6400–6403, 6504, 6700, 6701.

6. Corporations 🔑**668(1)**

If a corporation does not avail itself of statutory protective provisions and is aware of an action for damages and service of summons on an alleged agent, who in turn gives timely notice of such service to the principal, corporation should not be permitted to take advantage of a technicality the merit of which must be founded on its inadvertent neglect or deliberate failure to comply with the law, or on some changed condition in transferring its main office to another jurisdiction without notification to employees. Corporations Code, §§ 6400–6403, 6504, 6700, 6701.

7. Corporations 🔑**668(1)**

Statute providing that a foreign corporation which has transacted intrastate business in the state and has thereafter withdrawn from business in the state, may be served with process in any action brought in the state arising out of such business, whether or not it has ever complied with requirements of chapter 3 of the Corporation Code, does not mean that the business must be entirely intrastate, and the statute is applicable if there has been any substantial business, no matter how much interstate business may have been transacted. Corporations Code, § 6504.

8. Corporations ⚷637

A statute authorizing a means of service on a foreign corporation which has transacted business in a state and then departed, if the action arises out of its business and the process is served prior to expiration of statute of limitations, is valid. Corporations Code, § 6504.

◆

Prohibition proceeding by the Oro Navigation Company, a corporation, against the Superior Court of the State of California, in and for the city and county of San Francisco, respondent, to restrain the respondent from hearing and trying the allegations of a complaint and from entering a default judgment in an action against the petitioner.

Petition for permanent writ denied and alternative writ discharged.

Graham & Morse, of San Francisco, for petitioner.

Gladstein, Andersen, Resner & Sawyer, of San Francisco, Cal., for respondent.

WARD, Justice.

An alternative writ of prohibition was issued by this court on the petition of defendant relative to an action entitled Anderson v. Oro Navigation Company, a corporation, filed in the superior court of this state. Plaintiff Anderson claimed damages based upon the alleged negligence of petitioner as owner and operator of the "S. S. Telfair Stockton." Summons was served upon the secretary of the General Steamship Corporation, Ltd., at its San Francisco office. Defendant Oro Navigation Company, petitioner herein, filed a special appearance in the trial court to quash the service of summons upon it on the ground that it was not present in the State of California at the time of the service. It is alleged in the present petition that the trial court, unless restrained, will hear and try the allegations of the complaint in Anderson v. Oro Navigation Company and threatens to enter a default judgment.

The Oro Navigation Company, a Nevada corporation, acquired the S. S. Telfair Stockton, a ship of the steam freighter class, from the United States Maritime Commission in May, 1947. At about that time the Oro company had officers and stockholders who were residents of the State of California. The petition alleges that the Oro company employed General Steamship Corporation, Ltd., to assist it in accepting delivery of the S. S. Telfair Stockton and in preparing the vessel for operation by the Oro company. The United States Treasury Department, through the United States Coast Guard, issued "Shipping Articles (R.S. 4612, as amended—U.S.C., title 46, sec. 713 [46 U.S.C.A. § 713])." These "Articles of Agreement between Master and Seamen * * * Required by act of Congress, title LIII, Revised Statutes of the United States (U.S.C., title 46, ch. 18 [46 U.S.C.A. § 541 et seq.])" provided that it is obligatory that "a legible copy of the agreement * * * be placed or posted up in such part of the vessel as to be accessible to the crew." (46 U.S.C.A. § 577.) The articles, dated May 29, 1947, designate Oro Navigation Company as the "Owner," and General Steamship Corporation, Ltd., as the "Operating Mgrs."

On June 2, 1947, the Oro Navigation Company made an employment contract with Anderson as a member of the crew. According to the articles the vessel was to sail from the port of San Francisco to "South and/or East Africa, either direct or via a port or ports on the Pacific, thence to such other ports and places in any part of the world." The articles provide that the final port of discharge shall be in the United States. So far as the present record discloses, San Francisco, California, is the only port definitely referred to, except that there is the statement that Anderson was "aboard said vessel at Portland, Oregon, on or about June 17, 1947."

Anderson was injured aboard the S. S. Telfair Stockton at Portland, Oregon, on or about June 17, 1947, while a member of the crew of the vessel. Petitioner sets forth that as of July 1, 1947, the vessel left the Pacific Coast for operation in foreign commerce, and that by such date the General Steamship Corporation, Ltd., had completed its services for petitioner. This fact gives rise to petitioner's claim that the General Steamship Corporation, Ltd., had been displaced as "Operating Mgrs." On July 1, 1947. On or about July 15, 1947, residents of New York were elected officers and directors of the Oro company replacing the residents of California who had occupied such positions, and the offices of the company were removed from San Francisco to New York City. It is alleged that since July 15, 1947, the Oro company has had no officer or agent present in the State of California. There is no claim made that Anderson, the injured employee, or any other member of the crew, was ever notified of either a change of officers or place of business. It must be assumed that Anderson believed that the "Shipping Articles" stated the fact. On August 27, 1947, Anderson's complaint was filed and summons was served upon the secretary of the General Steamship Corporation, Ltd.

[1] There is no merit to petitioner's contention that as service was made on August 27, 1947 upon the General Steamship Corporation, Ltd., which had completed its services for petitioner by July 1, 1947, no jurisdiction was obtained over petitioner. Corporations Code section 6701 (Stats. 1947, Ch. 1038, pg. 2409), formerly Civil Code section 411, provides that "Mere retirement from transacting business within this State without filing a certificate of withdrawal does not revoke the appointment of any agent for the service of process within this State." Furthermore, it is through petitioner's conduct in describing General Steamship Corporation, Ltd., as "Operating Mgrs." on the articles, that Anderson caused summons to be served upon General Steamship Corporation, Ltd. Code of Civil Procedure, Section 1962, subd. 3, provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

[2-4] Service of process upon a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute. Doe v. Springfield Boiler & Mfg. Co., 9 Cir., 104 F. 684. Judicial decisions often express this rule by stating that the corporation must "be present" within the jurisdiction where service is made at the time of service. "Presence" does not necessarily refer to the state wherein the articles of incorporation were filed, the location of the corporation's residence in directing the conduct of its business or the main site of operating activity. "Presence" means transacting business which is not merely an isolated transaction. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057. Likewise, the transaction should have a relation to the purpose for which the corporation was formed. Whether the corporation is "present" after a discontinuance of some former activity ordinarily presents a question of fact to be determined by established rules of law controlling within the jurisdiction where the foreign corporation was served. In this case the laws of California are applicable.

The view of the Federal Courts on the matter is seen in Giusti v. Pyrotechnic Industries, Inc., 9 Cir., 156 F.2d 351. In that case Triumph Fusee & Fireworks Company was one of many alleged corporations both of California and of other states, in an action charging violation of the anti-trust act. The complaint named Triumph, a Delaware corporation, as one of several defendants engaged in business in California. The fact that the Triumph company had transacted intrastate business was the factual ground upon which it was decided that service of plaintiff's summons in that action on the designated California agent, the Secretary of State, was a valid service. It was declared by the United States Circuit Court that the United States District Court had jurisdiction of the subject matter and the person sued, based upon statutory provisions then designated as California Civil Code sections 411, 406a and 405.

The Civil Code sections covering corporation law have been redesignated as sections of the Corporations Code. (Stats. 1947, Ch. 1038, p. 2309.) Corporations Code sections 6700 and 6701 (Stats.1947, Ch. 1038, pp. 2408, 2409), formerly Civil Code section 411, permit a corporation which has the right to transact intrastate business to surrender such right by filing with the Secretary of State a certificate. Corporations Code section 6504 (Stats.1947, Ch. 1038, p. 2408), formerly a part of Civil Code section 406a, reads: "A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided in this chapter in any action brought in this State arising out of such business, whether or not it has ever complied with the requirements of Chapter 3 of this part." This is the same rule stated in Restatement of the Law, Judgments, Ch. 2, Topic 3, Tit. C., sec. 30, pg. 123. Chapter 3, including sections 6400, 6401, 6402 and 6403, of the new Corporations Code covers part of former Civil Code section 405, and in particular the subject of the qualification for foreign corporations to transact intrastate business in California. Corporations Code section 6504 (formerly a part of Civil Code section 406a) permits service on the withdrawn corporation whether or not it has complied at any prior time with the requirement of filing its articles of incorporation and designating a person in the state upon whom process may be served if the action upon which the process is based arose out of business previously conducted in California.

[5, 6] The legislature, in enacting the last paragraph of Civil Code sec. 406a, and its reenactment into the Corporations Code, sec. 6504, appears to have given due consideration to the rights of claimants and corporations. The provision hereafter may be referred to by its corporate code designation. The purpose of the various sections dealing with service of summons upon a foreign corporation is to give an aggrieved party a means of bringing a foreign corporation into a proper jurisdictional tribunal and to protect the corporation through the enactment of statutes providing methods and means of security from default judgments. If the corporation does not avail itself of statutory protective provisions and is aware of the filing of an action for damages and service of summons upon an alleged agent, who in turn gives timely notice of such service to the principal, it should not be permitted to take advantage of a technicality, the merit of which must be founded upon its inadvertent neglect or deliberate failure to comply with the law, or upon some changed condition in transferring the main office without notification to the employees. With the above test in mind the facts as presented on this application, and the applicable rules of law, may be considered.

Corporations Code section 6504 provides that the corporation shall have transacted "intrastate business in this State." That petitioner transacted intrastate business in this state at a period prior to Anderson's injury appears from the petition by the following allegation: "* * * that it maintained an office and had officers and stockholders residents of the State of California." In addition, it caused the S. S. Telfair Stockton to be prepared and to be accepted "for operation under the ownership of the Oro Navigation Company." The latter conduct is intrastate business contracted and performed and completed in this state. The maintenance of an office, the preparation of the vessel, contracting with 56 seamen and apprentices from various foreign countries or different states in this country, and many other duties, were tasks that devolved upon the principal or through the agency of the operating managers.

Petitioner, in support of its contention that the Oro company was not present in California at the time of service of the summons upon the agent of that company, cites Holland v. Parry Navigation Co., Inc., D.C., 7 F.R.D. 471, 472, 1947 A.M.C. 1435. In that case the Parry company was not registered to do business in Pennsylvania. The work of a Philadelphia company acting as managing agent was less in scope than that of the managing operators in the present case. Vessels of the Parry company entered the port of Philadelphia and the managing agents represented the Parry company during such periods. The trial court held that the business conducted by the agents was sufficient "to make it amenable to service of process in this jurisdiction" but that as a question of fact there was no relation of principal and agent on the date of service of summons. The writer of the opinion does not put the thought into words, but indicates that the facts of each case under the legal provisions of the existing law at the place of service control. This is demonstrated by pointing out that in the Parry opinion the court notes the "striking similarity in the facts between the instant case" and Jenkins v. Lykes Bros. S. S. Co., D.C., 48 F.Supp. 848, which was written by the same District Judge. In the Jenkins case, the court said (page 850 of 48 F.Supp.): "The second question is whether service on Kurz as Lykes' agent is legally sufficient to constitute service on Lykes. Under Rule 4(d) (7) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, service is valid if made 'in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process * * * in an action brought in the courts of general jurisdiction of that state'. By the Pennsylvania Act of April 8, 1851, P.L. 353, 12 P.S. § 1310, a foreign corporation having an agency in any county of Pennsylvania may be validly served by a service of a summons upon the 'president, cashier, agent, chief or any other clerk, or upon any directors or agent' in such county." No provision is noted similar to California Corporation Code section 6504, supra. The factual difference, as indicated by the District Judge, between the Lykes and the Parry cases appears to be that in the former the business of the agent was practically continuous whereas in the Parry case it was occasional and sporadic. The court also pointed out that although "it did not appear in the opinion in the Jenkins case," the agent there was actually performing his duties, whereas in the Parry case there was no relationship of principal and agent in existence at the time service was made.

In the absence of a statutory provision, no judicial uniform rule should be invoked upon a question which is based in each case upon variant facts. Marcum v. Owens-Parks Lumber Co., D.C., 31 F.Supp. 748. In the last cited case it was determined that in view of the failure of a California corporation to designate an agent in the State of Washington, the master of the steamship, upon whom service of summons was made, was its agent with reference to the transaction out of which the claim arose, namely, an action for damages arising out of the employment of a dock employee for injuries sustained in unloading of cargo.

In Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149, a representative of the Thew company during a trip from his home state to California sought to compromise a claim against his company. No question of authorization of the representative to compromise the claim was involved in that case. It may appear to be an isolated transaction, but in fact is was the outgrowth of and a continuance of previously transacted business. See, also, Socony-Vacuum Oil Co. v. Superior Court, 35 Cal.App.2d 92, 94 P.2d 1019.

[7] Corporation Code section 6504, supra, which states that service may be made whether or not the corporation has ever complied with the various steps set forth in chapter 3 of the Corporation Code, providing the corporation has transacted intrastate business in this state, does not mean that the business must be entirely intrastate. If that interpretation should be given the wording of the section, then it would be an easy matter to transact, through an agent, only interstate business, and thereby be immune from the provisions of the section in such an action as is pending in the trial court. If there is any substantial intrastate business, no matter how much interstate business may be transacted, the section is applicable so far as that

point is concerned. In Eastman Kodak Co. of New York v. Southern Photo Co., 273 U.S. 359, 372, 373, 47 S.Ct. 400, 403, 71 L.Ed. 684, it is said: "Be that as it may, it is clear that such an enlargement was made by section 12 of the Clayton Act [15 U.S. C.A. § 22]—dealing specifically with the venue and service of process in suits against corporations—under which the plaintiff proceeded in the present case. This provided that 'any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.' * * * We are further of opinion that a corporation is none the less engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. And see International Harvester [Co. of America] v. [Commonwealth of] Kentucky, 234 U.S. 579, 587, 34 S.Ct. 944, 58 L.Ed. 1479; Davis v. Farmers' Cooperative Co., 262 U.S. 312, 316, 43 S.Ct. 556, 67 L.Ed. 996."

In Giusti v. Pyrotechnic Industries, supra, (the Triumph case), it was held (page 354 of 156 F.2d) that the above is "the law in California as to the intrastate business of destroying appellant's business there." The Triumph case involved the commission of a conspiracy, a civil wrong independent of a contract. It is the civil wrong and not the conspiracy that is actionable. In brief, the subject of the action in the Triumph case and that in the present was in each instance based upon a tort. (5 Cal. Jur., sec. 29, pp. 528-529.)

[8] A statute authorizing a means of service upon a foreign corporation which has transacted business in a state and then departed, if the action arises out of such business and the process is served prior to the expiration of the statute of limitations, is valid. The basis of such decision is that persons who have transacted business should not be precluded from enforcing a corporate liability by the withdrawal of the corporation from the state. State of Washington v. Superior Court, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653.

As applied to the peculiar facts in this case the Oro Navigation Company offers a minimum, if any, inconvenience. As previously stated, one of the benefits of the laws and rules is the protection of the corporation to the extent that it may have an opportunity to defend actions. The Oro Navigation Company has had timely notice of the filing of the complaint as appears from the filing of the motion in the trial court and of this petition in this court. The purpose of filing this petition for a writ of prohibition is to restrain the trial court from entering a default judgment against the Oro Navigation Company. If a proper and timely appearance is made no default judgment will be entered.

The petition for a permanent writ of prohibition is denied and the alternative writ discharged.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

WOLFSEN et al. v. HATHAWAY et al.*

Civ. 7406; Sac. 5849.

District Court of Appeal, Third District, California.

Dec. 15, 1947.

Rehearing Denied Jan. 14, 1948.

Hearing Granted Feb. 9, 1948.

1. Judgment ⚷948(1)

In absence of either pleading or proof of a former judgment upon litigated issues, defense of res judicata is thereby waived.

2. Frauds, statute of ⚷44(4), 141

A purported oral agreement to lease farm land to defendants for period longer than one year, in absence of written memorandum, was void under statute of frauds, and did not entitle defendants sued for destruction of growing crops to enter upon land and disk or plow the land and destroy the crops growing thereon. Civ.Code, § 1624, subd. 4.

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* Subsequent opinion 198 P.2d 1.

3. Frauds, statute of 🔑141

Under rule limiting to equitable suits, as distinguished from actions at law, the rule relieving a person of usual application of statute of frauds by partial performance, defendants could not defend action at law for damages for alleged wrongful destruction of grass and grain growing on land on ground that purported oral agreement to lease land to defendants was outside statute of frauds by reason of part performance. Civ.Code, § 1624, subd. 4; Code Civ.Proc. §§ 1971–1973.

4. Frauds, statute of 🔑129(1)

The doctrine of part performance of agreement within statute of frauds does not apply to action at law, although doctrine may apply in equitable suit to prevent fraud or undue enrichment of owner of property who has acquiesced or induced one to take possession and spend money or to furnish labor under an invalid oral agreement. Civ.Code, § 1624; Code Civ.Proc. §§ 1971–1973.

5. Damages 🔑112

Ordinarily, measure of damages for wrongful destruction of crops of growing volunteer grass for grazing purposes is difference in rental value of land with and without the crops, and measure of damages for wrongful destruction of annually planted crops, as distinguished from perennial crops such as volunteer grass for grazing purpose, is market value thereof at time of destruction, less cost of maturing and marketing the crops.

6. Appeal and error 🔑1064(1)

Defendants sued by tenants under written lease for damages for wrongful destruction of crops of growing volunteer grass for grazing purposes were not prejudiced by instruction that measure of damages was difference between value of crops before and after destruction, notwithstanding that ordinarily the correct measure of damages for wrongful destruction of such crops is difference in rental value of land with and without the crops, where defendants also tried case on theory that measure of damages was such difference in value of crops. Civ.Code, § 3333.

7. Damages 🔑94, 138

Evidence warranted award of $15,410 compensatory damages and $15,000 exemplary damages for wrongful destruction of crops of growing volunteer grass for grazing purposes on 670 acres of land. Civ.Code, § 3294.

8. Damages 🔑215(2)

In action for damages for wrongful destruction of crops of growing volunteer grass for grazing purposes, instruction that exemplary damages could be awarded only if crops were destroyed with deliberate purpose or intent to vex, annoy, or injure plaintiffs, but could not be awarded if defendants acted in good faith under honest claim of right, properly informed jury that nothing but proof of actual "malice" toward plaintiffs would entitle jury to award of exemplary damages. Civ.Code, § 3294.

> See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

9. Damages 🔑188(1)

In action for exemplary damages for wrongful destruction of crops of growing volunteer grass for grazing purposes, evidence warranted finding that crops were destroyed with intent on part of defendants to vex, annoy, and injure the plaintiffs. Civ.Code, § 3294.

10. Appeal and error 🔑1004(1)

A reviewing court may not interfere with amount of exemplary damages awarded by jury unless the sum is so excessive as to shock conscience, or if in view of all facts it appears that an award of exemplary damages is not warranted, and primarily it is sole province of jury to fix amount of punitive damages, although its discretion may not be arbitrarily exercised. Civ.Code, § 3294.

11. Damages 🔑91(1), 94

In determining whether award of exemplary damages is result of passion or prejudice, it is proper to consider amount of compensatory damages allowed together with all circumstances attending unlawful acts complained of which may indicate motive, intent, or malice with which they were performed, and extreme acts of deliberate intent to brutally commit bodily harm or to ruthlessly and seriously injure property of another, prompted by mere vindictiveness and ill will, may warrant the imposition of substantial punitive damages. Civ.Code, § 3294.

12. Damages ⚷87(1)

"Punitive damages" are awarded as punishment for willful, intentional, and unjustifiable conduct. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Punitive Damages".

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Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Henry B. Wolfsen and Lawrence C. Wolfsen against W. L. Hathaway and Seth Cole and others for damages for alleged wrongful destruction of grass and grain growing on plaintiffs' leased land. From the judgment the named defendants appeal.

Affirmed.

Linneman & Burgess, of Dos Palos, for appellants.

C. Ray Robinson, of Merced, for respondents.

THOMPSON, Justice.

The defendants W. L. Hathaway and Seth Cole have appealed from a judgment for damages which was rendered against them pursuant to the verdict of a jury, in a suit at law for the wrongful destruction of grass and grain which were growing on plaintiffs' leased land. The appellants claimed they held an oral agreement for a written lease of the farm, and that they were therefore legally authorized to disk and plow the land, which resulted in the damage complained of. On the theory that there was no evidence to support the existence of a valid alleged oral agreement, on motion the court instructed the jurors that plaintiffs were entitled to damages, the amount of which should be determined by them, and that the jury should determine whether plaintiffs were entitled to exemplary damages, and if so, should fix the amount thereof. The jury returned a verdict against appellants for compensatory damages in the sum of $15,410, together with exemplary damages against appellant W. L. Hathaway in the further sum of $15,000. The jury also returned a verdict to the effect that plaintiffs take nothing from the owners of the land, who were also named as codefendants. Judgment was accordingly rendered against the appellants for said amounts, from which this appeal was perfected.

The appellants contend that the court erred in instructing the jury that plaintiffs were entitled to damages in any sum whatever, and that the verdicts and judgment, which are based on the assumed invalidity of the alleged oral agreement, are not supported by the evidence. It is further asserted that the amount of compensatory damages is excessive, and that there is no evidence of actual malice to support the verdict or judgment for exemplary damages.

The defendants, Luis, May and Paula Fatjo and Lolita Fatjo Judge, own 1,740 acres of grazing and grain land in Merced County. January 17, 1946, they executed a written lease of said land to plaintiffs for a term of seven and a half months from March 15, 1946, for the cash rental of $7,500. Plaintiffs leased the land for the purpose of grazing cattle and harvesting the volunteer crop of grass and the grain. They took possession March 15, 1946. Appellants allege in their separate answer to the complaint, and claim that on December 15, 1945, said owners of the land, through their agent, C. J. McCullough, "entered into *an oral agreement* * * * to lease and demise and agreed to enter into a [subsequent] written lease for the purpose of leasing" said land, for a term "to expire on the 30th day of June, 1947," in consideration of one-fourth of the crop of grain produced, to be delivered to the lessors as rental therefor; that the written lease (which was not executed or delivered) "should contain substantially the same terms and conditions in addition to the foregoing terms and stipulations as were contained in a certain lease executed * * * under date of November 1, 1941, to one Thomas Hauschildt;" that pursuant to said oral agreement they took immediate possession of the land and plowed and disked "approximately six hundred to seven hundred acres."

McCullough was acting as agent for a real estate firm by the name of Coldwell, Banker & Company. The evidence is undisputed that no written lease was executed between the owners of the land and appellants. On January 8th and 9th the appellant, Cole, commenced disking the land, but ceased work on the last mentioned date on account of a breakdown of machinery. On January 18th, Coldwell, Banker & Company notified Hathaway that the land had been leased to other persons. In spite of that notice and after receipt of a telegram from McCullough on January 8th, saying, "Do not disk or plow until we communicate with you again," the appellants resumed their work and disked and plowed 670 acres of land. Mr. Hathaway admitted that he had notice on or before March 8th that appellants "had no lease on the property" and that demand was made that they cease plowing and disking. Mr. Cole admitted that, in the latter part of February or the first of March the plaintiff, Henry Wolfsen, came to the field and told him plaintiffs had a lease on the property and that if he did not cease destroying the crops an order of court would be sought to stop the work. Cole admitted that an injunction was served on them March 7th to stop the work. Regardless of appellants' knowledge of plaintiffs' lease and of the notices to cease plowing or disking, and the fact that they would be unable to secure a lease, they proceeded to plow and disk some six hundred and seventy acres of the grazing and grain land. Substantially all the damage complained of by plaintiffs was done by appellants after such definite notices to cease working had been received.

[1] The respondents contend that a judgment which was rendered in a former action between the owners of the land involved in this suit and these appellants, in which it was determined that Hathaway and Cole did not hold the oral lease claimed in this suit, nor the right to disk, plow or destroy the crops of grass or grain thereon, and in which an injunction was issued against them, is res judicata of those issues in this action. It is true that suit was filed March 7, 1946, in Merced County, by Luis Fatjo, et al., against these appellants, in which those identical issues were determined against Hathaway and Cole; that the defendants appealed that action to this court, and that the appeal was dismissed by this court March 26, 1947. It is also true that since appellants set up in their answer in this case their defense of destroying the grass and grain under an alleged oral lease of the property, and that plaintiffs therefore had no opportunity to plead res judicata, that plea was not a prerequisite to plaintiffs' right to tender proof of the former judgment as an estoppel against the attempt of appellants to again litigate the same issues. But our attention is called to no proof in this case of respondents' reliance upon the former judgment as res judicata. The evidence of Mr. Hathaway in the former action was referred to, but only for the purpose of impeachment. It has been uniformly held that, in the absence of either pleading *or proof* of a former judgment upon litigated issues, the defense of res judicata is thereby waived. Rideaux v. Torgrimson, 12 Cal. 2d 633, 638, 86 P.2d 826; Domestic & Foreign Petroleum Co., Ltd., v. Long, 4 Cal.2d 547, 562, 51 P.2d 73; Spitzer v. Superior Court, 74 Cal.App. 494, 498, 241 P. 270; Madruga v. Borden Co., 63 Cal. App.2d 116, 123, 146 P.2d 273; 15 Cal.Jur. 208, sec. 230; 50 C.J.S., Judgments, § 822.

[2] We are, however, of the opinion there is no substantial evidence in this case that appellants held a valid oral lease on said land, or that they destroyed the growing crops of grass and grain in good faith under such alleged lease. It follows that the court therefore properly instructed the jury that plaintiffs were entitled to judgment, leaving the amount of compensatory damages and the question of whether exemplary damages were allowable, to be determined by the jury. The purported oral agreement to lease the land was absolutely invalid and void, under subdivision 4 of Section 1624 of the Civil Code,

since it purports to be "an agreement for the leasing for a longer period than one year." It was alleged to have been made December 15, 1945, "to expire on the 30th day of June, 1947." The statute provides that such an agreement *is invalid* unless the same, or some memorandum thereof, is in writing subscribed by the party to be charged or by his agent. No such memorandum was signed. It seems evident from a reading of the record that Mr. Hathaway had a conversation with McCullough, the agent of Coldwell, Banker & Company, in December, 1945, regarding a proposed lease of the premises. It had been formerly leased, in November, 1941, to Thomas Hauschildt, for five years. Hauschildt subsequently died. That conversation clearly indicates that Hathaway and McCullough contemplated a lease *"along the line* of the Hauschildt lease", as Mr. Hathaway himself testified, upon terms to be thereafter agreed upon and executed between the owners of the land and these appellants. Mr. Hathaway testified in that regard:

> "Q. You understood then that this lease was to be signed by the owner of the property, didn't you? A. That is right.
> * * *
>
> "Q. You understood by that that he wanted a signed lease in order to complete the deal, isn't that right? A. Yes."

It is true that McCullough prepared and sent to Hathaway a proposed written lease in January, 1946, for appellant's approval and signature. It was not signed by the owners. The prompt delivery of that proposed written lease by McCullough is convincing evidence that the parties did not rely on an oral agreement of lease, but contemplated only a written lease to be thereafter executed by the respective parties. McCullough had no authority as an agent of the owners or otherwise to orally lease the property or to agree upon the terms of a proposed written lease. He so testified. There is absolutely no evidence in the record that McCullough had or claimed any such authority. Hathaway knew that fact. He testified that McCullough told him "he was going to *take the bull by the horns* and go ahead with this arrangement with me on the property." That statement clearly inferred that McCullough had no authority to lease the property orally or otherwise. Moreover, Mr. Hathaway admitted that he read the proposed written lease which he received from McCullough and signed it, notwithstanding the fact that it contained some provisions with which he did not agree. Regarding those changes in the proposed lease, he said:

> "We had not arrived at all the details of the lease, the agreement was I believe I testified to in discussing this with Mr. McCullough over the phone, and he told me to go ahead and sign this lease and shoot it up to him, that he and I would get together on some of the details later. * * * I have had no conversation with Mr. McCullough since the phone call that I made."

Mr. Hathaway admitted that he received a letter from the firm of Coldwell, Banker & Company, which McCullough represented, dated January 18th, notifying him that the property had been leased "to other persons for grazing purposes." Prior to that letter, McCullough telegraphed Hathaway on January 8th not to disk or plow the land until he was communicated with. March 1st, Henry Wolfsen, one of the plaintiffs, saw the appellant, Cole, at the premises, and told him plaintiffs had leased the land, and warned him not to destroy the crops or a court order would be sought to restrain them. In effect, Cole refused to abandon the work, and told Wolfsen that he would take his orders only from his boss (Mr. Hathaway). That injunction was served on appellants on March 7th. The previous injunction suit resulted in a judgment against these appellants, determining that they held no oral lease on the premises and that they had no right to plow or disk the land or to destroy the crops. In spite of all such notices the appellants subsequently committed substantially all the damages complained of in this suit. We are satisfied there is no evidence in this case that appellants held an oral lease or that they were lawfully entitled to enter the premises and disk or plow the land and destroy the crops thereon. The court, therefore, properly instructed the jury to that effect.

[3] The appellants contend that their alleged oral agreement to lease was not invalid under Section 1624 of the Civil Code, regardless of the fact that it was for a longer period than one year, for the reason that they entered the premises and performed some work in partial performance of the contract. Schubert v. Lowe, 193 Cal. 291, 223 P. 550; Manning v. Franklin, 81 Cal. 205, 22 P. 550; Cheney v. Newberry & Co., 67 Cal. 125, 7 P. 444. We think the foregoing cited cases are not in point. None of them involves, as the present action does, the wrongful entry of real property by defendants under an invalid oral agreement and the wilful destruction of growing crops thereon, after notice and knowledge of the invalidity of their claim, and of the fact that the land had been leased to other persons. In the Schubert case, supra, the owner of land brought suit in unlawful detainer against the defendant who had been occupying the land under a tenancy from month to month. The defendant filed a cross-complaint, alleging an oral agreement with plaintiff for a written lease upon specific terms. Plaintiff's demurrer to the cross-complaint was erroneously overruled for the reason that a cross-complaint in a suit for unlawful detainer is not permissible. Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann. Cas.1916D, 370. Section 1170 of the Code of Civil Procedure limits the defendant's authorized pleadings in the Schubert action to an answer or demurrer. The court then granted a decree of specific performance against the plaintiff. The decree for specific performance was reversed on appeal. The court, however did say that while the defendant was not entitled to specific performance of the agreement to execute a written lease [193 Cal. 291, 223 P. 552], "the part performance of such an agreement can be interposed *as an equitable defense* to the plaintiff's attempt to wrest from him the possession of the premises *by the summary proceedings in unlawful detainer.*" (Italics added.) In that case it does not appear that the alleged oral agreement was for a lease for a longer period than one year. The present case is not a suit for unlawful detainer, nor for specific performance. It is a suit at law for damages for the wilful and wrongful destruction of growing crops. Certainly a defendant may not defend a suit at law for damages for wilful destruction of crops, by alleging an oral agreement which is invalid on its face and contrary to the statute of frauds, under the uncontradicted facts of this case.

Likewise, the case of Manning, supra, was a suit for unlawful detainer. Under an oral contract with the aged owner of real property, the defendant constructed a dwelling house thereon and paid one-half of the taxes and water charges, and care for plaintiff in her illness, as agreed, for a period of several years. The court properly held that such part performance and expenditure of money in permanent improvements and in payment of taxes and costs and care of plaintiff would result in wrongfully and fraudulently enriching plaintiff at the expense of the defendant, and that he was therefore entitled to retain possession of the premises according to their agreement [81 Cal. 205, 22 P. 550], "during the natural life of plaintiff." In the present case there was no issue regarding the undue enrichment or fraudulent procurement of benefits by either the owners or plaintiffs. That case is clearly distinguishable from this action on the facts.

So, also, the case of Cheney, supra, was a suit for unlawful detention of real property. It has no application to the principle of partial performance of an oral agreement to lease. The defendant held a written three-year lease of the premises for a stipulated rental per month. He held possession of the property and paid the rental as agreed. Several months after the execution of the lease the owner gave the defendant notice of rescission of the lease, and then commenced the action in unlawful detainer. But the owner continued to accept the rent when tendered, according to the terms of the lease. The trial court properly held that the defendant was entitled to possession under the terms of the written lease. That judgment was affirmed on appeal.

The doctrine which relieves a person of the usual application of the statute of frauds by partial performance is confined to equitable defenses. In the absence of a statutory provision to the contrary it does not apply to actions at law. Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 565, 71 P.2d 817, 819; 1 Tiffany's Landlord and Tenant, 386, sec. 66d; 59 A.L.R. 1305, note. In the authority last cited, the caption to an elaborate note supported by numerous cases from many jurisdictions, including California, reads as follows:

> "It appears to be the general rule that the doctrine of part performance is purely an equitable doctrine, unrecognized at law, and accordingly will not sustain an action at law based on a contract within the Statute of Frauds."

[4] Section 1971 of the Code of Civil Procedure provides that no interest in real property, "other than for leases for a term not exceeding one year," can be created except by an instrument in writing signed by the grantor or his lawful agent authorized in writing. The following section, however, modifies that statute by providing that it shall not be construed "to abridge the power of any court to compel the *specific performance* of an agreement, in case of part performance thereof." (Italics added.) The statutes of California do not otherwise abridge or modify the mandatory provisions of Sections 1971 and 1973 of the Code of Civil Procedure or of Section 1624 of the Civil Code with respect to agreements affecting interests in real property. That fact reinforces our conclusion that the doctrine of part performance of an agreement within the statute of frauds does not apply to an action at law, although it may apply in an equitable suit to prevent fraud or undue enrichment of the owner of property who has acquiesced or induced one to take possession and expend money or to furnish labor under an invalid oral agreement. That distinction is clearly drawn in the late case of Paul, supra, in which the Supreme Court said:

> "It is necessarily conceded that an oral agreement to make a contract which must be in writing, is itself within the statute of frauds. * * *
>
> "To entitle the plaintiff to the relief [of specific performance] provided for by section 1972, the part performance must relate to the transaction involved, viz., the transfer of the interest in land which is the subject of the agreement. * * *
>
> "The facts alleged and stated show that the plaintiff could not present a case of fraud or unconscionable injury to support an estoppel under any statute or authority relied upon by him.
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> "The intimation in the case of Martinez v. Yancy, 40 Cal.App. 503, 180 P. 945, relied on by the plaintiff, that there may be a remedy by an action for damages for the breach of an oral promise to make a lease for a longer period than one year, is inconsistent with the generally accepted doctrine that no right of action for damages exists for the breach of an invalid or unenforceable contract [citing authorities], * * * and should be disregarded."

It will be observed that, in the present suit at law for damages resulting from appellants' unlawful and wilful destruction of growing crops, the answer of appellants does not plead specific performance nor ask for compensation for fraud or for services performed, nor does the proof indicate that those issues were presented at the trial. It follows from the pleadings and from the uncontradicted evidence in this suit at law that plaintiffs were entitled to some damages for the wilful and unlawful destruction of the crops, and that the court therefore properly so instructed the jury.

[5] The appellants, for the first time on appeal, challenge the measure of damages adopted on the trial of this case. They now assert that the correct measure of damages for the wrongful destruction of crops of growing volunteer grass for grazing purpose, is the difference in the rental value of the land with and without the crops. That appears to be the approved rule. Miller & Lux, Inc. v. Pinelli, 84 Cal. App. 42, 257 P. 573; Maddalena v. LeDuc, 29 Cal.App.2d 211, 84 P.2d 254; 8 Cal.Jur. 819, sec. 76; 25 C.J.S., Damages, § 85b. Ordinarily, the measure of damages for the wrongful destruction of annually planted crops, as distinguished from perennial crops, such as volunteer grass for grazing purpose, is the market value thereof at the time of destruction, less the cost of maturing and marketing the crops. Dutra v.

Cabral, 80 Cal.App.2d 114, 181 P.2d 26; Fay v. Cox, 45 Cal.App. 696, 188 P. 623; 25 C.J.S., Damages, § 85b. In the present case the destruction of both volunteer grass and grain was involved. The evidence shows that plaintiffs rented the land for feeding their stock upon both the volunteer grass and the stubble and uncut grain which remained on the premises. The evidence of the market value of the grass, less the cost of cutting and hauling it to market, was adduced without the objection of appellants. In fact, appellants cross examined witnesses on the theory that that was the correct measure of damages. In the case of Staub v. Muller, 7 Cal.2d 221, 60 P.2d 283, 286, in which evidence of the value of damaged alfalfa was established by showing the market value of the crop destroyed, as it was in the present case, and in which there was no evidence of the rental value of the land, the judgment was affirmed. In that case no damage to the freehold was proved. The Supreme Court said, "Appellant is in no position to complain at this late date of the lack of a specific finding with respect to the presence or absence of damage to the freehold." The distinction in the rule with respect to the measure of damages, between perennial crops, like alfalfa, and such crops as vegetables and grain, which require annual planting, was recognized and stated by the court in that case. After discussing the difficulty of applying a correct measure of damages to various crops under particular circumstances, and commenting upon the existence of some apparent conflict of authorities, the Supreme Court finally concluded that:

> "Notwithstanding the conflict of authorities and the difficulty of estimating damages in these cases, the decisions are in complete agreement upon one proposition, and that is, that 'compensation for the real injury is the purpose of all remedies.' [Citing authorities.] From the record in this case we cannot but conclude that the court, in fixing the damages, named an amount which, as nearly as it is possible to ascertain, will fairly compensate plaintiff for the actual injury suffered."

In accordance with the preceding paramount issues with respect to the measure of damages, the jury was instructed in this case at the request of the appellants, as follows:

> "I instruct you that the measure of damages for the destruction of a growing crop is the value of the crop in the condition it was in at the time and place of destruction.
>
> "Compensatory damages are such damages as will reasonably compensate the person injured for the detriment suffered by him. In awarding compensatory damages, no jury has the right to award any amount in excess of such sum as will reasonably compensate for the damage actually sustained, but in this connection you are instructed that it is not the purpose of the law in permitting compensatory damages to permit any plaintiff to realize a profit by way of award of compensatory damages."

It is true that the jury was further charged as follows:

> "You are instructed that in determining the amount of any damages to be awarded by you for any injury to or destruction of the crops involved in this action, if you find that there was any such injury or destruction, the measure or amount of such damages would be the difference between the value of such crops so injured or destroyed before and after such injury or destruction."

[6, 7] We think the appellants were not prejudiced by the last quoted instruction. They offered no instruction in conflict therewith. The case was tried on the theory that was the proper measure of damages. The plaintiffs leased the land with the sole purpose of using the volunteer grass and grain thereon with which to feed their stock. They did not claim to have suffered any other damage to the freehold. It would seem to be true, under the circumstances of this case, that the result would be the same whether the jury considered the damages to be the value of the land with or without the growing crops, which were destroyed, or the market value of the damaged or destroyed crops. The appellants may not complain of the method of proving the amount which would compensate plaintiffs for their loss of crops, pursuant to Section 3333 of the Civil Code, since that evidence was admitted without objection and was the apparent theory of

the measure of damages upon which the case was tried. The evidence adequately supports the amount of compensatory damages fixed by the jury.

A more serious question exists as to whether there is sufficient evidence to support the award of exemplary damages. The appellant Hathaway claims that the court erred in giving to the jury an instruction on examplary damages which failed to define the character of "actual malice", as distinguished from mere legal malice, which would support an award of exemplary damages. At the request of plaintiffs, the jury was charged, in the exact quoted language of Section 3294 of the Civil Code, regarding the circumstances which would warrant the allowance of exemplary damages. The instruction complained of was approved in Fitzpatrick v. Clark, 26 Cal.App.2d 710, 80 P.2d 183, 184. It defined "malice" which would support exemplary damages as that which would "import a wish to vex, annoy or injure another person." But that instruction also states that "if you further find from the evidence that the defendant W. L. Hathaway maliciously *sought to vex, annoy, or injure the plaintiffs*" (italics added), you are authorized to award a further amount as exemplary damages. And, at the appellants' request, the jury was charged that:

> "* * * I instruct you that you have no right to award exemplary damages unless the evidence clearly shows that the acts in question were committed maliciously or wantonly. Therefore, if you find in this case that the defendant, Hathaway, *acted in good faith or under an honest claim of right, no exemplary damages can be awarded against him.*" (Italics added.)

[8] We are unable to perceive how the jury could have been misled or prejudiced by the foregoing instructions. It was clearly told that exemplary damages could not be awarded unless the evidence proved to the jury's entire satisfaction that the crops were destroyed with a deliberate purpose, or intent to vex, annoy or injure plaintiffs. Moreover, to emphasize that limitation, the jury was further specifically instructed that it could not award exemplary damages if it found that Hathaway "acted in good faith or under an honest claim of right." We are of the opinion the instructions, read as a whole, clearly and properly informed the jury that nothing but proof of actual malice toward the plaintiffs would entitle it to award exemplary damages. In the case of Ross v. Sweeters, 119 Cal.App. 716, at page 724, 7 P.2d 334, the foregoing distinction is drawn between actual malice which will support exemplary damages, and mere legal malice which is insufficient for that purpose.

We find nothing in Davis v. Hearst, 160 Cal. 143, 116 P. 530, chiefly relied upon by appellant Hathaway in conflict with the foregoing definition of actual malice, supporting an award of exemplary damages. The language quoted by appellant from page 162 of 160 Cal., from page 539 of 116 of that opinion supports what we have previously said regarding the character of actual malice which must be shown by direct evidence or implied therefrom to support an award of exemplary damages. The court said:

> "It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase 'express or implied' has reference only *to the evidence by which that malice is established;* 'express malice' thus mean- or direct evidence going to prove the actual ing that the malice is established by express existence of the hatred and ill will; 'implied malice' referring to the indirect evidence from which the jury may infer the existence of this malice in fact. * * * But throughout the whole history of the law, whatever may be the mode of proving the existence of malice in fact, it is only upon some showing regarded by the law as adequate to establish the presence of malice in fact (that is, the motive and willingness to vex, harass, annoy, or injure) that punitive damages have ever been awarded. * * * *'It is the wrongful personal intention to injure that calls forth the penalty.'*" (Italics added.)

In this case the jury was told that exemplary damages could not be awarded unless it was clearly shown that the crops were destroyed with a desire, wish or intent to vex, annoy or injure the plaintiffs;

that such punitive damages should not be allowed unless it was proved that Hathaway "maliciously *sought to vex,* annoy, or injure the plaintiffs;" that such damages could not be awarded if the jury believed that Hathaway "acted in good faith or under an honest claim of right." We think these instructions are not prejudicial or erroneous. Punitive damages were awarded against Hathaway only.

[9] But the appellant Hathaway asserts that the evidence conclusively shows that the property was disked, plowed and the crops were destroyed in good faith, under an oral agreement for a future written lease. It was the sole province of the jury to determine from the evidence the motive with which the crops were destroyed. The evidence is uncontradicted that some six hundred acres of crops were destroyed after appellants had full knowledge and notice that the alleged oral agreement was invalid and that they therefore had no right to do so, and after they knew that the land had been formally leased to plaintiffs. There is much evidence from which the jury was warranted in assuming that the crops were destroyed by appellants through enmity and ill will on the part of Hathaway, to vex, annoy and injure plaintiffs. We think the evidence is adequate to support the implied finding of the jury that the crops were destroyed with the intent on the part of appellant Hathaway to vex, annoy and injure the plaintiffs.

[10-12] A reviewing court may not interfere with the amount of exemplary damages awarded by a jury unless the sum is so excessive as to shock the conscience, or if, in view of all the facts and circumstances disclosed by the record, it appears that an award of exemplary damages is not warranted. Primarily, it is the sole province of the jury to fix the amount of punitive damages, in a proper case, although its discretion may not be arbitrarily exercised. Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; Wilkinson v. Singh, 93 Cal.App. 337, 269 P. 705; Boyes v. Evans, 14 Cal.App.2d 472, 58 P.2d 922; Booth v. People's Finance & Thrift Co., 124 Cal.App. 131, 12 P.2d 50; 82 Cal.Jur. 866, sec. 109; 25 C.J.S., Damages, § 126a. In determining whether the award of exemplary damages is the result of passion or prejudice, it is proper to take into consideration the amount of compensatory damages allowed, together with all of the facts and circumstances attending the unlawful acts complained of which may indicate the motive, intent or malice with which they were performed. Extreme acts of deliberate, wilful intent to brutally commit bodily harm or to ruthlessly and seriously injure the property of another, prompted by mere vindictiveness and ill will, may warrant the imposing of substantial punitive damages. We do not mean to infer that appellant Hathaway was guilty of such aggravated conduct. Punitive damages are awarded as punishment for wilful, intentional and unjustifiable conduct. There is no absolute rule determining the amount, or even the relative magnitude of exemplary damages which may be awarded under all circumstances. That is left to the sound discretion of the trial judge or jury. In 25 C.J.S., Damages, § 126, it is said with relation to the circumstances which may properly be considered by a jury in awarding punitive damages, that:

"* * * Particular matters which are to be considered are the nature of the case at bar, the nature or character of the act, the malice or wantonness of the act, the motive for the act, the manner in which it was committed, the injury intended or likely to result from a disregard of duty, the character and extent of the injury."

In some cases, reviewing courts have modified the amounts of punitive damages which have been awarded, for the evident reason that they clearly appeared to be out of all reasonable proportion and in conflict with the gravities and nature of the acts performed. Wilkinson v. Singh, supra; Booth v. People's Finance & Thrift Co., supra; Plotnik v. Rosenberg, 55 Cal.App. 408, 203 P. 438. But many such awards have been sustained on appeal, even though the punitive damages allowed were equal to or approximate the amounts allowed for compensatory damages. Clark v. McClurg, supra.

In spite of the fact that the present case does not appear to be an extremely aggravated one, we are impelled to hold that this court may not interfere with the amount of exemplary damages which was awarded by the jury.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

82 Cal.App.2d 860

SCHNEIDER v. SCHNEIDER.

Civ. 16032.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1947.

Hearing Denied Feb. 9, 1948.

1. Limitation of actions 🔑85(3)

Absence of debtor from state tolls limitations for aggregate period of absence regardless of reasons for absence. Code Civ.Proc. § 351.

2. Courts 🔑95(1)

A rule of law which is clearly established by decisions of the courts of California may not be overruled by District Court of Appeal in favor of one followed in decisions of other states.

3. Limitation of actions 🔑85(3)

Temporary absence of debtor from state upon business of his employer and while he was on his honeymoon constituted a "departure from the state" sufficient to toll limitations running against note, and where, after subtracting aggregate of periods of absence from period elapsing between due date and debtor's death, four years had not elapsed, action based on note was not barred. Code Civ.Proc. § 351.

See Words and Phrases, Permanent Edition, for all other definitions of "Departure from State".

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Angela B. Schneider against Virginia E. Schneider, as administratrix of the estate of Jacob Walter Ford Schneider, also known as J. Walter Schneider, deceased, to recover the amount of a rejected claim. Judgment for plaintiff, and defendant appeals.

Affirmed.

George I. Devor, of Los Angeles, for appellant.

Overton, Lyman, Plumb, Prince & Vermille, Irving H. Prince and Donald H. Ford, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the amount of a rejected claim filed with defendant as administratrix of the estate of J. Walter Schneider, deceased, defendant appeals.

The undisputed facts are these:

J. Walter Schneider died intestate on December 14, 1944. Defendant is the administratrix of his estate. Plaintiff filed a claim against the estate predicated upon a promissory note dated November 15, 1939, payable on or before one year from its date. Defendant rejected the claim and plaintiff filed suit thereon December 19, 1945. Recognizing that the statute of limitations had apparently run, she sought to avoid such defense by alleging that between November 15, 1940, and the date of the death of decedent on December 14, 1944, he was out of the state of California for periods of time which aggregated in excess of 40 days.

It is conceded that decedent was, after the maturity of the note, out of the state of California for periods aggregating more than 40 days, and that such absences were due to his being on business trips for his employer and while he was on a honeymoon. The trial court held that the statute of limitations was tolled during the temporary absences of decedent from the state of California.

This is the sole question presented for our determination:

Did the temporary absence of decedent from the state upon the business of his em-

ployer and while he was on his honeymoon constitute a departure from the state of California sufficient to toll the statute of limitations in accordance with the provisions of section 351, Code of Civil Procedure?

[1] This question must be answered in the affirmative. Section 351, Code of Civil Procedure reads in part as follows: "* * * if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." Predicated on the foregoing statute it has been held in California that the absence of a debtor from the state tolls the statute of limitations as to him for the aggregate period of his absence. The reasons for the absence of the debtor from the state are immaterial. The important thing is that the debtor is absent from the state and cannot be served with a complaint and summons for the purpose of conferring upon the court jurisdiction to enter a personal judgment against him. (Rogers v. Hatch, (1872), 44 Cal. 280, 288; Watt v. Wright, (1884), 66 Cal. 202, 205, 5 P. 91.) The rule announced in these cases has never been overruled and is binding upon this court. The mere fact that it has not been questioned in over 63 years is cogent evidence of its soundness and recognition by the legal profession in this state.

[2] It is settled that if a rule of law is clearly established by the decisions of the courts of California we are not at liberty to overrule it in favor of one followed in decisions of other states. (Ahlborn v. Peters, 37 Cal.App.2d 698, 705, 100 P.2d 542; Brown v. Davis, 84 Cal.App. 180, 184, 257 P. 877. Hence cases from other states which state a contrary rule relied on by defendant are of no value in deciding the question presented to us. Such cases cited by defendant are: Sage v. Hawley, 16 Conn. 106, 41 Am.Dec. 128; Dorus v. Lyon, 92 Conn. 55, 101 A. 490; Blodgett v. Utley, 4 Neb. 25; Webster v. Citizens' Bank, 2 Neb.Unof. 353, 96 N.W. 118; Aronow v. Bishop, 112 Mont. 611, 120 P.2d 423; Barney v. Oelrichs, 138 U.S. 529, 11 S.Ct. 414, 34 L.Ed. 1037.)

[3] Applying the rule in California to the facts of the present case it is evident that the statute of limitations had not run against the note which was the basis of this suit. It was due November 15, 1940, and the date of decedent's death was December 14, 1944. Hence subtracting 40 days from this period the four years had not elapsed at the date of the maker's death, and the statute of limitations had not run against his obligation at that time.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

82 Cal.App.2d 893

FEDERATED INCOME PROPERTIES, Inc. v. STATE et al.

Civ. 16106.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1947.

1. Taxation 🔑805(1)

If sale by state to city of realty which had been sold to the state for nonpayment of taxes was void, no title was conveyed to city, and right to contest the effect of the sale was not cut off by one-year statute of limitations. Revenue and Taxation Code, §§ 3771 et seq., 3809.

2. Taxation 🔑695

On execution of tax deeds to state of realty which had been sold to the state for nonpayment of taxes, owner of realty forfeited all rights in realty except privilege of redeeming it before the state disposed of it, and owner's right of redemption of realty was not affected by sale of realty by state to city. Revenue and Taxation Code, § 3771 et seq.

3. States 🔑119

Sale to city by state of realty which had been acquired by the state by tax deeds, and which was located in a distressed assessment district, for sum of $1 a parcel for purpose of restoring realty to the tax rolls, was not in violation of constitutional provisions that no grant or donation of property should be made by the state, and that the Legislature shall have no power to give or to lend, or to authorize the giving or lending of the credit of the state. Revenue and Taxation Code, §§ 133, 3771 et seq.; Const. art. 4, §§ 22, 31.

4. Taxation ⚷805(1)

Tax deed to the state on expiration of five years conveys absolute title to realty. Revenue and Taxation Code, § 3771 et seq.

5. States ⚷89

The Legislature has full control over the sale of property belonging to the state, and it may direct property to be sold and may regulate or change at any time the method of its disposition.

6. Taxation ⚷679(7), 695

The state may sell tax deeded realty to a municipality for such price and on such terms as may be agreed on and thereby terminate the owner's right of redemption. Revenue and Taxation Code, § 3771 et seq.

7. Taxation ⚷754

Owner of realty which had been sold to state for nonpayment of taxes, and which the state had sold to city, so that owner lost all right and interest in the realty, except the privilege of redeeming, could not object to the manner in which the realty was conveyed by the state to the city. Revenue and Taxation Code, § 3771 et seq.

8. Taxation ⚷679(7)

In action by owner of realty which had been sold to the state for nonpayment of taxes, and which had then been sold by the state to city for $1 a parcel, to quiet title to the realty, alleged fact that city obtained a c ontract that was detrimental to the county would not affect validity of sale. Revenue and Taxation Code, §§ 3771 et seq., 3775, 3791.

9. Taxation ⚷679(1), 695

Statutes relating to tax sales to private persons and to right of property owners to redeem their realty from tax sales prior to sales to private persons are inapplicable to sales to cities or other public taxing agencies. Revenue and Taxation Code, §§ 3351–3841.

10. Taxation ⚷679(5)

The sale to city by state of realty which had been sold to the state for nonpayment of taxes, and which had been conveyed to the state by tax deeds, was not forbidden by law because the realty was in a distressed assessment district. Revenue and Taxation Code, §§ 133, 3771, 3798, 3799, 3802–3804, 3806, 3807, 4101.

11. Taxation ⚷805(1)

Where sale to city by state of realty which had been sold to the state for nonpayment of taxes, and which had been conveyed to the state by tax deeds, was valid, original owner's action against city to quiet title which was not commenced within one year after execution of deed from state to city, was barred by one-year limitations. Revenue and Taxation Code, §§ 3771 et seq., 3809.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to quiet title to realty by Federated Income Properties, Inc., a corporation, against the State of California, the City of South Pasadena, and others. A dismissal was filed as to all defendants except the City of South Pasadena. From a judgment for the City of South Pasadena, the plaintiff appeals.

Judgment affirmed.

James M. Gammon, of Los Angeles, for appellant.

Braeme E. Gigas, City Atty., of South Pasadena, and Robert E. Rosskopf, Special Counsel, of Los Angeles, for respondent City of South Pasadena.

WILSON, Justice.

In this action to quiet title to real property a dismissal was filed as to all defendants except City of South Pasadena. Judgment was rendered in favor of defendant city and plaintiff has appealed from the judgment.

The property was sold to the State of California for nonpayment of taxes. More than five years thereafter tax deeds to the state were issued and recorded. After acquiring title the state sold the property to the City of South Pasadena pursuant to an agreement authorized by Chapter 8 of Part 6 of Division I of the Revenue and Taxation Code for the sum of $1 per parcel for the stated purpose of restoring the property to the tax rolls. At the time of the sale by the state to the city the property was in an assessment district in which street bonds had been issued, more than 57 per cent of which were delinquent on June 30, 1940—a distressed assessment district as defined in section 133 of the Revenue and Taxation Code.

Respondent contends that since the sale to the City of South Pasadena was on September 15, 1943, and this action was commenced on May 28, 1945, the action is barred by section 3809 of the Revenue and Taxation Code, which reads as follows: "A proceeding based on alleged invalidity or irregularity of any agreement or deed executed under this article can only be commenced within one year after the execution of the instrument."

[1] Appellant maintains that the deed to the City of South Pasadena is void and that section 3809 is therefore inapplicable for the reasons: (a) That the consideration of $1 per parcel paid by the city was so grossly inadequate that the sale amounted to a gift of public funds to a municipal corporation in violation of sections 22 and 31 of Article IV of the Constitution, and (b) that the property was in a distressed assessment district and therefore not subject to sale pursuant to said Chapter 8. If the sale was void no title was conveyed and the right to contest its effect is not cut off by the statute of limitations, hence our first inquiry will be into the validity of the sale.

[2-4] 1. *Is the sale void by reason of sections 22 and 31 of Article IV of the Constitution?* The provisions contained in Chapter 8 are derived from former section 3897d of the Political Code, which was discussed in South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, 489, 42 P.2d 64. The court held that in the absence of constitutional limitations the legislature is free to dispose of the state's tax deeded lands in any way deemed by it to be in the public interest and that a person having the privilege of redemption has not a vested or a substantial right to have such lands disposed of by the state in any particular way when his right of redemption is not affected. Upon the execution of the deed to the state the property owner forfeited all right in the property except the privilege of redeeming it before the state disposed of it. Appellant's right of redemption was therefore not affected by the sale to the city. The manner of sale was not in violation of constitutional provisions. There is a distinction between the absolute right to redeem within the fixed period of five years after the date of sale to the state and the conditional right to redeem after the property has been deeded to the state, if the state does not sell the property. The deed to the state upon the expiration of five years conveys the absolute title to the property. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111.

[5, 6] The legislature has full control over the sale of property belonging to the state. It may direct it to be sold and may regulate or change at any time the method of its disposition. Buck v. Canty, 162 Cal. 226, 233, 121 P. 924. The state may sell tax deeded property to a municipaltiy for such price and upon such terms as may be agreed upon and thereby terminate the right of redemption. (Chapter 8, supra.)

[7] Appellant having lost all its right and interest in the property, except the privilege of redeeming, cannot object to the manner in which the property was conveyed to respondent. Helvey v. Bank of America, 43 Cal.App.2d 532, 111 P.2d 390.

It is to the interest and benefit of the state that tax deeded property should be resold into private ownership. Fox v. Wright, 152 Cal. 59, 62, 91 P. 1005. Thereby it is returned to the tax rolls and taxes thereon are paid to all the taxing agencies in which the property is located; the state is relieved of the management of it; it is likely to be improved, thus adding to its tax value and to the amount of taxes to be paid thereon. It is advantageous to merge and unify the tax titles of the various taxing agencies to the end that a private purchaser will acquire all outstanding tax titles through one sale and one deed. South San Joaquin Irr. Dist. v. Neumiller, supra, 2 Cal.2d 485, at page 490, 42 P.2d 64.

The foregoing elements enter importantly into the consideration received by the state for the transfer of its interest in the property to respondent city and are sufficiently adequate to negate the contention that the sale amounted to a gift in violation of the constitution. Before a sale is made by the state to a city the price shall be agreed upon between the board of supervisors of the county, the state controller and the governing body of the city in which the property is located. Revenue & Taxation Code, secs. 3775, 3791. Such an agreement was entered into before the sale involved in this action was made to the City of South Pasadena. The state having determined that other considerations than the cash received furnished an adequate return for the state's tax title and no reason appearing for questioning the wisdom of such decision, the court will not set aside the sale.

For the reasons above stated the court did not err in rejecting appellant's offer to prove that the property was worth $100 per parcel at the time of the sale to respondent city.

[8] In connection with its argument appellant complains that the County of Los Angeles did not receive its fair share of the consideration for the sale. The contention is made that the county should have been reimbursed for a portion of the taxes due and unpaid to it and that the City of South Pasadena obtained a contract that was unfair and detrimental to the county. The County of Los Angeles was a party to the contract (Revenue & Taxation Code, secs. 3775, 3791) and it is presumed that its officials obtained terms and conditions that were equitable to its interests. The county obtained the benefit of having the property returned to the tax rolls thereby increasing the amount of taxes it would receive after the sale. Moreover, since that question does not affect the validity of the sale appellant cannot raise it in its action to quiet title as it might possibly do if it were suing as a taxpayer to recover funds belonging to the county which the public officials have not sought to recover.

2. *Was the sale forbidden by law because the property was in a distressed assessment district?* Appellant contends that the first sentence of the fourth paragraph of section 50 of Chapter 290, page 1433, Statutes of 1941, expresses the intention of the legislature to postpone the right of redemption of property in a distressed assessment district until January 31, 1947, and that the sale to the City of South Pasadena on September 15, 1943, was in violation of the statute and therefore void. The first portion of section 50 of Chapter 290 consists of the usual severability clauses. The fourth paragraph of that section contains two sentences on the first of which appellants rely, but in order to determine the issues involved in this action it is necessary to consider the entire fourth paragraph, which reads as follows: "There are specially exempted from the provisions of this section the provisions of Sections 4.8 and 18 of this act, which sections add Sections 3511.3 and 3571.3, respectively, to the Revenue and Taxation Code. The Legislature hereby expressly declares that it is its intent not to terminate the right of redemption of property in distressed assessment districts, as defined, until after January 1, 1947, in order to permit refunding of such districts. If the exception of property in delinquent assessment districts from the provisions of Section 4.8 of this act, or from the provisions of Chapter 4.6 of Part 6, Division I of the Revenue and Taxation Code until after January 1, 1947, as provided in Section 18 of this act, is declared unconstitutional, then both entire sections shall be ineffective."

Chapter 290 of the Statutes of 1941 is commonly referred to as the "Tax Termination Act of 1941." It adds several new sections to Chapters 4, 4.6, 7 and 8 of Part

6 of Division I of the Revenue and Taxation Code.

Sections 3511.3 and 3571.3 referred to in said section 50 of Chapter 290 are in Chapters 4 and 4.6, respectively. For the reasons hereinafter pointed out they have no application to the sale of the property to respondent City of South Pasadena.

[9] Part 6 of Division I of the Revenue and Taxation Code relates to tax sales and tax deeds generally. Chapters 1 to 7, inclusive, relate to sales to private persons and to the right of property owners to redeem their property from tax sales prior to sales to private persons, and have no bearing on sales to cities or other public taxing agencies. Repsondent city did not acquire its title by reason of Chapters 1 to 7. Its title was derived under the provisions of Chapter 8 of Part 6 of Division I, which provides a complete scheme by which conflicting tax titles or claims held by a county, a city or any other taxing agency on the same property may be combined into one title in order that a sale by the taxing agency so acquiring title will convey all outstanding tax titles and the purchaser will receive a deed that will not be brought into question by reason of conflicting tax interests.

Chapter 8 declares in section 3771 that "As used in this chapter, 'taxes' includes assessments." Succeeding sections of Chapter 8 set up the procedure whereby titles or claims of all taxing agencies may be conveyed to one of them by an agreement made by the taxing agency with the board of supervisors, approved by the state controller. A notice of the agreement is required to be published (sec. 3798) and to be mailed to the last assessee of the property at his last known address (sec. 3799). The agreement does not become effective until 21 days after the first publication and the mailing of the notice of the agreement (Sec. 3802). The assessee is thus given ample warning that the property is to be sold and opportunity to redeem. If within the 21-day period the property is redeemed the agreement is null as to such property (Sec. 3803). If property is not redeemed the tax collector shall execute to the purchaser (the taxing agency) a deed therefor (Sec. 3804). Except as against actual fraud, the deed is conclusive evidence of compliance with the statute and otherwise has the same effect as evidence and as a conveyance as a deed to a private purchaser after sale of taxdeeded property (Sec. 3806). If not previously terminated, all rights to redeem the property from a sale to the state will terminate on the execution of the deed (Sec. 3807).

Section 4101 provides that tax deeded property may be redeemed by the redemptioner until the right of redemption is terminated. Since appellant's right to redeem was terminated under the provisions of section 3807 upon the execution of the deed to respondent City of South Pasadena, appellant has no right, claim or interest in the property.

Section 3807 was repealed and reenacted by Chapter 290 of the Statutes of 1941, this being the same chapter wherein section 3511.3 (a part of Chapter 4) and section 3571.3 (a part of Chapter 4.6) were enacted. The latter sections do not relate to the termination of the right of redemption after property has been sold pursuant to Chapter 8. The inclusion of all these provisions in the same act indicates that it was the intent of the legislature that the right of redemption should be terminated absolutely under section 3807 upon the sale of the property to a taxing agency and that the other provisions of Chapter 290 should not be applicable thereto, and that it was not the legislative intent that section 50, upon which appellant relies, should in any way modify the effect of section 3807.

[10] No intent of the legislature is indicated by any part of Chapter 290 to postpone the right of redemption when property is sold to a city or other taxing agency. Section 50 of that chapter does not have that effect. It refers entirely to sections of the code relating to sales to private persons.

[11] 3. *The statute of limitations.* Since the sale to the City of South Pasadena was valid and since this action was not commenced within one year after the execution of the deed from the state to the city it is

barred by section 3809 of the Revenue and Taxation Code.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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83 Cal.App.2d 32

NATIONAL ELECTRIC WELDING MACHINES CO., Inc. v. GLICK et al.

Civ. 15952.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1947.

1. Appeal and error ⚿1012(1)

Arguments upon the weight of evidence have no place before a reviewing court except where there is either an utter lack of evidential support for the judgment or where proof is so slack that to base a judgment thereupon would be an abuse of discretion.

2. Sales ⚿441(1)

In action for balance due on account of machinery sold to defendants, evidence sustained finding against defendants on defendants' cross-complaint for damages for asserted breaches of warranty on account of alleged defectiveness of the machinery and accessories.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by National Electric Welding Machines Co., Inc., against Fred P. Glick, and others for balance due on account of certain machines sold to defendants and upon an account stated, wherein defendants cross-complained for breach of warranty. From an adverse judgment, defendants appeal.

Judgment affirmed.

Ben Gould, of Los Angeles, for appellants.

Cannon & Callister, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the judgment is supported by substantial evidence.

Respondent sued appellants (1) for a balance of $7930 due on account of certain machines sold to appellants and (2) upon an account stated in the same sum. Appellants having admitted by their answer the alleged purchase, sought by their cross-complaint damages in the sum of $400,000 for breach of warranty on account of the alleged defectiveness of the machines and accessories, consisting of a mat welder, a tee welder and a gun welder, which appellants purchased for the purpose of manufacturing grating although they had been constructed for the purpose of welding airfield landing mats. The findings and judgment were in favor of respondent (1) on its account stated and (2) against appellants on their cross-complaint. The latter demand a reversal of the judgment on the ground that their evidence in support of the cross action met with no substantial conflict.

[1] Appellants have outlined with meticulous care the several particulars with respect to which the warranties were breached, and have quoted testimony and documentary proofs in support of their contentions. Such labor is presumptively a duplication of the effort made before the trial court. Arguments upon the weight of evidence under our system of procedure have no place before a reviewing court except in those cases where there is either an utter lack of evidential support for the judgment or where the proof is so slight that to base a judgment thereon would be an abuse of discretion. Such is not the situation here. On the contrary, on the issues of the breaches of warranty respondent introduced substantial evidence which was adopted by the trial court. No advantage could be gained by a recital of the proofs introduced by the respective parties or by inscribing in these pages the total evidence in rebuttal of that which was favorable to appellants.

Suffice it to say that respondent established that at the time of appellants' purchase of the machines with which they purposed to make grating respondent's agents stated that they could be put to such use with necessary changes; that specifications for the conversion of the mat welder to a grating welder would be prepared by respondent but that the labor should be performed by appellants at their own expense. Respondent's Los Angeles manager testified that designs for the making of the mat welder into a grating welder were delivered to appellants. The welder was set up by appellants in their Los Angeles factory in May, 1942, and for some time so performed as to demonstrate all of the capabilities promised by respondent in the manufacture of ship grating. With reference to a number of the alleged defects which appellants claimed to have developed in that period, the testimony of respondent's witnesses was to the effect that they were due to inexperienced workmanship in reassembling the machine and not to its inefficiency as originally designed and built. But it was proved that during the period of the manufacture of grating appellants were "absolutely satisfied" with the mat welder's performance.

In October, 1942, appellants disassembled the machine and reassembled it as a mat welder. Some slight deficiencies were shown to have been caused by incompetent workmanship; however, it was still a success. The chief electrician of the company which had taken over the plant in March, 1943, testified that it could then weld 22,000 welds or 65 mats per hour, a greater output than had been promised, and that there was no other machine of comparable speed, contrary to the contention of appellants.

The proof of appellants that the mat welder failed in (1) that hot rolled steel could not be used in making mats, (2) that the laminations did not operate successfully, and (3) that the bus bar, the electrodes, the indexing mechanism, the hydraulic cooling systems, the transformers and locater mechanism were defective, was rebutted by witnesses on behalf of respondent who testified that the defects either did not exist or were caused by inexperienced workmanship in the reassembling of the machine. Also, the alleged defects on the tee welder were shown by respondent's witnesses to be nonexistent, their testimony being that the bolt in its carrying bar of which complaint was made had been inserted at the time of reassembling the machine. As to alleged defects in the gun welder, it was shown that appellants never used such welder by reason of having discovered a clip which was a cheaper method of clamping mats and which is universally used.

[2] Under the well established rule governing appellate procedure in cases of conflicting evidence the substantial rebuttal of each item of appellants' asserted breaches of warranty disposes of this appeal. Feckenscher v. Gamble, 12 Cal.2d 482, 492, 85 P.2d 885; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 695, 87 P.2d 349.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

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82 Cal.App.2d 863

TOWNSEND v. FLOTILL PRODUCTS, Inc.

Civ. 7359.

District Court of Appeal, Third District, California.

Dec. 12, 1947.

1. Customs and usages 🔑11, 15(1)

The code sections, requiring interpretation of contract according to usage of place of performance and implication of stipulations necessary to make contract conform to usage and all things in law or usage incidental or necessary to contract or effectuation thereof, govern interpretation of otherwise uncertain contracts, rather than formation of contracts, and do not compel conclusion, from parties' prior dealings and knowledge of usage and customs, that alleged oral contract was consummated and partially performed. Civ.Code, §§ 1646, 1655, 1656.

2. Carriers ⚷69(3)

Evidence sustained finding that no oral contract for hauling of tomatoes by truck to cannery was consummated by truck and cannery owners, as alleged by cannery owner's cross-complaint for breach of such contract in truck owner's action to recover compensation for trucking services rendered to cannery owner.

3. Contracts ⚷25

An agreement to enter into contract at future date is not of itself binding on parties.

4. Appeal and error ⚷1011(1)

Conflicting evidence as to negotiations forming basis of alleged oral contract raise fact question for trial court as to existence of such contract.

5. Appeal and error ⚷931(1)

Conflicts in evidence must be disregarded and evidence and proper inferences therefrom given their fullest effect in support of trial court's findings and judgment thereon in determining on appeal whether judgment is substantially supported by evidence.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Harve Townsend, doing business as the Townsend Trucking Company, against Flotill Products, Incorporated, to recover compensation for trucking services rendered to defendant, which filed a cross-complaint to recover damages for plaintiff's breach of oral contracts to furnish trucking service to defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jefferson E. Peyser, of San Francisco, for appellant.

Neumiller, Ditz, Beardslee & Sheppard, of Stockton, for respondent.

PEEK, Justice.

Plaintiff commenced this action to recover an indebtedness on a common count for services rendered at defendant's oral and special request. Defendant answered and filed a cross-complaint alleging that defendant and plaintiff entered into oral contracts whereby plaintiff agreed to furnish trucking service for the hauling of peaches and tomatoes to defendant's canneries, and alleging damages by reason of plaintiff's breach of said contracts. Plaintiff admitted execution and alleged full performance of the agreement to haul peaches, but denied that an oral agreement to haul tomatoes as charged by defendant had been entered into, and alleged that defendant orally agreed to give plaintiff such a contract to haul tomatoes, that in anticipation of receiving such contract plaintiff did haul some tomatoes to defendant's canneries, that defendant refused to give plaintiff such contract and he was thereby prevented from further hauling the tomatoes. As a separate defense to the cross-complaint plaintiff alleged that if such oral agreement to haul tomatoes had been entered into, defendant breached the same by refusing to pay waiting time on hauls made to its canneries as required by the Office of Price Administration, and that plaintiff was thereby prevented from further performance.

The trial court sitting without a jury found for the plaintiff and against the defendant on all issues. Judgment was entered for the full amount as prayed for in the complaint.

Appellant's contentions on appeal in effect raise but one issue—the sufficiency of the evidence to support the findings of the trial court that no contract was entered into for the hauling of tomatoes by plaintiff from the Woodland area to defendant's Stockton cannery.

[1] It is appellant's argument that the particular contract alleged to exist here must be interpreted according to the usage of the place of performance (Civ.Code, § 1646), that in the absence of a contrary intention any stipulations necessary to make the contract reasonable and conform to usage must be implied (Civ.Code, § 1655), and that all things in law or usage either incidental or necessary to the contract or to carry it into effect if not expressly mentioned, are implied (Civ.Code, § 1656). From this appellant concludes that in the light of prior dealings between the parties and the knowledge of each with respect to the usage and customs of the hauling business the force of

such statutory rules compels the conclusion that a contract for the hauling of tomatoes from the Woodland area to Stockton was consummated and in fact partially performed.

These code sections, however, are rules governing the interpretation of contracts which might otherwise be uncertain rather than the formation of contracts. No question of interpretation enters into the present controversy if the trial court properly found upon sufficient evidence that no contract was entered into.

[2, 3] In its attempt to conclusively establish the existence of a contract from the evidence appellant relies upon (1) the admitted authority of one Bennett, an agent for plaintiff, (2) the continuous course of dealing between the parties for more than one year with relation to a contract for the hauling of tomatoes from the Tracy district to Stockton and another for the hauling of peaches from the Gridley district, and (3) the certainty of the subject matter or commodity to be hauled, the compensation for the hauling at the prevailing tariffs as set by the Office of Price Administration and in accordance with regulations of the Office of Defense Transportation, and the amount and term of the hauling. Lastly appellant contends that whatever the nature of the agency relationship, plaintiff, by the uncontradicted testimony, ratified the acts of Bennett.

However correct appellant's contentions may be, both as an abstract principle of law and as an argument upon the evidence in light of appellant's evaluation thereof, yet when applied to the vague and contradictory facts and circumstances disclosed by the record, its contentions are without force because the trial court, upon such conflicting and contradictory testimony, found that no contract existed. There is testimony by plaintiff denying that a contract was concluded with the defendant for the hauling of tomatoes from Woodland to Stockton and affirmative testimony by him that his only contract to haul tomatoes between those points was with a third party, one Marino, also a trucker. He further testified that although Bennett did have authority to solicit business and negotiate contracts for him said agent's negotiations regarding the alleged Woodland contract did not at any time ripen into a valid contract. He contends that at most said negotiations constituted only an agreement to enter into a contract at a future date, which was never concluded. Such an agreement is not of itself binding upon the parties. Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832. It should be noted further that much of the testimony relied upon by appellant to establish the existence of a contract consisted of conclusions of the witness or the examiner as evidenced by the repeated use of words such as "Agree" and "Agreement". In the case of Nevills v. Moore Mining Co., 135 Cal. 561, 563, 67 P. 1054, 1055, contentions similar to those advanced by appellant herein were made in support of an alleged agreement for extra compensation of a partner, and the court in discussing the effect of such testimony, stated: "Before the court can say that an express contract is proven, there must be something more than the deductions or conclusions of the witness from the words used." (See also, Wold v. League of the Cross, etc., 114 Cal.App. 474, 300 P. 57.)

[4] Where the evidence on the negotiations forming the basis of the alleged oral contract is in conflict, the question is one of fact, and it is for the trial court to determine from the evidence whether a contract is proven. Nevills v. Moore Mining Co., supra; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25. Appellant's contention that the trial court's finding was erroneous being dependent upon testimony which would be insufficient to support a contrary conclusion is, therefore, without merit.

Appellant's final contention relates to the nature of the agency of Bennett and the ratification of his acts by plaintiff. However, if our conclusion is correct, that the finding of the trial court against the formation of a contract is sustained by the evidence, then the question thus raised by appellant becomes immaterial to this appeal. And likewise, in view of such finding any argument on the issue of agency becomes wholly academic as does the question of ratification of the acts of the agent.

[5] The facts and circumstances disclosed by the record before us make particularly apropos the rule as expressed by this court in the recent case of Andrews v. Andrews, 82 Cal.App.2d 521, 186 P.2d 744: "Disregarding conflicts, and giving to the evidence, and proper inferences therefrom, their fullest effect in support of the findings and judgment as we are obliged to do (citing cases) we cannot say that such judgment is without substantial support."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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82 Cal.App.2d 784

BENTON v. DOUGLAS.

Civ. 3806.

District Court of Appeal, Fourth District, California.

Dec. 10, 1947.

Rehearing Denied Jan. 6, 1948.

Hearing Denied Feb. 5, 1948.

1. Automobiles 🔑245(7, 56, 73, 90)

In action for injuries sustained by pedestrian in an automobile collision, conflicting evidence as to intoxication of pedestrian and location of motorist out of the proper highway lane and their bearing on contributory negligence, negligence, and proximate cause of the accident was for the jury.

2. Appeal and error 🔑882(12)

Where error in defendant's instructions was present, to the same general effect, in instructions given on plaintiff's request, judgment not reversible under the invited error rule.

3. Automobiles 🔑160(4)

Where a street resembling an ordinary country road, and having no sidewalks curbs, or pedestrian paths, met a three-lane concrete highway at right angles and ended there, the trial judge properly ruled that there were no "unmarked crosswalks" across the highway at the intersection, as regards the right of way as between a motorist and pedestrian. Vehicle Code, §§ 84, 85(a).

4. Trial 🔑296(3)

In action for injuries sustained by pedestrian when struck by an automobile in the center lane of a street, defendant's instructions were not subject to objection that they should have permitted the jury to determine whether defendant was rightfully in center lane in view of instruction given at plaintiff's request, and since a motorist may turn his vehicle into the center lane under some circumstances when endeavoring to avoid injuring another. Vehicle Code, §§ 525, 526.

5. Automobiles 🔑246(30)

In action for injuries sustained in an automobile collision between motorist and pedestrian, charge that it was pedestrian's duty to exercise ordinary care to observe the approach of motor vehicles which might constitute a hazard to him, and failure either to look or, if looking, to see a danger in plain sight to be seen by one exercising ordinary care was negligence, was proper.

Appeal from Superior Court, San Bernardino County; Hon. Stanley Mussell, Judge.

Action by Ernest Benton against Andrew MacLean Douglas for personal injuries sustained in an automobile collision. From the judgment, plaintiff appeals.

Affirmed.

Fred A. Wilson and Wilson & Wilson, all of San Bernardino, for appellant.

Parker, Stanbury & Reese, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment based on a verdict for defendant in a case in which plaintiff, a pedestrian, was injured when he and an automobile driven by defendant collided on Highway 99, near Bloomington, in San Bernardino County.

The accident happened about 7:30 p. m. on April 26, 1945. There was sufficient daylight so that the lights on automobiles were not illuminated. The roadway was dry and visibility was good. Defendant is not accused of traveling at any excessive speed.

Highway 99 runs east and west, is straight, and has three lanes of concrete with wide, hard-surfaced shoulders on each side of the pavement. The accident happened where Church Street dead-ends at right angles in Highway 99. There is a marked pedestrian cross-walk crossing Highway 99 about 200 feet west of Church Street. Several hundred feet east of Church Street there is a rise in the grade of Highway 99, which plaintiff maintains was sufficient to obscure vehicles approaching from the east. It is not made clear just how far east of Church Street an automobile traveling west on Highway 99 would come into the view of a pedestrian on the highway at Church Street, though the evidence indicates that it would be a number of hundred feet.

Church Street is improved with an oil strip twenty feet wide in its center. It has no sidewalks or curbs and no pedestrian paths on either side. The spaces usually reserved on streets for sidewalks is grown over with grass, brush and trees so that pedestrians use the roadway to walk on. There are no sidewalks or curbs on the south side of Highway 99 near the point of collision. Church Street south of the highway presents the appearance of an ordinary country road and there is no marked cross-walk across Highway 99 at that intersection. The intersection is in unincorporated territory.

The evidence is sharply conflicting on practically every phase of the case important here.

Plaintiff testified that he had been in the vicinity for several hours and had consumed about three beers; that he came out of Spud's Cafe which is situated on the north side of the highway several hundred feet east of the intersection; that he walked west along the north side of the highway until he was opposite Church Street, where he turned south; that he looked to the east and saw no vehicle approaching; that he proceeded south into the center lane where he paused to let a truck pass which was traveling east in the south lane; that he then saw defendant's car for the first time; that it was a few feet from him traveling west in the center lane; that he attempted to throw himself onto the pavement so that he would be run over instead of being struck by the automobile.

It is not questioned that plaintiff was seriously injured. He denied being intoxicated.

Defendant testified that he was driving his car west in the north traffic lane when he saw plaintiff on the north edge of the highway; that plaintiff was weaving and swinging his arms and seemed to be intoxicated; that plaintiff started south across the highway, still weaving and swinging his arms; that he turned and proceeded north on the shoulder; that he turned and proceeded to walk south, still weaving and swinging his arms; that defendant, believing plaintiff intoxicated, edged his car to the south and into the center traffic lane to avoid plaintiff; that when the car was nearly opposite plaintiff, who was in the next lane, plaintiff either jumped or threw himself into the front of defendant's car. Defendant was positive in his testimony that his was the only vehicle traveling on the highway near the place of the accident.

[1] Under the facts before us the questions of the contributory negligence of plaintiff and that of the negligence of defendant and whether either proximately contributed to or proximately caused the accident were of fact to be determined by the triers of fact. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; White v. Davis, 103 Cal.App. 531, 284 P. 1086; Shaw v. Robertson, 8 Cal.App.2d 520, 48 P.2d 128; Sanker v. Humberg, 48 Cal.App.2d 203, 119 P.2d 431; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091. This seems to be conceded by plaintiff who does not argue the insufficiency of the evidence to support the verdict and judgment.

[2] Plaintiff complains of defendant's instructions number 11 and number 5, of which he says: "By Instruction No. 11 the jury was told that 'any failure' of plaintiff

to yield the right of way to the motorist constituted negligence, and by Instruction No. 5 that if the plaintiff was guilty 'of any negligence' which 'contributed to the accident in any degree, no matter how slight' he could not recover."

In this connection it should be observed that plaintiff's instructions numbered 6, 12 and 13 were given to the jury. Those instructions were to the same general effect as the defendant's instructions numbered 11 and 5. If we assume error in those two instructions, we would be unable to reverse the judgment because of them under the invited error rule. Ray v. Kennedy, 24 Cal. App.2d 583, 76 P.2d 147; Jesse v. Giguiere, 24 Cal.App.2d 160, 74 P.2d 310; Smith v. Aggola, 27 Cal.App.2d 750, 81 P.2d 997.

[3] The next question argued is whether or not there were unmarked cross-walks across the highway at the intersection, it being clear that there was no marked cross-walk there.

An unmarked cross-walk is defined by subdivision "a" of section 85 of the Vehicle Code as follows:

"That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street."

Section 84 of the same code provides:

"'Sidewalk' is that portion of a highway, other than the roadway, set apart for pedestrian travel."

Both of the foregoing code sections were read to the jury at the request of plaintiff.

There is nothing in the record indicating that any portion of Church Street had been set apart for pedestrian travel. Photographs indicate that the only portion of that street on which pedestrians could travel was the roadway.

The only case we have found bearing on the question of an unmarked cross-walk under similar circumstances to those of the instant case is LaBranch v. Scott, 82 Cal. App.2d 1, 185 P.2d 823, where it was held that there was no unmarked cross-walk at a similar intersection. This holding agrees with the rulings of the trial judge, as evidenced by his instructions in the instant case, and we find no error in those instructions.

[4] Plaintiff complains of defendant's instructions 10 and 15. While he seems to admit that the instructions were correct statements of the law in the abstract, he argues that they were liable to mislead the jury under the facts of this case and that: "These instructions should have permitted the jury to determine whether the defendant was rightfully in the middle lane. If not, the defendant's duty, by reason of the violation, was greater than that of the plaintiff."

At plaintiff's request, sections 525 and 526 of the Vehicle Code were read to the jury so it was informed that the law provided that an automobile should not be driven into the center lane of a three-lane highway except when overtaking or passing another vehicle or in preparation for a left turn. The jury was also informed that violation of law might be negligence.

In addition to the rules of the code there are other well established rules permitting a driver to turn his vehicle into a center lane or onto his left side of a highway under some circumstances when endeavoring to avoid injury to another. While the instructions might have been more happily worded we do not believe the jury could have been misled by them.

[5] Plaintiff also complains of defendant's instruction number 9 in which the jury was told that it was plaintiff's duty "* * * at all times to exercise ordinary care to observe the approach of motor vehicles, which might constitute a hazard to him * * *," and that if he "either failed to look at all, or that he looked and failed to see a danger that was in plain sight to be seen by one exercising ordinary care * * *" he was negligent. This instruction only placed on plaintiff the duty to use ordinary care for his own safety in observing the approach of vehicles, and placed no undue burden upon him. Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200.

While the phraseology of some of the instructions given, as proposed by both parties, could have been improved, we find no serious error in them when all are taken as a whole and construed together.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

SORENSEN v. COSTA.*

Civ. 7393.

Sac. 5842.

District Court of Appeal, Third District, California.

Dec. 15, 1947.

Hearing Granted Feb. 9, 1948.

1. Adverse possession 🔑13

To establish title by adverse possession, claimant's possession must be by actual possession under such circumstances as to constitute reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title, or claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed upon property during such period.

2. Adverse possession 🔑95

A claimant to land by adverse possession is bound to prove that he actually paid taxes on the land, and it is not sufficient to show that he paid taxes on other lands supposing them to include the lands in dispute.

3. Adverse possession 🔑90

Where defendant had title to west half of lot and had paid taxes thereon but as result of mix-up actually resided in dwelling upon east half of lot, and plaintiff, while holding title to east half of the lot and paying taxes thereon, had actually resided in dwelling on west half of lot, plaintiff, upon basis of his residence upon the west half of the lot, did not acquire title thereto by adverse possession, since he did not in fact pay taxes assessed against west half.

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Actions by Ernest T. Sorensen against Manuel Costa and others and by same plaintiff against Nettie Connolly and others to quiet title to certain realty, wherein both of the named defendants answered and cross-complained. From an adverse judgment, the defendant Costa alone appeals.

Reversed.

Ernest C. Crowley, of Fairfield, for appellant.

W. Del Richards and Morse & Richards, all of Oakland, for respondent.

ADAMS, Presiding Justice.

This is an appeal by defendant Costa from a judgment in favor of plaintiff Sorensen, which judgment decreed that Sorensen was the owner of the westerly half of Lot 7, Block 51, as delineated upon the official map of the City of Benicia.

Plaintiff filed two actions, (1) No. 15151 against Costa et al., and (2) No. 16635 against Nettie Connolly et al., claiming title to the west half of said Lot 7; both Costa and Nettie Connolly answered and cross-complained, Costa claiming title to the said west half of Lot 7 and Nettie Connolly claiming title to the east half of said lot. Costa filed a separate action, No. 15330 against Sorensen et al., claiming title to said west half of Lot 7. Costa's action was dismissed. The other two cases were consolidated for trial and tried together. The court rendered judgment that Nettie Connolly was the owner of the east half of Lot 7 and no appeal was taken therefrom. Therefore we are concerned only with the title to the west half of Lot 7 as between Sorensen and Costa.

Devolution of the title to Lot 7 is shown by the record to have been as follows:

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* Subsequent opinion 196 P.2d 900.

In 1890 one Mizner executed a deed to all of said lot to Albee and Carson; these two grantees then exchanged deeds which gave the title to the west half to Albee, and title to the east half to Carson. In 1901 Albee conveyed his west half to Costa. The latter then took possession of the westerly of two houses, which house was pointed out to him by one Captain Turner as the house owned by Albee, his grantor, but which house, by subsequent survey, was found to be actually situated on the east half of the adjoining Lot 8 which Albee did not own. Costa, since 1891, has resided in the house on the east half of Lot 8 but has paid taxes assessed against the west half of Lot 7, and has not paid any taxes on the east half of Lot 8. In September, 1940, Costa purchased the east half of Lot 8, at a tax sale, and thereafter discovered the confusion as to his title.

In the meantime Sorensen and his predecessors in title, which title descended from Carson and which described the east half of Lot 7, have occupied a house actually situated on the west half of Lot 7, though believing same to be on the property described in their chain of title as the east half of Lot 7, upon which they paid taxes. In short, while Costa has title to the west one-half of Lot 7 and has paid taxes thereon, he has actually resided during said time upon the east half of Lot 8; and Sorensen, while holding title to the east half of Lot 7 and paying taxes thereon, has actually resided upon the west half of said lot. Upon the basis of his said residence upon the west half as aforesaid, Sorensen claims to have acquired title thereto as against Costa, the owner of the record title; and upon the premise in its findings, that Sorensen and his predecessors in interest had been, since April, 1890, in actual possession of the west half of said lot, had occupied, used and cultivated same, kept it surrounded by a substantial enclosure, and used and claimed the same in their own right adversely to all the world, the trial court held that Sorensen and not Costa was the owner of said west half of Lot 7.

[1] We are unable to agree with this conclusion. In order to acquire title by adverse possession as against the owner of the legal title it is essential that the following conditions be met: possession must be by actual possession under such circumstances as to constitute reasonable notice to the owner; possession must be hostile to the owner's title; the holder must claim the property as his own, either under color of title, or claim of right; possession must be continuous and uninterrupted for five years; and the possessor must pay all taxes levied and assessed upon the property during the period. And unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession. West v. Evans, 29 Cal.2d 414, 417, 175 P.2d 219.

[2, 3] We need go no further in this case than to point out that Sorensen did not in fact pay the taxes assessed against the west half of Lot 7. Such taxes were paid by Costa. Sorensen paid the taxes assessed against the east half of the said Lot 7. In the leading and often followed case of Reynolds v. Willard, 80 Cal. 605, 608, 22 P. 262, the court held that a claimant is bound to prove he actually paid the taxes on the land in controversy and that it is not sufficient to show that he paid taxes on other lands supposing them to include the lands in dispute. In following the Reynolds case, in the case of In re Wasson, 54 Cal.App. 269, 274, 201 P. 793, 795, the court said: "He was bound to prove that he had actually paid the tax *on the very property in controversy.*" (Italics added.) Again the Reynolds case was followed in the case of Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 124, 64 P. 113, 117, where the court said: "It is not sufficient that defendants *thought or supposed* they were paying taxes on lands in section 23." (Italics added.) This court reached the same conclusion in Pedersen v. Reynolds, 31 Cal.App.2d 18, 29, 87 P.2d 51.

In the case before us the trial court made a finding as follows: "The Court further finds that plaintiff and cross-defendant Ernest T. Sorenson, in action No. 15151 and his predecessors in interest have since the 19th day of April, 1890, been in actual possession of all the land and premises described in the complaint, in said action No. 15151, and have ever since the last date aforesaid, occupied, used and cultivated said land, having and keeping the same surrounded by a substantial enclosure, using and claiming the same in their own right from that date to the present time, adversely to all the world.

"The Court further finds that all of the parties, to wit: Manuel Costa, Ernest T. Sorensen and Nettie Connolly, defendant in action No. 16635 and their predecessors in title, have paid all of the taxes assessed by the City of Benicia and the County of Solano, against the properties actually occupied by them."

But the evidence fails to support this finding regarding the payment of taxes since it is conceded that Costa paid the taxes assessed against the property occupied by Sorensen, and that the property upon which Sorensen paid taxes was the east half of Lot 7, to which he had a deed, but which is a vacant lot.

It is apparent from the evidence in the case that when Sorensen bought the east half of Lot 7 he thought he was getting the house that is located upon the west half; and that Costa, when he acquired the west half of Lot 7 thought he was getting the house that is located on the east half of Lot 8. It is also apparent that both were mistaken. But their mistakes were not due to anything done by their respective grantors. Each acquired title by deed to that, and that only, which his grantor owned.

The judgment here appealed from by Costa adjudged that Sorensen is the owner in fee simple absolute of the west one-half of Lot 7, and quieted his title thereto as against Costa, the owner of the record title. Since the only ground upon which such a decree could be premised is that Sorensen acquired title to said lot by adverse possession, and since the essential elements of adverse possession by him have not been proven, the conclusion seems inescapable that the judgment appealed from must be, and it is hereby reversed.

PEEK and THOMPSON, JJ., concur.

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82 Cal.App.2d 796

JOHNSTON et al. v. TWENTIETH CENTURY-FOX FILM CORPORATION.

Civ. 15745.

District Court of Appeal, Second District, Division 3, California.

Dec. 10, 1947.

1. Appeal and error ⚷882(3)

Appellant cannot deviate from position taken in trial court.

2. Literary property ⚷1

A product of the mind is an intangible, incorporeal property right. Civ.Code, §§ 654, 655, 679, 980.

3. Literary property ⚷2

There cannot be property in an author's ideas, but there may be property in a particular combination of ideas or in the form in which the ideas are embodied. Civ.Code, §§ 654, 655, 679, 980.

4. Literary property ⚷2

A person may have a property right and the right to the exclusive use of arbitrary or fictitious or fanciful or artificial or technical names or titles. Civ.Code, §§ 654, 655, 679, 980.

5. Literary property ⚷2

There can be no property in words which are merely generic or descriptive in their ordinary application, but such words may, when not used in a generic or descriptive sense, be the subject of a property right and the right of exclusive use.

6. Literary property ⚷2

The title "Queen of the Flat Tops" was an arbitrary, fictitious, fanciful, artificial, distinctive, and nondescriptive combination of words, of which the author and publisher of book about air craft carrier and Coral Sea battle were the owners, with right to exclusive use for all purposes. Civ.Code, §§ 654, 655, 679, 980.

7. Literary property ⚷1

At common law, an author has an exclusive and absolute incorporeal property right in his original intellectual production before it is published.

8. Literary property 🔑2

An idea given embodiment in tangible form is the subject of common-law property right.

9. Copyrights 🔑37

The copyright of a book does not protect the owner's exclusive use of the title.

10. Copyrights 🔑13, 37

A title alone is not copyrightable and, upon publication of book with title, owners cease to have exclusive common-law right to use of title.

11. Trade-marks and trade-names and unfair competition 🔑71

The doctrine of "secondary meaning", which is a legal term dealing with the significance, in law, of extensions of words and symbols to new uses, has been developed by the courts to protect author in his property right to title and its use after publication of work.

See Words and Phrases, Permanent Edition, for all other definitions of "Secondary Meaning".

12. Trade-marks and trade-names and unfair competition 🔑71

The title of a copyrighted book attains a "secondary meaning", which will afford protection to the author in his property right to title, if it acquires a trade significance as an arbitrary designation.

13. Trade-marks and trade-names and unfair competition 🔑71

The doctrine of secondary meaning, protecting author in property right to title, has been extended to catch phrases and slogans, and acquisition of a secondary meaning signifies attaining popularity.

14. Literary property 🔑2

The title of a radio program is subject to ownership, and right in it is established by proof that it has been used in radio broadcasts, has been announced and advertised, and has reached the public in other ways.

15. Literary property 🔑2

The title of a newspaper, magazine, or periodical is subject to ownership, and right in it is established by proof of circulation and advertising, although it is not registered as a trade-mark.

16. Literary property 🔑2

The title of a play is subject to ownership, and right in it is established by proof of use, advertising under the title, although it is not registered as a trade-mark and is not a trade-name.

17. Trade-marks and trade-names and unfair competition 🔑71

The title of a book consisting of words of common usage may acquire a secondary meaning which will protect the author in his property right to the title.

18. Trade-marks and trade-names and unfair competition 🔑71

Whether a title has acquired a secondary meaning which will protect author in his property right to the title and its use is a question of fact.

19. Literary property 🔑9

In action for breach of oral contract to buy the exclusive right to use of the title "Queen of the Flat Tops" for all purposes except in connection with publication of book, evidence supported finding that the title alone, divorced from material in book, had acquired a secondary meaning which would protect author in property right to title and its use.

20. Literary property 🔑7

Exclusive use of title, to which author and publishers of book were entitled, included use as title of book, as title of silent motion picture, title of a speaking motion picture, title of radio broadcast, title of dramatic production, and title of television production, and the author and publisher as owners of such rights could grant exclusive right to use of the title for any one or more of such purposes. Civ.Code, §§ 980, 1044 et seq., 1045.

21. Literary property 🔑6

The common-law rights to literary property are subject to disposition, absolute or qualified, by any mode by which personal property is transferred.

22. Literary property 🔑7

The originator of an advertising slogan which is novel and reduced to concrete form may recover from one granted permission to use the slogan, upon a contract, express or implied.

23. Literary property 🔑9

An author who has become entitled to exclusive use of literary title is protected from misappropriation by pirates and cheats, and would be entitled to an injunction against unauthorized use or threatened use.

24. Literary property 🔑7

The right to exclusive use of literary title was a right of value which owners by agreement for a consideration could waive in whole or in part.

25. Literary property 🔑7

A contract to sell exclusive right to use of literary title for all purposes except in connection with publication of book was not unlawful as a transfer of a title in gross since title was not transferred and contract merely permitted buyer to do something it could not otherwise do, use the title for motion picture and other purposes.

26. Literary property 🔑7

In action for breach of oral contract to buy the exclusive right to use of the title "Queen of the Flat Tops" for all purposes except in connection with publication of book which dealt with air plane carrier and Coral Sea battle, whether title had lost value so as to constitute no consideration because literary material of book had lost its value was not determinable as a matter of law.

27. Property 🔑11

The right of transfer is one of the inseparable incidents of property.

28. Literary property 🔑6

The title "Queen of the Flat Tops" applied by author to book about air plane carrier was subject to transfer for use for motion picture and other purposes.

29. Evidence 🔑5(2)

It is common knowledge that since the advent of motion pictures, and particularly since advent of radio, titles, names, slogans, catch phrases and the like have become of great value.

30. Literary property 🔑7

Agreement to sell exclusive right to use of certain title for all purposes except in connection with publication of book was adequate consideration for agreement to pay money therefor. Civ.Code, § 1605.

31. Trade-marks and trade-names and unfair competition 🔑71

Rights with respect to use of a title need not be supported by copyright, and title alone may acquire a secondary meaning with right of protection independent of copyright.

32. Literary property 🔑7

Contract to sell exclusive right to use title for all purposes except in connection with publication of book carried with it implied obligation on part of seller to fully protect buyer's use.

33. Literary property 🔑7

Oral contract to buy exclusive right to use of certain title for all purposes except in connection with publication of book was not lacking in consideration because sellers allegedly had power to destroy grant by letting book fall into the public domain or by assigning copyright to a bona fide purchaser for value.

34. Literary property 🔑7

Oral contract to buy exclusive right to use of certain title for all purposes except in connection with publication of book was not unenforceable by sellers for want of authority on part of negotiating agents to enter into a binding contract, for want of acceptance of offer, or for want of a meeting of minds on essential elements. Civ. Code, § 1550.

35. Contracts 🔑32

The validity of original oral contract embodying all terms and conditions, with mutual intention that it shall become binding, is not altered by fact that a formal written agreement to the same effect is to be prepared and signed.

36. Appeal and error 🔑1008(1)

Whether parties mutually intended that oral agreement should become binding eo instanti was for trial court to determine from surrounding facts.

37. Literary property 🔑9

In action for breach of oral contract to buy the exclusive right to use of title "Queen of the Flat Tops" for all purposes except in connection with publication of book, evidence supported finding that parties intended oral agreement to become effective immediately, though subsequent reduction to writing was contemplated.

38. Literary property ⚷7

Oral contract to buy the exclusive right to certain title for all purposes except in connection with publication of book was breached by buyer's refusal to pay the purchase price, and buyer could not avoid liability for such breach because sellers had refused to execute proposed written agreement incorporating a "covenant of nonsuit" under which buyer could with impunity make use of any of material in book.

39. Literary property ⚷9

In action for breach of oral contract to buy the exclusive right to use of certain title for all purposes except in connection with publication of book, evidence supported finding that sellers were ready, willing, and able to perform agreement, that buyers refused to perform unless sellers agreed to "covenant of nonsuit" in proposed written contract, that covenant was contrary to oral contract, and that buyer repudiated and refused to perform the oral contract.

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Stanley Johnston and E. P. Dutton & Company, Inc., against Twentieth Century-Fox Film Corporation for a breach of an oral agreement to buy the title "Queen of the Flat Tops" for all purposes except the right of plaintiffs to continue to use title in connection with publication of a book. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Alfred Wright and Harold F. Collins, both of Los Angeles (Gordon Hall, Jr., of Los Angeles, of counsel), for appellant.

Harry E. Sokolov and Nathan E. Gillin, both of Los Angeles, for respondents.

VALLEE, Justice pro tem.

Appeal by defendant from a judgment for plaintiffs in an action to recover damages for the breach of an oral agreement granting defendant the right to the exclusive use of the title, "Queen of the Flat Tops," for all purposes except the right of plaintiffs to continue to use the title in connection with the publication of a book.

Stanley Johnston, referred to as the "author," was on the aircraft carrier Lexington in the battle of the Coral Sea in May, 1942. Shortly thereafter he wrote a book entitled, "Queen of the Flat Tops," subtitled, "The U. S. S. Lexington and the Coral Sea Battle." The book was published and copyrighted in the United States in 1942 by E. P. Dutton & Co., Inc., referred to as "Dutton." It was one of the first books published to treat in detail of the activities of an aircraft carrier and its crew in combat. The book is non-fictional. It relates historical facts, warfare in the Pacific. It does not contain any fictional character or characterization as such, or any plot or theme. The author and Dutton at all times have been the owners of the book referred to in the record as the "literary property," and of the copyright. The book became widely known as Queen of the Flat Tops." It attained considerable popularity which endowed the title, "Queen of the Flat Tops," with considerable value. Up to April 14, 1944, Dutton had sold 170,578 copies of the book throughout the world and had expended the sum of $14,669.71 in advertising and publicizing the book. A substantial number of copies of the book were sold in California. About October, 1942, the author and Dutton employed Myron Selznick Agency, referred to as "Selznick," to vend motion picture rights in the book. Hugh King, acting as "motion picture literary agent" for Selznick, endeavored to effect a sale, contacting all motion picture companies. King was in exclusive charge of the efforts to sell. Early in 1944, appellant was engaged in the production of a motion picture centered about the operations of an aircraft carrier. The picture, like the book, related to historical facts, warfare in the Pacific. In March or April, 1944, Zanuck, executive vice-president of appellant in charge of production, empowered to make contracts in its behalf, authorized Julian Johnson, appellant's story editor, to purchase the right to use the title, "Queen of the

Flat Tops." Johnson contacted King, and on behalf of appellant offered $2,500 for the use of the title alone, telling King that appellant was only interested in buying use of the title. This offer was rejected by King. After some negotiation, the amount of the offer increasing each time, Johnson, upon authorization of Zanuck, offered King $20,000 for use of the title alone. King told Johnson that that was a fair price and that he would recommended to his principals, respondents, that they accept the offer. In his negotiations with King, Johnson used "the term 'all rights' and I meant all rights universally in the various countries." King did not, at that time, have any authority from his principals to accept an offer. It may be inferred from the evidence that, between the $2,500 offer and that of $20,000, Johnson was in constant contact with Zanuck with respect to the amount to be offered. On April 11, 1944, King telegraphed Dutton to the effect that appellant had offered $20,000 for use of the title alone, the material in the book to remain the author's property. On April 12, Dutton telegraphed King to the effect that it would check with the author immediately regarding the offer. On April 13, the author wrote King to the effect that Dutton and he had agreed that the price was acceptable and authorized King to accept the offer. The letter stated that Dutton was contacting King separately. On April 14, the author telegraphed King to the effect that he had spoken with Dutton and that they were in agreement to sell the title for $20,000. Immediately upon receipt of this telegram and on April 14, 1944, King telephoned Johnson, at appellant's studio, and told him that the author and Dutton accepted the offer. Johnson replied, "Thank God, it's over." King then dictated an office memorandum, "the blue memo, which meant the closing of the deal." The same day King went to Johnson's office, at appellant's studio, and verbally confirmed his telephone conversation, thanked Johnson for the deal, each party telling the other that he had made a good deal at a fair price, Johnson asking King in whose name the contract would be drawn. At that conversation King said, "You bought the title only; why don't you buy the whole book and buy the material too?" Johnson replied that their only interest was in the title and "that they didn't want the material." Johnson testified that at that time he regarded the deal "as a good deal for the company and for the author and publisher," and that the title "had a distinct value because Stanley Johnston had written a book giving the saga or story of the 'Lexington.'" On the same day, April 14, Johnson signed and sent to Schreiber, an officer of appellant authorized to make contracts in its behalf, a writing, reading:

"Subject Queen of the Flat-Tops
"(Title purchased)

"Through the Myron Selznick Agency (Hugh King representing) we have just purchased all rights to the title of this book. Price, $20,000, which was the figure of our offer—as we discussed the other day.

"This is a book published by E. P. Dutton, written by Stanley Johnston.

"Mr. Wasson should know, in closing his contract, that we purchased the *title only.* (We were not interested in the literary material)

"I have not notified anyone of this purchase, except Mr. Zanuck."

On April 17, Schreiber signed and sent to Wasson, resident studio counsel of appellant, the following:

"Subject Queen of the Flat Tops Title
"Dear George:

"We have purchased all the rights to the title of the book, Queen of the Flat Tops, for the price of $20,000. We were not interested in the property, but Mr. Zanuck wanted us to purchase the title only.

"Lew Schreiber

"Lew Schreiber

"Dear George: When the papers are ready will you please contact Hugh King of the Myron Selznick Agency."

Upon receiving this writing from Schreiber, Wasson telephoned Johnson and, in his own handwriting, wrote on the same writing, the following: "J. Johnson says: Sellers retain no rights to title for mo. pic. [motion picture], telev. [television], radio or dramatic purposes. Stanley Johnston, author—Dutton." On the same day, Wasson told Ferguson, an employee in the legal department of appellant, to prepare a contract and that the contract should contain a "waiver of similarity"—a covenant "not to sue re similarities." On April 17, Ferguson telephoned King asking in whose name the contract should be drawn. On April 17, King telegraphed Dutton, "Closed at Twentieth Friday on 'Queen.' In whose name should contracts be drawn? Wire." The same day Dutton telegraphed King that the contracts should be drawn in the names of the publisher and the author. King so informed Ferguson. On April 17, Wasson telegraphed Kilroe, a copyright searcher for appellant in New York, asking Kilroe to register the title with the Hays Office, saying that appellant proposed to use the title for a picture formerly entitled, "Wing and a Prayer." The Hays Office was the office of the "Motion Picture Producers and Distributors of America." On April 25, Kilroe sent a telegram to Wasson, in which he said that "Dutton states deal has been closed through Selznick's office." On May 2, Ferguson sent Selznick four copies of a written contract. The proposed written contract transferred to appellant all of the right, title and interest of the author and Dutton in the title, "Queen of the Flat Tops," including, but not limited to, "the motion picture, radio, dramatic, television and allied rights throughout the world, provided however, that the owners shall have the right to continue to utilize said title in connection with the publication of said literary property," without any obligation on appellant to exercise or put to use any of the rights acquired, for a consideration of $20,000. The proposed contract also contained provisions which are referred to in the record as "covenant of nonsuit." This "covenant of nonsuit" constituted a waiver by respondents of all claims, present or future, against appellant, its successors, licensees and assigns "by reason of any similarity which may exist between any dramatic production, television production, radio broadcast, motion picture or pictures, including a remake, reissue or foreign language version thereof utilizing the title 'Queen of the Flat Tops' * * * and the literary property hereinbefore mentioned and described," and required the author and Dutton to obtain a similar waiver from anyone to whom they might sell the motion picture, dramatic, radio or television rights in the literary property itself, exclusive of rights in the title. Under the terms of the "covenant of nonsuit" appellant could, with impunity, make use of any of the material in the book it desired. Wasson testified that his idea in inserting the "covenant of nonsuit" in the contract was to put the risk of pirating by appellant from the book itself on respondents and not on appellant. A few days after receipt of the contract by King, one or more conferences were had between King, Ferguson and Wasson, at one of which Johnson was present. King insisted that the "covenant of nonsuit" be deleted from the contract insofar as it related to the material in the book; that appellant had bought rights in the title only; that it had not purchased "the literary property"; that purchase of the "literary property" had never been discussed; and that appellant had no right to inject such a clause into the contract. Wasson insisted that the covenant remain in the contract. At the meeting at which Johnson was present, Johnson conceded that appellant had only purchased rights in the title and not any of the material in the book. Neither Wasson nor Johnson made any claim that appellant "had bought anything other than the title to the book." Wasson told King that either the "covenant of nonsuit" stayed in the contract or he would recommend to appellant's officers that the deal be called off. King would not agree to its remaining. Wasson then conferred with Zanuck and Schreiber. Wasson told King, on May 11, 1944, "I have got bad news * * * you ain't got no deal," and asked him to return the copies of the proposed contract. King told Wasson that so far as he, King, was concerned, "they had made a deal and they were going to stick by it." King returned the copies of the proposed contract to Wasson on May 12. On May 11, King advised the author and Dutton, by telegram, of appellant's insistence upon the insertion of the "covenant of nonsuit" in the contract and of its effect, that he had refused to accept the contract, and recommended that they not sign the contract as submitted. On May 13, Dutton telegraphed King saying, "We agreed to accept their price for the title alone" and appellant should be "made to stick to the deal." On May 15, the author telegraphed King, "Agree with McCrae [Dutton] that we should insist Fox carry through deal." The evidence also shows that acquisition of the right to use the title of a book divorced from any material in the book is a common and usual transaction in the motion picture industry; that titles are of such value in the industry that Motion Picture Producers and Distributors of America maintain an elaborate system for their registration; that motion picture companies often purchase a title and the literary property with which it is connected in order to obtain use of the title only without using the literary property.

Respondents commenced this suit, alleging that an oral agreement was made on April 14, 1944, by which appellant had agreed to buy from respondents, and respondents had agreed to sell to appellant, the right to the use of the title, "Queen of the Flat Tops," for motion picture and all other purposes except that respondents should have the right to continue to use the title in connection with the publication of the book, breach of the agreement by appellant, and damage to respondents in the sum of $20,000.

The trial court, among other things, found that respondents are and were at all times the sole owners of the literary work entitled, "Queen of the Flat Tops, The U. S. S. Lexington and the Coral Sea," and the copyright thereon; that "as of and prior to April 14th, 1944, the title, 'Queen of the Flat Tops' had acquired a secondary meaning with which the use of said title by others than plaintiffs for motion picture, radio, dramatic or television productions or uses would unfairly compete"; that on or about April 14, respondents and appellant, through their respective agents duly authorized and empowered to so contract on behalf of their respective principals, entered into an oral contract, all of the essential terms of which were then and there mutually understood and agreed upon, whereby appellant agreed to buy from respondents and respondents agreed to sell to appellant for a consideration of $20,000, the right to the exclusive use of the title, "Queen of the Flat Tops," for all purposes of any and every nature, subject only to the reservation of the right of the respondents to continue to use said title in connection with the publication of said literary work; that it was the mutual intention of the parties to be, and they were, bound by said oral contract of April 14, 1944, as of the time of the making thereof, although the said oral contract was subsequently to be reduced to writing; that respondents at all times have been ready, willing and able to perform their part of the contract; that appellant had refused to perform the contract unless the respondents, as an express condition of the appellant's performance, "would in writing agree to waive all claims and covenant not to sue defendant in the event that any similarity should exist between any motion picture, radio, dramatic or television production by defendant utilizing said title, 'Queen of the Flat Tops,' and the material contained in the plaintiffs' literary work hereinbefore referred to, which condition the Court finds to be contrary to the terms of said oral contract of April 14th, 1944, and therefore unwarranted, and finds defendant's insistence thereon as a condition to its performance to be a breach of said contract and a repudiation thereof, and finds that the refusal on plaintiffs' behalf to consent to such condition was justifiable"; that ever since April 14, 1944, appellant had failed and refused to perform and had breached the oral contract and had failed to pay respondents the purchase price; that respondents had been damaged in the sum of $20,000 with interest; that "the agreement by plaintiffs to grant to defendant the rights as aforesaid to the use of the title 'Queen of the Flat Tops' constituted an agreement by plaintiffs both to confer upon defendant a benefit to which defendant was not lawfully entitled and to suffer a prejudice which plaintiffs were not lawfully bound to suffer and that such an agreement constituted a good consideration for defendant's promise to pay $20,000 for such rights."

Appellant urges first that there was no consideration for its promise to pay $20,000 because, so it says respondents "had no vendible property right in the words 'Queen of the Flat Tops' which they could lawfully transfer to" appellant. Appellant says in this behalf that there is no element of property in a literary title or name capable of being transferred separate and apart from the literary work to which it is appended.

Appellant takes a position here inconsistent with, and contrary to, that which it took in the trial court. There it said: "In the instant case, the contemplated contract was for the sale of a part of a literary property. There is an enormous traffic in literary properties, especially in the motion picture industry. Hundreds of law suits involving literary properties have found their way into court. However, we have been unable to discover any reported case dealing with the sale of rights in literary property founded upon an oral contract. * * * Though there are conflicting dicta on the subject, it has long been held that there is a property right in a trade mark or trade name. * * * the Supreme Court of California, in Derringer v. Plate, 1865, 29 Cal. 292, 293, 87 Am.Dec. 170, holds that a man may acquire, by adoption and use, a property right in a trade name. It has long been recognized that titles to literary and dramatic works are analogous to trade names and are governed by the same principles. Outcault v. Lamar, 1909, 135 App.Div. 110, 119 N.Y.S. 930; Dickey v. Mutual Film Corp., 1916, 160 N.Y.S. 609. Referring to the nature of a title, it was said in National Pictures Theatres, Inc., v. Foundation Film Corporation, 2 Cir., 1929, 266 F. 208, that it is 'a right in being, an actual property' protectible against invasion. * * * We apprehend that it will be urged that trade marks and trade names are not vendible in gross, and that, therefore, there was no sale within the meaning of the Sales Act. If this be so, there was a total failure of consideration for defendant's alleged promise to pay $20,000. However, we think the proper view is that business practice has so developed, and the law must recognize, that certain names and titles have a marketable value and are the subject of commercial traffic. In Benioff v. Benioff, 1923, 64 Cal.App. 745, 222 P. 835, the court recognized that the owner of a trade name could grant the exclusive right to another to use it in another locality, although the court held that since no consideration was paid for the right, and since it was not acted upon by the defendant, that it was revocable at plaintiff's pleasure."

[1] It would be sufficient for us to say that appellant, upon appeal, cannot deviate from the position it took in the trial court. Merchant, etc. Ass'n v. Kellogg Express & Draying Co., 28 Cal.2d 594, 601, 170 P.2d 923; Ayoob v. Ayoob, 74 Cal.App.2d 236, 247, 168 P.2d 462, where it was held that the respondent could not claim illegality of consideration upon appeal when he claimed in the trial court that an oral contract was voidable under the statute of frauds and had not claimed illegality of consideration. As a special defense, appellant pleaded want of consideration for the oral agreement. It vigorously asserts that it did raise the question of the transferability of the title in the trial court. We are inclined to the opinion that it did not raise that question or the question of the transferability of a right to use the title. However, in view of appellant's insistence that it did raise the question of the transferability of the title in the trial court, and that it did plead want of consideration, and of the importance of the question, we pass on appellant's contention.

[2-6] It may be well to emphasize here that what respondents, in fact, granted to appellant, as found by the trial court, was not the title but the exclusive right to use the title for all purposes except in connection with the publication of the book. The author of any product of the mind has an exclusive ownership therein and in the representation or expression thereof which continues so long as the product and the representations or expressions thereof made by him remain in his possession. Civ.Code, sec. 980. There may be ownership of such products of labor or skill as the composition of an author and of rights created by statute. Civ. Code, sec. 655. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. The thing of which there may be ownership is called property. Civ. Code, sec. 654. The ownership of property is absolute when a single person has the absolute dominion over it and may use it or

dispose of it according to his pleasure subject only to general laws. Civ. Code, sec. 679. A product of the mind is property. 16 Cal.Jur. 665; 21 Cal.Jur. 642, sec. 4. It is an intangible, incorporeal right. Italiani v. Metro–Goldwyn–Mayer Corporation, 45 Cal.App.2d 464, 114 P.2d 370. There cannot be property in an author's ideas but there may be property in a particular combination of ideas or in the form in which ideas are embodied. Barsha v. Metro–Goldwyn–Mayer, 32 Cal.App.2d 556, 90 P.2d 371; 18 So.Cal.L.Rev. 256. There can be no property in words which are merely generic or descriptive. Fidelity Etc. Co. v. Federal Etc. Co., 217 Cal. 307, 18 P.2d 950; Jaynes v. Weickman, 55 Cal.App. 557, 558, 203 P. 828. However, a person may have a property right and the right to the exclusive use of arbitrary or fictitious or fanciful or artificial or technical names or titles. They have a special significance. They are creations of the mind. Words which are generic and descriptive in their ordinary application may, when not used in a generic or descriptive sense, be the subject of a property right and the right of exclusive use. Words and terms, such as "Mechanics," "What Cheer House," "Philadelphia," "Hudson Bay," "Carolina," while generic and descriptive in their ordinary application may, when not used in their generic or descriptive sense, be the subject of a property right and the right of exclusive use. Rosenthal v. Brasley–Krieger Shoe Co., 19 Cal.App. 2d 257, 259, 64 P.2d 1109. A word or combination of words may be descriptive when used in one connection, and non-descriptive in other contexts. A descriptive word or combination of words may be used in a non-descriptive sense because unrelated to the subject matter in question. In Gannert v. Rupert, 2 Cir., 127 F. 962, the word "Comfort," as the title of a magazine, was held to be technical and non-descriptive and entitled to protection as against the title "Home Comfort" of another magazine. The following have been held non-descriptive: "Chantecler," as applied to a play in which every character represented a barnyard fowl or animal, even though the principal character was a rooster, Frohman v. William Morris, 63 Misc. 461, 123 N.Y.S. 1090, 1092; "Chicken of the Sea," for canned tuna fish, Van Camp Sea Food Co. v. Alexander B. Stewart Organizations, Cust. & Pat. App., 50 F.2d 976, 979; "Cough Cherries," for a confection of a reddish color and a cherry flavor, Stoughton v. Woodard, C.C., 39 F. 902; "Kaiser," for beer, J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co., 3 Cir., 74 F. 222, 224; "Pride," as applied to cigars, Hier v. Abrahams, 82 N.Y. 519, 522, 37 Am.Rep. 589; "Royal," for baking powder, Royal Baking Powder Co. v. Raymond, C.C., 70 F. 376, 382, affirmed, 7 Cir., 85 F. 231, 236; "Star," for hams and bacon, Armour & Co. v. Louisville Provision Co., 6 Cir., 283 F. 42, 45, certiorari denied 260 U.S. 744, 43 S. Ct. 164, 67 L.Ed. 492; "The Rosary," as applied to a drama as such, Selig Polyscope Co. v. Unicorn Film S. Corp., 163 N.Y.S. 62; "Queen," for shoes, Thomas G. Plant Co. v. May Co., 6 Cir., 105 F. 375, 378; "Queen Quality," for shoes, Thomas G. Plant Co. v. May Mercantile Co., C.C., 153 F. 229. In our opinion, the title "Queen of the Flat Tops" is an arbitrary, fictitious, fanciful, artificial, distinctive and non-descriptive combination of words. The words "Flat Tops" alone are descriptive. For a long time aircraft carriers have been referred to commonly as "flat tops." The word "Queen" may be descriptive. It is ordinarily not descriptive of an aircraft carrier. Some of the synonyms and ordinary meanings of "queen" are: "Wife of a king," "a female monarch," "a goddess," "an empress," "a belle," "a woman eminent in rank, power or attraction," "a strikingly attractive girl or woman," "the fertile female of bees, ants and termites," "a female cat," "a playing card." No one of these would be used normally to describe an aircraft carrier. The combination of words, "Queen of the Flat Tops," is purely fanciful. It suggests one flat top. Which one is not disclosed. The title, "Queen of the Flat Tops," being non-descriptive, was a product of the mind. Under Civil Code sections 655 and 980 respondents were the owners of the title and as such owners had the right to its exclusive use for all purposes. Civ.Code, secs. 654, 679.

[7-19] At common law an author has an exclusive property right in his original intellectual production before it is published. Drone, Copyright, p. 101. The common law right is an absolute, incorporeal property right. It is not a privilege conferred by statute. It is a right of the common law wherever that system prevails. Ferris v. Frohman, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492; Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643. An idea given embodiment in tangible form is the subject of common law property right. Barsha v. Metro-Goldwyn-Mayer, supra, 32 Cal.App.2d 556, 561, 90 P.2d 371; Yadkoe v. Fields, 66 Cal.App. 2d 159, 151 P.2d 906; Brunner v. Stix, Baer & Fuller Co., supra; Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind.App. 420, 194 N.E. 206, 210. The copyright of the book does not protect the owner's exclusive use of the title. Warner Bros. Pictures v. Majestic Pictures Corporation, 2 Cir., 70 F.2d 310, 311. A title alone is not copyrightable. Patten v. Superior Talking Pictures, D.C., 8 F.Supp. 196, 197. Upon publication of the book with the title the owners ceased to have an exclusive common law right to use of the title. Little et al. v. Hall et al., 18 How. 165, 15 L.Ed. 328; Keene v. Kimball, 16 Gray, Mass., 545, 550, 77 Am.Dec. 426; Palmer v. DeWitt, 47 N.Y. 532, 539, 7 Am.Rep. 480. While an author may not have any property interest in the use of a title under his common law right after publication it does not follow that he does not have a property interest in the title and in its use as against a competitor. International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 219, 2 A.L.R. 293. To protect the author in his property right to the title and its use after publication of the work, the courts have developed the doctrine of secondary meaning. " 'Secondary meaning' is a legal term which deals with the significance, in law, of extensions of the meaning of words and symbols to new uses." Nims, Unfair Competition and Trade-Marks, 4th Ed. (1947), p. 152. A title of a copyrighted book attains a secondary meaning if it acquires a trade significance as an arbitrary designation, and its use is secured to the owner of the copyrighted matter. Selig Polyscope Co. v. Unicorn Film S. Corp., supra, 163 N.Y.S. 62, 63. Acquiring a secondary meaning signifies attaining popularity. G. & C. Merriam Co. v. Saalfield, 6 Cir., 198 F. 369, 373. The doctrine of secondary meaning has been extended to catch phrases and slogans. Fishel & Sons v. Distinctive Jewelry Co., 196 App.Div. 779, 188 N.Y.S. 633, 639. The title of a radio program is subject to ownership, and right in it is established by proof that it has been used in radio broadcasts, has been announced and advertised and has reached the public in other ways. "Old Maestro," Premier-Pabst Corporation v. Elm City Brewing Co., D.C., 9 F.Supp. 754; "The March of Time," Time, Inc., v. Barshay, D.C., 27 F. Supp. 870, 873; "Information Please," Golenpaul v. Rosett, 174 Misc. 114, 18 N.Y. S.2d 889. The title of a newspaper, magazine or periodical is subject to ownership, and right in it is established by proof of circulation and advertising of the name, although it is not registered as a trademark; "Comfort," Gannert v. Rupert, supra, 2 Cir., 127 F. 962; "Photoplay," Photoplay Pub. Co. v. La Verne Pub. Co., 3 Cir., 269 F. 730; "Vogue" Magazine, Vogue Co. v. Thompson-Hudson Co., 6 Cir., 300 F. 509; "The Sun," Powell v. Valentine, 106 Kan. 645, 189 P. 163; "Suburban Life," Suburban Press v. Philadelphia Suburban Pub. Co., 227 Pa. 148, 75 A. 1037. The title of a play is subject to ownership, and right in it is established by proof of use, advertising under the title, although it is not registered as a trademark and is not a trade-name. "A Fool There Was," Klaw v. General Film Co., 154 N.Y.S. 988, affirmed 171 App.Div. 945, 156 N.Y.S. 1128; "The Rosary," Selig Polyscope Co. v. Unicorn Film S. Corporation, supra, 163 N.Y.S. 62; "White Zombie," Amusement Securities Corporation v. Academy Pictures Distributing Corporation, 162 Misc. 608, 294 N.Y.S. 279, affirmed 250 App.Div. 710, 294 N.Y.S. 305, 306, modified in part 251 App.Div. 227, 295 N.Y.S. 436; motions denied 250 App.Div. 749, 295 N.Y.S. 472, affirmed 277 N.Y. 557, 13 N.E. 2d 471, rehearing denied 277 N.Y. 672, 14 N.E.2d 383; "Blind Youth," National Picture Theatres v. Foundation Film Cor-

poration, 2 Cir., 266 F. 208. The title of a book consisting of words of common usage may acquire a secondary meaning. National Picture Theatres v. Foundation Film Corporation, supra; Photoplay Pub. Co. v. La Verne Pub. Co., supra, 3 Cir., 269 F. 730, 732; Warner Bros. v. Majestic Pictures Corporation, supra, 2 Cir., 70 F. 2d 310, 311. The subject of property is the order of words in the author's composition. Jeffreys v. Boosey, 4 H.L. 815, 867, 10 Eng.Rep. 681, 702. When the words, "Queen of the Flat Tops," have acquired a secondary meaning it may be said that such meaning is their primary meaning insofar as their use in connection with the activities of an aircraft carrier are concerned. Eastern Columbia, Inc. v. Waldman, 30 Cal.2d 268, 271, 181 P.2d 865. The facts in Estes v. Williams, C.C., 21 F. 189, were that one James Johnston of London published a series of juvenile books called "Chatterbox"; they became widely known and quite popular in England and in this country; James Johnston did not have a copyright or trade-mark; *he assigned the exclusive right to use and protect the title "Chatterbox" in this country to Estes, the orator;* defendants began publication in this country of a series of books similar in appearance and style and called them "Chatterbox." In enjoining the use by the defendants of the title "Chatterbox," the court said in 21 F. at page 190: "Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that other work was his. Not the right to prevent the copying of his, and putting the work upon the markets, but the right to be free from untrue representations that this other work was his when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them. The question then arises whether Johnston could transfer his right, or any part of it, to the orators, so that the defendants, in what they have done and are about to do, trespass upon the orator's rights, and not upon Johnston's. He could not do all this himself; he must act by and through others. No reason is apparent why he could not give them the exclusive right to put his work on the market as his, as he had that right. This seems to be what he undertook to do. They had that right, and the profits of its enjoyment would belong to them. The defendants would deprive them, and not Johnston, of the profits. The injury would be to them and not to him, and they are, in this view, entitled to the remedy." See, also, Estes v. Leslie, C.C., 27 F. 22, and Estes v. Worthington, C.C., 31 F. 154, in each of which the transferee of the right to use the title was awarded an injunction against the use of the title "Chatterbox." The court, in Hemingway v. Film Alliance of United States, 174 Misc. 725, 21 N.Y.S.2d 827, 828, held that the title of a play, "The Fifth Column," had acquired a secondary meaning although it had only run on Broadway for two and one-half months, having opened elsewhere, and had only enjoyed "some measure of success"; that exhibition of a motion picture titled, "Fifth Column Squad" should be enjoined. The court said (21 N.Y.S. 2d at page 829) that even if the title "Fifth Column" had not acquired a secondary meaning "to paraphrase the opinion in Skelly Oil Co. v. Powerine Co., Cust. & Pat.App., 86 F.2d 752, 754, quoted with approval in Philadelphia Storage Battery Co. v. Mindlin, 163 Misc. 52, 56, 57, 296 N.Y.S. 176, a vast field of words and phrases is open to a producer who wishes to seek a title to distinguish his play or photoplay from that of another. Consequently, whatever doubts there may be on that score should be resolved in favor of the producer who has already spent time, money and effort to give the title to his production a secondary meaning and against the newcomer who, even unintentionally, uses or simulates the title in such a manner as to confuse or mislead the public." The question whether a title has acquired a secondary meaning is one of fact. Jenney Mfg. Co. v. Leader Filling Stations Corporation, 291 Mass. 394, 196 N.E. 852, 854; Little Tavern Shops, Inc. v. Davis, 4 Cir., 116 F.2d 903, 906. The evidence recited, showing exclusiveness and priority of use and great popularity, is sufficient to support the finding of the trial court that the title "Queen of the Flat Tops" alone, and divorced from the material in the book, had acquired a secondary meaning. Shaler v. Rite-Way Products, 6 Cir., 107 F.2d 82, 84, certiorari denied 310 U.S. 634, 60 S.Ct. 1076, 84 L.Ed. 1403; N. S. W. Co. v. Wholesale Lumber & Millwork, 6 Cir., 123 F.2d 38, 43; Beneficial Industrial Loan Corporation v. Kline, 8 Cir., 132 F.2d 520, 524; Bill's Gay Nineties, Inc. v. Fisher, 180 Misc. 721, 41 N.Y.S.2d 234.

[20-22] Under the statutes of this state, and under the common law, respondents were the owners of the right to the exclusive use of the title. This exclusive use included: Its use as the title of the book, as the title of a silent motion picture, as the title of a speaking motion picture, as the title of a radio broadcast, as the title of a dramatic production, as the title of a television production—dealing with the activities of an aircraft carrier in combat. As owners of these rights, respondents could grant the exclusive right to use the title for any one or more of these purposes. Civil Code section 1044 provides that "Property of any kind may be transferred, except as otherwise provided by this article." Section 1044 is in Article II of Chapter I of Title IV. The only property which Article II says may not be transferred is a "mere possibility, not coupled with an interest." Section 1045. Many items of property are assignable under Civil Code section 1044, which were not assignable at common law. Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 37, 41 P. 1024. The common law rights are subject to disposition, absolute or qualified, by any mode by which personal property is transferred. Caliga v. Inter Ocean Newspaper Co., 7 Cir., 157 F. 186, 188, affirmed 215 U.S. 182, 30 S.Ct. 38, 54 L.Ed. 150; Frohman v. Ferris, 238 Ill. 430, 87 N.E. 327, 328, 43 L.R.A., N.S., 639, 128 Am.St.Rep. 135, affirmed 223 U.S. 424, 56 L.Ed. 492, 32 S.Ct. 263. Writing of the common law right, the court in Aronson v. Baker, 43 N.J.Eq. 365, 12 A. 177, 178, declared: "The right to literary property is just as sacred, and just as much entitled to the protection of the law, as the right to any other kind of personal property. Its acquisition and succession are governed by the same legal rules which control the acquisition and succession of other property of the same general class, and, if the rights of its owner are violated, he is entitled to the same remedies to which the owner of other personal property may resort for redress." In Goldwyn Pictures Corporation v. Goldwyn, 2 Cir., 296 F. 391, 397, it was squarely held that "one by contract may deprive himself of his exclusive right to use his name in industry." See, also, Brown Chemical Co. v. Meyer, 139 U.S. 540, 542, 11 S.Ct. 625, 35 L.Ed. 247, 248. If an advertising slogan is novel and reduced to concrete form, the originator may recover from one granted permission to use the slogan upon a contract, express or implied. Healey v. R. H. Macy & Co., 251 App.Div. 440, 297 N.Y.S. 165, affirmed 277 N.Y. 681, 14 N.E.2d 388; Alberts v. Remington Rand, 175 Misc. 486, 23 N.Y.S.2d 892; Plus Promotions, Inc., v. R.C.A. Mfg. Co., Inc., D.C., 49 F.Supp. 116; Brookins v. National Refining Co., 26 Ohio App. 546, 160 N.E. 97; How J. Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P.2d 1053, 104 A.L.R. 1353. Liggett & Meyer Tobacco Co. v. Meyer, supra, 101 Ind. App. 420, 194 N.E. 206, answers appellant's contention. In that case that plaintiff, Meyer, on December 3, 1925, submitted to defendant, seller of Chesterfield cigarettes, an original advertising scheme to be used in the way of billboard advertising. The idea consisted of this: Two gentlemen, well groomed, in working clothes or in hunting togs, apparently engaged in conversation, one extending to the other a package of cigarettes saying, "Have one of these," the other replying, "No thanks; I smoke Chesterfields." In submitting the scheme, by letter, Meyer said that he trusted the idea would "be of sufficient value as to merit a reasonable charge therefor." About two and one-half years later, on July 21, 1928, the defendant used a modification of the advertising scheme in numerous daily papers and magazines. In upholding a judgment for the plaintiff for the reasonable value of the scheme, the court stated (194 N.E. at page 210): "This is a common-law action. The rules of the common law are continually changing and expanding with the progress of the society in which

it prevails. It does not lag behind, but adapts itself to the conditions of the present so that the ends of justice may be reached. While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale. Of course, it must be something novel and new; in other words, one cannot claim any right in the multiplication table. [Citing cases.]" The judgment was upheld upon the theory that the plaintiff had made an offer to sell a merchantable idea or scheme, the defendant had accepted, and, in the absence of an express agreement to pay, there was a use of the property from which arose an implied obligation to pay. The recent case of Yadkoe v. Fields, supra, 66 Cal.App.2d 150, 151 P.2d 906, was an action to recover the reasonable value of literary material submitted by Yadkoe to and used by W. C. Fields. The court quoted with approval from Liggett & Meyer Tobacco Co. v. Meyer, supra, 101 Ind.App. 420, 194 N.E. 206, and said that while an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself concrete form it then becomes a property right *subject to sale*, that there may be literary property in the form in which ideas are expressed, and that whether an idea is expressed in concrete form is a matter of degree. See, Bradbury v. Dickens (Eng.) 27 Beav. 53, 54 Eng.Rep. 21, holding that the title of a magazine was the sole valuable asset of the proprietor and authorizing its sale.

[23, 24] If appellant, before or without the grant of April 14, 1944, had threatened to use or had used the title "Queen of the Flat Tops" for any purpose, it could have been enjoined. The author is protected from misappropriation by pirates and cheats: Golenpaul v. Rosett, supra, 174 Misc. 114, 18 N.Y.S.2d 889, in which the publisher of a magazine was enjoined from using "Information Please," the title of a radio program, as the title of a magazine; Klaw v. General Film Co., supra, 154 N.Y.S. 988, holding that the producer of a play under a certain title was entitled to restrain the production of a dissimilar motion picture under the same title. See, Frohman v. Payton, 34 Misc. 275, 68 N.Y.S. 849; Frohman v. Morris, supra, 68 Misc. 461, 123 N.Y.S. 1090; Dickey v. Mutual Film Corporation, 160 N.Y.S. 609, where the sole similarity was in the title; Patten v. Superior Talking Pictures, supra, D.C., 8 F.Supp. 196. Appellant concedes the correctness of this principle when, in its closing brief, it says: "We further agree that title to a literary work achieves a proprietary aspect as the result of its acquiring a secondary meaning and that, having acquired such meaning, it may not be used in connection with any other work, however dissimilar." The right to the exclusive use of the title was a right of value. Having that right, respondents could, by agreement for a consideration, waive it in whole or in part. There is nothing unlawful in such an agreement. Appellant argues that the title of a book may not be transferred in gross—that is, apart from the book. The argument overlooks the fact that the agreement between the parties here was not a transfer of the title in gross. Under the agreement the title remained in respondents in connection with the publication of the book. Respondents merely permitted appellant to do something it could not otherwise do—that is, use the title for motion picture and other purposes. These were the findings. It is obvious that the title could only be used for those purposes in connection with the activities of "Flat Tops," aircraft carriers. The title was not transferred.

[25] Fairly, it may be inferred from the evidence that the contents of the book, the literary material, had lost its value at the time of the transaction between the parties; that the only value was in use of the title. The book, in evidence, is wholly historical. As has been said, it treats largely of the exploits of the carrier Lexington and its crew in the battle of the Coral Sea, which occurred in May, 1942. Selznick was given the agency to sell the book for motion picture purposes in October, 1942. Results were nil up to the time that appellant made an offer for use of the title alone in March or April, 1944. During the negotiations between King and Johnson, King made repeated

efforts to persuade appellant to buy the literary material without avail. After appellant acquired the right to use the title Selznick continued its effort to sell the literary material to other motion picture producers without success. The subject matter of the book was publici juris, and, as such, was not protected by the copyright. It was only the manner in which the literary material was set up and the personal reactions of the author which the copyright protected. The fact that the material became valueless was, no doubt, due to the fact that all historical and news events soon lose commercial value as the interest of the public wanes and current news events become the topic of the day and capture the public fancy. The war had progressed about two years between the sinking of the Lexington in the battle of the Coral Sea and the grant to appellant. Numerous exploits of men, aircraft carriers, airplanes and other instruments of war had occurred, been written about, and captured public attention. We cannot say, as a matter of law, that because the literary material probably had lost its value that the right to use the title also had lost value and for that reason no consideration passed to appellant. Appellant's officers, at least, thought that the title alone had substantial value.

[26-28] Property rights exist because they promote the general welfare. As society has developed there has been a corresponding evolution in the development of property rights. Matters considered as near revolutionary a few years ago are now accepted as facts. Legal history shows a continual recognition of new interests and a gradual willingness to protect interests in intangible things. Warren & Brandeis, 4 Harv.L.Rev. 193; 4 Ford.L. Rev. 307; 45 Yale L.J. 520. The right of transfer is one of the inseparable incidents of property. A title signifies origin and a certain standard of competence. Warner Bros. Pictures v. Majestic Pictures Corporation, supra, 2 Cir., 70 F.2d 310, 311. The title "Queen of the Flat Tops," was produced by shrewd calculation. It is an original combination, a catchy phrase. It had sales appeal. Much energy, time and money were spent in popularizing it. A thing of such great value should not only be protected but should be subject to transfer for use. There is no valid reason why it should not be held that a transferable property right exists in use of a title of a book, such as this, for motion picture and other ends. Any other rule would give the owner of the right an empty shell where the literary material, as a book, has lost value. He could prevent another from using the title for such purposes but could realize nothing upon that right unless he was financially and otherwise in a position to use it for such purposes. There is nothing novel, complex or unique about the transaction. Appellant's studio counsel testified that purchase of the right to use a title divorced from the material with which it has been associated is a most usual transaction in the motion picture industry. We should be realistic. It is common knowledge that since the advent of motion pictures—and particularly since the advent of radio—titles, names, slogans, catch-phrases and the like have become of great value. Agreements for their use in particular fields are common. Large sums are paid for their use in advertising. The law is not quiescent. It progresses. Evolution of the law to meet changing conditions is exemplified by the attitude of our Supreme Court. The earlier cases held that in order to entitle one to an injunction restraining another from using a name or title previously appropriated, a showing had to be made that the name was being used by the infringer in a competing business. In Academy of Motion Picture, etc., v. Benson, 15 Cal.2d 685, 104 P.2d 650, it was held that an injunction should issue even though the infringer was using the name in a non-competing business. The reasoning of the later cases is that use by another of the name or title results in a dilution of its value to the original appropriator. Tiffany & Co. v. Tiffany Productions, 147 Misc. 679, 264 N.Y.S. 459; affirmed 262 N.Y. 482, 188 N.E. 30. Modern conditions require our conclusion in the instant case. The law is, and should be, molded to meet the changing requirements of the people. As it was held in Uproar Co. v. National Broadcasting Co.,

D.C., 8 F.Supp. 358, that the advertising value of an announcer's name (Graham McNamee) is an assignable property right, so it must be held here that respondents had vendible property rights in the right to the exclusive use of the title "Queen of the Flat Tops," which they could lawfully grant to appellant for motion pictures and other purposes.

[29-33] The next phase of appellant's argument of want of consideration is that there was no counter-promise on the part of respondents which furnished any consideration for appellant's promise. This is the point which appellant made in the trial court in support of its plea of want of consideration. The point is wholly without merit. The evidence fully supports the trial court's finding that "the agreement by plaintiffs to grant to defendant the rights as aforesaid to the use of the title 'Queen of the Flat Tops' constituted an agreement by plaintiffs both to confer upon defendant a benefit to which defendant was not lawfully entitled and to suffer a prejudice which plaintiffs were not lawfully bound to suffer and that such an agreement constituted a good consideration for defendant's promise to pay $20,000.00 for such rights." Respondents had the exclusive right to the use of the title for all purposes. Appellant had no right to its use for any purpose. Respondents granted appellant the exclusive right to use the title for all purposes except in connection with the publication of the book. This was adequate consideration for appellant's promise to pay $20,000. Civ.Code, sec. 1605; Krobitzsch v. Middleton, 72 Cal. App.2d 804, 809, 165 P.2d 729. Appellant's assumption, as the premise for its argument in this connection, that there was no "benefit or prejudice which is offered or assumed as an inducement to the promisor," because, so the argument runs, the waiver of respondents of a right which they otherwise would have had to object to appellant's use of the title was not the inducement for appellant's offer to pay $20,000, is contrary to the evidence, inferences which the trial judge could draw therefrom, and the findings. In presenting this point, appellant also argues that while copyright does not protect title, rights with respect to the use of a title must be supported by a copyright and follow it, that, therefore, it lay within respondents' power to destroy the grant "by letting the book fall into the public domain (as by publishing it without the statutory notice of copyright) or by assigning the copyright to a bona fide purchaser for value." Neither appellant's premise nor its conclusion is sound. Rights with respect to the use of a title need not be supported by a copyright. As we have seen, a title alone may acquire a secondary meaning with the right of protection. That right is not dependent upon copyright. Some of the more recent cases cited above hold that a title which is nondescriptive will be protected. That right is not dependent upon copyright. As the learned trial judge pointed out, the agreement carried with it implied obligations upon the part of respondents to fully and adequately protect appellant's use. See, Uproar Co. v. National Broadcasting Co., 1 Cir., 81 F.2d 373, 377. There is always a possibility in any agreement of one or the other of the parties breaching the agreement whether its covenants are express or implied. Appellant was perfectly willing to take the exclusive use of the title without any express obligation on the part of respondents to refrain from letting the book fall into the public domain, as by publishing it without the statutory notice of copyright, or by assigning the copyright to a bona fide purchaser for value. Appellant bargained for use of the title only, with the exclusive right to use it as the title of motion pictures, stage performances, radio broadcasts, television broadcasts, and any use whatever throughout the world, except the right in respondents to continue to use it in connection with the publication of the book for so long as such rights existed under the law. Appellant got just what it bargained for. It cannot complain because it did not get more.

[34] Appellant next says that "at no time did the parties consummate a binding contract." It is said, (a) that neither of the negotiating agents was authorized to enter into a binding contract, (b) that even if Johnson made an offer there was no acceptance by Dutton, (c) that the minds

of the parties did not meet on essential elements of the proposed contract, (d) that the parties contemplated that any agreement they might reach was to be reduced to writing and until that was done they were not obligated to each other. **It is** unnecessary to repeat the evidence which we have stated at length. It is without conflict that both negotiating agents were authorized to enter into a binding agreement, and that Dutton accepted appellant's offer. If there was any question whether King had authority from Dutton to accept Johnson's offer, which there was not, it is clear that Dutton ratified King's acceptance before withdrawal of the offer. The same may be said with respect to the contention that the minds of the parties did not meet on essential elements of "the proposed contract." The contention is not that the minds of the parties did not meet upon the essential elements of "a contract." Civil Code, section 1550, says: "It is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." All of these elements were present. Because the agreement did not embody other matters does not affect its validity. Neither is its validity affected because it does not contain provisions which a super-technical lawyer for a motion picture producer would have insisted upon.

[35-37] The trial court found that the oral agreement of April 14, 1944, was binding on that date, although it was subsequently to be reduced to writing. It has been held repeatedly that when the respective parties orally agree upon all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the original oral agreement. Thompson v. Schurman, 65 Cal.App.2d 432, 440, 150 P.2d 509; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 630, 152 P.2d 774; Kreling v. Walsh, 77 Cal.App.2d 821, 176 P.2d 965; Note: 165 A.L.R. 756. Whether it was the mutual intention of the parties that the oral agreement should become binding eo instanti is to be determined by the surrounding facts and circumstances of a particular case and is a question for the trial court. Thompson v. Schurman, supra; Kreling v. Walsh, supra. The entire tenor of the argument of counsel for appellant is that the officers of appellant should not have authorized Johnson to make the agreement, that they should have authorized him only to make an offer—conditioned, if it was accepted, upon the making of a written contract. The argument has no merit. At the time of the grant the war was on. Appellant was producing, and had about completed, an historical motion picture dealing with an aircraft carrier in combat warfare in the Pacific. Its officers wanted a popular, catchy title for the picture. They were willing to pay $20,000 for it. It is a reasonable inference from the evidence that all they wanted was use of the title for that picture and that they were not, in the slightest, concerned with leaving anything else to future negotiation. The finding that the oral agreement of April 14, 1944, became effective immediately is supported by substantial evidence. Upon King's acceptance of appellant's offer on April 14, 1944, nothing was left to be agreed upon. Indeed, it is difficult to see how any other finding could have been made in the face of appellant's memoranda that it had "purchased all the rights to the title of the book Queen of the Flat Tops."

[38, 39] Finally, appellant says that if there was an agreement it was broken through no fault of its own in that respondents refused to execute the written agreement proposed by appellant. This contention is so palpably lacking in merit that it should not be considered. Johnson, appellant's story editor, testified without equivocation that all he purchased was the right to use the title; that he told King, on several occasions, that all appellant wanted was use of the title; that it did not want any of the material in the book. Notwithstanding, appellant's resident counsel, Wasson, inserted in the written contract a provision giving appellant unqualified right to use the material in the book, the so-called "covenant of nonsuit." King objected. Appellant, through its resident counsel,

then refused to go further with the transaction and refused to pay the purchase price. The oral agreement was breached by appellant. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 29, 142 P.2d 22. The trial court no doubt drew many inferences from the evidence unfavorable to appellant. The evidence on the subject left no room for doubt that attorney Wasson conceived the idea of inserting in the contract the "covenant of nonsuit," knowing at the time, from the memorandum which he had received from Schreiber, "we have purchased all the rights to the title of the book Queen of the Flat Tops, for the price of $20,000," that the purchase had been definitely agreed upon. It would appear clear, also, that it was the insistence of Wasson in this connection which caused the officers of appellant to breach the agreement. Wasson's testimony that Schreiber told him "that we were interested in purchasing the right to use the title Queen of the Flat Tops, and I believe he told me for $20,000," was so directly contradicted by the written memorandum as to justify the court in rejecting it. The finding that respondents were ready, willing and able to perform the oral agreement but appellant refused to perform unless respondents agreed to the "covenant of nonsuit," that this covenant was contrary to the oral agreement, and that appellant repudiated and refused to perform the oral agreement, is amply supported by the evidence.

No other point is presented for our consideration.

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

31 Cal.2d 202

JOHNDROW v. THOMAS et al.

L. A. 20034.

Supreme Court of California.
Dec. 18, 1947.

1. Trusts 🔑372(3)

In suit to enforce a trust with respect to one-half interest in a lot, wherein plaintiff contended that he did not execute deed conveying his half interest in the lot to defendants, evidence was sufficient to show execution of deed by plaintiff.

2. Appeal and error 🔑1011(1)

Trial court's finding on conflicting evidence is binding on Supreme Court.

3. Trial 🔑404(2)

Statement in conclusions of law that deed conveying plaintiff's purported interest in realty was executed by plaintiff, was a "finding of fact" and should have been in findings of fact rather than conclusions of law, but it could nevertheless be used to support judgment. Code Civ. Proc. § 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding of Fact".

4. Acknowledgment 🔑6(2)

Deed was not rendered ineffective as between parties because of alleged insufficiency of acknowledgment, since, as between parties, an acknowledgment is not essential to validity of a deed as a conveyance of realty.

5. Trial 🔑404(1)

Findings of fact must be liberally construed to support the judgment.

6. Appeal and error 🔑1149

The Supreme Court has power, where a jury trial is not a matter of right, or has been waived, to correct and amend findings which are in conflict as result of inadvertence, in order to affirm the judgment. Code Civ. Proc. § 956a; Const. art. 6, § 4¾.

7. Appeal and error 🔑1122(2), 1149

Supreme Court corrected conflicting findings that were erroneous because of clerical error, though evidence relating to the issues involved was in conflict, and, in so doing, the Supreme Court was not making a finding on conflicting evidence. Code Civ. Proc. § 956a; Const. art. 6, § 4¾.

8. Trial 🔑404(1)

Findings should not be construed with strictness appropriate to consideration of a complaint attacked by a special demurrer, nor should words employed be accorded a technical construction, nor be so strained as to make out a case of conflict, but findings should be construed as a whole and reconciled, if possible, so as to prevent a conflict on material points.

9. Trial 🔑404(1)

Findings should be considered in connection with the pleadings, and the entire evidence together with such inferences of fact as trial court may properly draw therefrom, and they may, in some cases, be explained by exhibits attached to the pleadings.

10. Appeal and error 🔑931(1)

If a finding is susceptible of two constructions, one of which is supported by the evidence and the other of which is not, the former construction is given.

11. Appeal and error 🔑931(1)

Whenever from facts found, other facts may be inferred which will support judgment, such inferences will be deemed to have been made.

12. Trial 🔑395(1)

The sufficiency of findings turns on the particular case, and there is no absolute rule that findings are insufficient because they are phrased as negatives pregnant.

13. Army and navy 🔑24

Trial court did not abuse its discretion in denying motion of plaintiff's counsel for a continuance so that he could confer with plaintiff who was in the military service, to see if plaintiff had any facts in rebuttal, where plaintiff's attorney had been fully advised by the pleadings of defendants' claims.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Albert B. Johndrow against Walter J. Thomas and Rose M. Thomas and others to enforce a trust and for other relief. From an adverse judgment, the plaintiff appeals.

Trial court's findings amended and judgment affirmed.

Prior opinion, 182 P.2d 270.

Eugene L. Wolver, of Los Angeles, for appellant.

Reuben Rosensweig, of Los Angeles, and Arch G. McLay, of Lynwood, for respondents.

CARTER, Justice.

Appellant by his complaint charged three counts, one, claiming a half interest in two lots (referred to herein as the Hobart lot and the La Salle lot) on the ground that he advanced half the purchase price thereof and title was taken in respondents' (husband and wife) names; two, claiming a partnership existed between him and respondents whose purpose was to and which did acquire the lots and household furnishings; three, asserting a half interest in the furnishings on the same basis relied upon in the first count. The court adjudged that appellant owned a half interest in the Hobart lot but none in the La Salle Street lot or house furnishings.

It appears that appellant before he became of age, prior to 1938, lived with respondents and in a relationship akin to a son. After an interval away he returned to live with them in Los Angeles under similar circumstances in 1940. According to the findings, in March of that year, for the purpose of assisting appellant to save money and to establish a better home, appellant and respondents agreed to acquire jointly, and at joint expense, a city lot. Pursuant thereto the Hobart lot was purchased in June 1941. Title was taken in the names of the parties as joint tenants. Thereafter the La Salle lot (which had a house on it) was purchased and the title was taken by the parties as joint tenants. The Hobart lot was used as security in that deal. The court found (the finding appears in the conclusions of law) that appellant executed a deed conveying to respondents all his interest in both lots.

The pleadings of the respective parties raise as issues, questions of fact as to whether appellant had contributed half of the purchase price of both lots and thus held an interest as beneficiary of a resulting trust, whether there was an agreement to acquire them jointly, whether there was such an agreement and contribution as to both lots or only one, and whether the lots were to be acquired by the parties as a partnership venture. The findings read literally are contradictory on those subjects. Be that as it may, it is conceded by all that title to both lots was taken in the names of the parties jointly a considerable time prior to 1943 and any agreement of partnership, trust or otherwise was carried out by the parties. Thus prior to 1943 the matter stood, that so far as the legal title was concerned, appellant had all the interest he claimed in both lots. In that year it is claimed he deeded any interest he might have to respondents. If that is true, and the court so found, then the other issues with reference to the contentions made became immaterial. The prior transactions and agreements would not affect the validity of the conveyance and it is not claimed that they do. Appellant's only contention in connection with the deed, both here and in his testimony in the court below, is that he did not execute it and it was not properly acknowledged. No claim is made of invalidity on any other ground, or that if executed, it did not pass his full interest in the lots. Although the findings in regard to those transactions may be somewhat conflicting on their face, they were surplusage, and could not prejudice appellant if any rights he may have had were lost by the deed of 1943. This brings us to the questions raised with reference to that conveyance.

[1, 2] The evidence, urges appellant, is insufficient to establish the execution of the deed by him. He testified that he did not execute it. Opposed to that is the testimony of respondents that appellant had left the home in 1942 because of a quarrel in regard to a girl with whom he had been friendly. He returned in January, 1943, and stated he wanted to give respondents a deed to the lots. Respondent Walter J. Thomas took him to a notary public. Thomas identified himself with personal papers to the satisfaction of the notary and the deed was acknowledged and recorded.

A photostatic copy of the recorded deed was introduced in evidence. Respondents never received the original from the recorder and its whereabouts is unknown. The notary was shown a group picture including appellant and identified appellant as the one who signed the deed on the occasion in question. He took the acknowledgment, appellant having identified himself by personal papers he carried. Clearly there was sufficient evidence to show execution of the deed by appellant. The conflict was resolved against appellant and that is binding upon this court.

[3] It is urged that the court made no finding with reference to the execution of the deed. It found that the property "now solely stands in the name of" respondents. The clear implication is that it stands in their names because of the deed. In the conclusions of law it is stated: "That the deed of January 7, 1943, conveying plaintiff's purported interest in said property was executed by plaintiff [appellant]." While it is a finding of fact and should have been in the findings of fact rather than the conclusions of law (Code Civ.Proc. sec. 632), yet it may be used to support the judgment. 24 Cal.Jur. 961.

[4] It is urged that the acknowledgment of the execution of the deed is insufficient because appellant was not properly identified and that this is of especial importance inasmuch as a photostatic copy of the record of the deed was introduced in evidence and the whereabouts of the original deed was unknown. There is evidence (above set forth), however, independent of the certificate of acknowledgment, that appellant executed the deed. As between the parties an acknowledgment is not essential to the validity of a deed as a conveyance of the property. Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180; Osterberg v. Osterberg, 68 Cal.App.2d 254, 156 P.2d 46; 1 Cal.Jur. 222–224.

Appellant contends that the findings and judgment are "illogical," for assuming the deed was found to be executed, yet appellant was found to have a half interest in the Hobart lot. If anything, appellant obtained more than that to which he was entitled in view of the execution of the deed and the adjudication that he had an interest in the Hobart lot was in response to a concession by respondents that he did.

Objection is made to the admission of oral evidence in regard to the transaction involving the acquisition of the La Salle Street lot as a violation of the parol evidence rule, but that is immaterial in the face of the deed in 1943.

In regard to the personal property (household furniture) in which appellant asserts an interest, the evidence is in conflict, some to the effect that appellant contributed to its purchase and some to the contrary. In this connection (and also bearing upon the real property) appellant claims the judgment must be reversed because of a conflict in the findings. Read literally there is undoubtedly a conflict. As above seen, appellant's complaint contained three counts. The first deals only with the real property, basing a claim thereto on the theory of a trust. The second and third are a claim to both the realty and personalty, predicated on the theory of partnership and trust. The first four paragraphs of the first count are of minor significance, alleging husband and wife relation of respondents, the corporate capacity of one of the defendants other than respondents and references to defendants named as "Does." The findings treated each count separately. As to the first count the first four paragraphs were found to be true in that language. Then followed express findings (that is, not referring to the complaint or answer) negativing appellant's claims except as to a half interest in the Hobart lot. In finding on the second count the court stated: "That the allegations set forth in paragraphs I, II, III and IV of plaintiff's Second Cause of Action are and each of them is true." A similar finding was made as to the third count, the reference being made to paragraphs in the third cause of action. In each instance express findings followed negativing appellant's claim to the La Salle Street lot and the personal property. As it happened, the first paragraph in the second and third causes of action incorporated by reference paragraphs of the first cause of action which substantiated appellant's claims. Moreover, in addition to the first paragraphs of the second and third counts incorporating paragraphs of the first count the additional paragraphs found to be true (II, III, & IV) embraced practically all of appellant's allegations. In other words, the facts were decided one way in one breath and the other way in another, yet the conclusions of law and judgment run in favor of respondents. Plainly the conflict was the result of inadvertence—a mere clerical error. Manifestly the reference in the findings covering the second and third causes of action to the first four paragraphs was intended to refer to the first four paragraphs of the first count as was referred to in the finding on the first cause of action. This is further manifested by the following. The express findings following the initial paragraph, which was found to be true including certain paragraphs as above seen, closely follow the pleadings in the various paragraphs that had been found true in the first paragraph, finding some of them untrue. When it came to dealing with the specific facts as pleaded, rather than merely a reference to paragraphs of the pleadings as a whole, the facts were found for respondents.

[5-7] Findings of fact must be liberally construed to support the judgment (Woodbine v. Van Horn, 29 Cal.2d 95, 173 P.2d 17; 2 Cal.Jur. 871, 872), and this court has power where a jury trial is not a matter of right or has been waived, to correct and amend findings which are conflicting as the result of inadvertence in order to affirm the judgment. See Cal.Const. Art. VI, § 4¾; Code Civ.Proc. § 956a; Hanselman v. Meadville, 12 Cal.2d 259, 83 P.2d 295; Wallace Ranch W. Co. v. Foothill D. Co., 5 Cal.2d 103, 53 P.2d 929; 1 Cal.Jur. Ten Yr.Supp. pp. 601–604. True there is a conflict in the evidence relating to the issues involved here, but this court by correcting the findings is not making a finding on conflicting evidence. It is curing a patent inadvertence—clerical error. For those reasons the findings of fact are amended by striking from the first paragraph of the findings on the second cause of action the word "Second" and inserting in lieu thereof the word "First" and by striking from the first paragraph of the findings on the third cause of action the word "Third" and inserting in lieu thereof the word "First."

[8-12] Appellant argues that the remaining findings (after the amendment above made) are insufficient because they are phrazed as negatives pregnant; that certain findings start with the statement that "It is untrue" followed by recitals coupled with the conjunctive. It has been held that a negative pregnant in material findings renders them insufficient. See Auerbach v. Healy, 174 Cal. 60, 161 P. 1157; Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615, 619, 30 P. 783, 19 L.R.A. 92; Mardesich v. C. J. Hendry Co., 51 Cal.App. 2d 567, 125 P.2d 595; Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 362, 86 P.2d 379; Harris v. Holland, 107 Cal.App. 646, 290 P. 903; Wiles v. Hammer, 66 Cal.App. 538, 226 P. 651; Tormey v. Anderson-Cottonwood I. Dist., 53 Cal.App. 559, 200 P. 814. On the other hand it has been held that because of the rule requiring a liberal construction of the findings to support the judgment the rule of negative pregnant does not apply. McAuliffe v. McAuliffe. 53 Cal.App. 352, 199 P. 1071; Ballagh v. Williams, 50 Cal.App.2d 10, 122 P.2d 343. And in others it is indicated that the findings are construed as may appear proper although a negative pregnant is present. See Stevens v. Stevens, 215 Cal. 702, 12 P.2d 432; Mardesich v. C. J. Hendry Co., supra. It has been settled by a legion of cases that "Findings should be accorded a liberal construction, with a view of supporting, rather than defeating, the judgment. They should not be construed with the strictness appropriate to the consideration of a complaint which is attacked by a special demurrer. Nor should the words employed be accorded a technical construction, or be so strained as to make out a case of conflict. Rather should the findings be construed as a whole, and reconciled, if possible, so as to prevent a conflict upon material points. They should be considered in connection with the pleadings, and the entire evidence in the case, together with such inferences of fact as the trial court might properly draw therefrom, and they may, in some cases, be explained by exhibits attached to the pleadings. * * * It is an established rule of law that the findings of fact are to receive such a construction as will uphold rather than defeat the judgment thereon. For this

purpose they are to be liberally construed, and any ambiguity or inconsistency therein is to be resolved in favor of sustaining the judgment. If a finding is susceptible of two constructions, one of which is supported by the evidence and the other is not, the former is given. And whenever from facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made." 24 Cal.Jur. 1007. These rules are at odds with the proposition that merely because a negative pregnant exists the findings are insufficient. It does not necessarily follow that because it is stated that A and B are untrue, the only meaning is that A or B alone is true. It all depends on the circumstances. Hence the appropriate rule should be that the sufficiency of findings turns upon the particular case and that there is no absolute rule regarding negatives pregnant, which at best is nothing more than a rule of construction.

Here it is plain from the findings as a whole that the intent was to find the material facts against the plaintiff (appellant) and in respect to the personal property it is to be noted that the ultimate fact is stated in the conclusions of law that: "plaintiff has no interest in the household furnishings and other personal property referred to in the Complaint."

[13] After all the pleadings were filed appellant requested and obtained an early setting of the date for the trial of the case on his affidavit that he was a member of the armed forces. The trial was set for September 5, 1944. The case came on for trial on that date and appellant presented his case. Thereupon respondents' attorney stated that respondents were then in Ohio but could be present to testify on October 30, 1944. The case was continued to that date. Upon whose motion it was continued does not appear nor does it appear that appellant made any objection thereto or to the date fixed. On that date respondents and their counsel and appellant's counsel appeared but not appellant, he being absent from the state by reason of military service. Without objection the trial proceeded, respondents putting on their case. Appellant then moved for a "short" continuance to confer with his client—to write to him to see if he had "any facts in rebuttal" and that he had been unable to obtain appellant's "time card * * * at the Consolidated," apparently referring to a card showing whether he was working when the deed of January, 1943, was executed and acknowledged. The motion was denied, the court stating: "It [apparently the time card matter] is not a vital point, and, in the second place, that information could have been elicited before." The foregoing showing is only by statement of counsel. No affidavits were presented. There is no indication that appellant could not have obtained a leave from military duty to attend the October 30th hearing, or prior thereto to more fully advise his counsel. True, appellant's counsel stated that he had only a short time for consultation with appellant prior to the first hearing—September, 1944, but at his request an early trial date was obtained. There is nothing to show why appellant's counsel did not obtain appellant's time card during the nearly two month period between the first and second hearings of the trial. It was not established that appellant's counsel could not have contacted his client during that period. While he desired to ask him about matters for the purpose of rebuttal, he was fully advised by the pleadings of the deed, the date it was executed and respondents' claims. Appellant had covered all the issues in his direct examination at the first hearing. It does not appear that appellant's counsel was surprised or justified in claiming surprise. In the light of all the circumstances we cannot say the court abused its large discretionary power in denying the continuance. The authorities cited by appellant involve different circumstances and are thus not controlling.

The findings of the trial court are amended as above indicated and the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

31 Cal.2d 66

JOHNSTON v. BOARD OF SUP'RS OF MARIN COUNTY et al.

S. F. 17224.

Supreme Court of California, in Bank.
Dec. 9, 1947.
Rehearing Denied Dec. 30, 1947.

1. Appeal and error 🔑1078(1)

Grounds of appeal not relied on by appellants on the appeal were waived.

2. Appeal and error 🔑1170(4)

Alleged misjoinder of causes of action or failure to state two alleged causes of action separately did not constitute reversible error where defendants were not prejudiced thereby. Const. art. 6, § 4½.

3. Injunction 🔑137(1)

A temporary injunction pendente lite restraining county board of supervisors from publishing proposed ordinance or taking any steps to bring ordinance into effect was improper as interfering with legislative action of legislative body of county, regardless of validity of proposed ordinance, where injunction was issued after action on proposed ordinance was delayed by motion for reconsideration, and plaintiff could not show that passage of ordinance without any attempt to enforce ordinance would instantly produce irreparable injury, and plaintiff had adequate remedy in event of passage of an illegal ordinance by injunction to restrain enforcement of ordinance.

4. Injunction 🔑134

A plaintiff seeking temporary injunction restraining county board of supervisors from enacting ordinance in excess of board's jurisdiction must show that there is no other adequate remedy for protection of plaintiff's rights and that political rights would not be curtailed.

5. Counties 🔑21½

A county zoning ordinance expressly providing that no use permit should be granted without approval of planning commission and giving board of supervisors power merely to approve or refuse to approve decision of commissioners approving application for permit, did not give board authority to grant permit disapproved by commission. Gen.Laws, Act 5211b.

6. Administrative law and procedure 🔑206
Counties 🔑50

Power to authorize variance from terms of zoning ordinance may be granted to administrative board without violating the principle against delegation of legislative powers. Gen.Laws, Act 5211b, § 9.

7. Administrative law and procedure 🔑206
Counties 🔑50

County zoning ordinance authorizing planning commission to approve use permit was not unconstitutional delegation of legislative power to local administrative board, since action of commission in granting or denying permit is wholly administrative. Gen.Laws, Act 5211b, § 9.

8. Administrative law and procedure 🔑104
Counties 🔑21½

Any power of county board of supervisors to grant use permit is an administrative power, and board does not have the inherent power regardless of terms of zoning ordinance to grant such permit. Gen.Laws, Act 5211b.

9. Administrative law and procedure 🔑104
Counties 🔑47

A county board of supervisors performs administrative as well as legislative functions.

10. Administrative law and procedure 🔑104
Counties 🔑21½

County board of supervisors acts in administrative capacity in granting permits under zoning ordinance, and is bound by terms of ordinance, until ordinance is amended through proper legislative procedure. Gen.Laws, Act 5211b.

11. Counties 🔑21½

Attempt of county board of supervisors to grant use permit contrary to zoning ordinance was not an amendment to ordinance where State Planning Act under which ordinance was adopted required that amendments to master plan be submitted to local planning commission. Gen.Laws Act 5211b, § 9.

12. Counties 🔑21½

The action of county board of supervisors in granting applications for use permits after planning commission's denial thereof was not such contemporaneous construction of zoning ordinance as to require court to construe ordinance as authorizing board to issue permit after commission's denial thereof, where board granted applications two and six years after enactment of ordinance. Gen.Laws, Act 5211b.

13. Counties 🔑21½

The constitutional provision authorizing counties to make and enforce within its limits all such local, political, sanitary and other regulations as are not in conflict with general laws, does not authorize county board of supervisors to adopt zoning ordinance in conflict with State Planning Act. Gen.Laws, Act 5211b; Const. art. 11, § 11.

14. Counties 🔑21½

County board of supervisors cannot pass zoning ordinance inconsistent with State Planning Act. Gen.Laws, Act 5211b.

15. Counties 🔑21½

The provision of State Planning Act authorizing county legislative body to determine reasonable and practical means for putting master plan into effect authorizes county board of supervisors to provide in county zoning ordinance for reasonable and practical means for putting the master plan into effect. Gen.Laws, Act 5211b, § 6.3.

16. Administrative law and procedure 🔑206
Counties 🔑50

Under provision of State Planning Act authorizing county legislative body to determine reasonable and practical means for putting master plan into effect, county board of supervisors could require approval of planning commission and board of supervisors for construction of fish reduction plant in heavy industry zone, and was not required to reserve to itself authority to permit such construction regardless of decision of planning commission. Gen.Laws, Act 5211b, § 6.3.

17. Counties 🔑21½

A county board of supervisors could not disregard provision of zoning ordinance requiring both planning commission and board to approve construction of fish reduction plant in heavy industry zone and permit construction of such plant after commission's disapproval, in the guise of amending the ordinance, where State Planning Act prescribed definite procedure for amending the ordinance and such procedure was not followed. Gen.Laws, Act 5211b, §§ 6, 9.

18. Administrative law and procedure 🔑206
Counties 🔑50

The provision of State Planning Act relating to procedure to be followed in certain matters when final authority thereon is within the jurisdiction of some body other than the planning commission, did not require county board of supervisors creating planning commission to reserve to itself final authority over granting permit for construction of fish reduction plant in heavy industry zone, where no provision of state or local law gave final authority over such use permits to board when commission has decided against their issuance. Gen. Laws, Act 5211b, § 10.

19. Counties 🔑21½

The provision of State Planning Act relating to procedure to be followed in certain matters when final authority thereon is within jurisdiction of some body other than the planning commission applies to action taken by any local public body or officer and to board of supervisors only if board has final authority over the matter involved and is not applicable to a provision for use permits adopted as a method of administering the zoning plan when there is no provision giving final authority over such permits to some local body or officer. Gen.Laws, Act 5211b, § 10.

20. Injunction 🔑190

An injunction restraining county board of supervisors from issuing use permit for construction of fish reduction plant contrary to zoning ordinance was not excessive as enjoining construction of plant as nuisance, even if allegations with respect to offensive nature of proposed plant could be considered as allegations of a nuisance, where such allegations also formed the basis of right to injunctive relief to prevent issuance of permit contrary to ordinance. Gen.Laws, Act 5211b.

21. Injunction ⚷211

Where applicants for permit for construction of fish reduction plant were dismissed as defendants and thereafter appeared only as interveners in action to enjoin county board of supervisors from issuing permit after negative action thereon by planning commission, order enjoining issuance of permit did not enjoin applicants from operating proposed plant under a valid permit. Civ.Code, § 3482.

SCHAUER, SHENK and CARTER, JJ., dissenting in part.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by B. G. Johnston against the Board of Supervisors of Marin County and others to restrain the supervisors from taking any further proceedings toward the issuance of a use permit to construct and operate a fish cannery and reduction plant and to restrain the supervisors from taking further proceedings toward the enactment of an ordinance purporting to regulate the establishment and operation of reduction plants in the county. Vito B. Alioto, individually and doing business as Benicia Food Products Company, intervened. From an order pendente lite enjoining the issuance of the use permit and the enactment of the ordinance, the defendants and the intervener appeal.

Order partly affirmed and partly reversed. Prior opinion, 169 P.2d 690.

A. E. Bagshaw, Harold Jos. Haley and Natalie J. Holly, all of San Rafael, and George Olshausen, all of San Francisco, for appellants.

Paul S. Marrin, Howard C. Ellis and Sterling Carr, all of San Francisco, for respondent.

TRAYNOR, Justice.

This action was brought by a resident and taxpayer of Marin County to restrain the members of the Board of Supervisors of that county from issuing to the Benicia Food Products Company to use a permit to construct and operate a fish cannery and reduction plant within an unincorporated part of the county. The plaintiff also sought an injunction against the members of the Board to restrain them from adopting an ordinance that allegedly authorized the construction and maintenance of the proposed plant in this area. Defendants, the members of the Board of Supervisors, and intervenors, Benicia Food Products Company, and Vito B. Alioto appeal from an order pendente lite enjoining the issuance of the use permit and the enactment of the ordinance.

The injunction was issued on the basis of plaintiff's complaint, the substance of which follows. The Benicia Food Products Company filed an application with the Marin County Planning Commission for a permit to construct and operate a fish cannery and reduction plant in an unincorporated part of Marin County located about one mile from plaintiff's residence. Plaintiff alleges that the operation of the proposed plant in that area would pollute the air with offensive odors and contaminate the waters surrounding plaintiff's property. Although the proposed site for the plant is in an area zoned for heavy industry, the local zoning ordinance (Ordinance 264 of Marin County) provides that a use permit must be obtained before any fish reduction plant may be constructed or operated in such area.

The commission held a hearing on the application for a use permit, and Mrs. Natalie Holly, wife of R. A. Thompson, a member of the Marin County Board of Supervisors, appeared as attorney for the applicant. After the hearing, the commission voted to deny the application and transmitted its report to the Board of Supervisors. The report was considered by the Board of Supervisors at a public meeting at which Mrs. Holly again represented the applicant. At this meeting, Supervisor Thompson submitted a proposed ordinance entitled, "An ordinance * * * regulating the establishment, maintenance and operation of reduction plants * * * and repealing all conflicting ordinances and parts of ordinances." Without submitting the proposed ordinance to the Marin County Planning Commission, the Board then voted to adopt it by a vote of three to two. Supervisor Thompson then made a motion that the Board reject the report of the Planning Commission and grant the application of the Benicia Food Products Company for a use permit. This motion was likewise carried by a vote of three to two. A supervisor voting against the proposed ordinance and against the use permit gave notice immediately after the vote on each measure that under parlimentary rules of order he elected to change his vote, and made motions for reconsideration of each matter at the next meeting.

Plaintiff filed the complaint before the next scheduled meeting of the Board of Supervisors, and the trial court issued a temporary restraining order and an order to show cause why an injunction pendente lite should not be issued. The ground on which plaintiff sought an injunction against enactment of the proposed ordinance was that the ordinance would be invalid because it was not submitted to the planning commission for a report as required by the provisions of the State Planning Act (Sec. 9, Stats. 1929, p. 1811, as amended; 2 Deering's Gen. Laws, 1944, Act 5211b) and section 21, Ordinance 264 of Marin County. The injunction restraining the Board of Supervisors from issuing the use permit was sought on two grounds: (1) that under the provisions of Ordinance 264, such a permit could be granted only on affirmative action of both the Planning Commission and the Board of Supervisors; and (2) that Supervisor Thompson was disqualified from participating in any action that the Board of Supervisors might take with respect to the application for a use permit.

The Benicia Food Products Company and Vito B. Alioto, a part owner of the company, were joined as defendants along with the members of the Board of Supervisors. The Company, Alioto, and Supervisor Thompson jointly filed a demurrer and an answer. The grounds of the demurrer were that the complaint failed to state facts constituting a cause of action; that the complaint contained a misjoinder of two causes of action; and that two causes of action were not separately stated. The other members of the Board of Supervisors filed a general demurrer. The trial court dismissed the action as to the Benicia Food Products Company and Alioto and granted them leave to appear as intervenors. They thereupon rested their opposition to the injunction on the demurrer and answer previously filed. The demurrers were overruled, and after hearing on the order to show cause, the trial court issued an injunction pendente lite restraining the members of the Board of Supervisors "from (a) issuing or causing to be issued any Use Permit, or any permit, pursuant to the application of said Benecia Food Products Company, filed as set forth in the complaint on file herein before the Planning Commission of the said County of Marin * * *, and (2) from publishing said purported Ordinance likewise referred to in said complaint on file herein, or taking any steps to bring said Ordinance into existence or effect * * *"

[1, 2] Defendants and intervenors, hereinafter collectively referred to as defendants, have appealed from this order on the following grounds: (1) the injunction is erroneous in that it restrains the Board of Supervisors from taking legislative action: (2) the Board of Supervisors had power to issue the use permit in question after the denial thereof by the Planning Commission: (3) Supervisor Thompson was not disqualified from participating in any action with respect to the issuance of the use permit: (4) the injunction is excessive in any event, because it enjoins the construction of a fish cannery as a nuisance. Defendants on appeal have not relied on the alleged misjoinder of causes of action or failure to state two alleged causes of action separately. Those contentions may therefore be regarded as waived. (Title Guarantee & Trust Co. v. Fraternal Finance Co., 220 Cal. 362, 363, 30 P.2d 515; Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 179, 175 P. 690.) In any event, if the complaint is deficient in these respects there is nothing to indicate that defendants were in any way prejudiced thereby. (Cal.Const. Art. VI, sec. 4½; Tobin Grocery Co. v. Spry, 204 Cal. 247, 250, 267 P. 694; cases collected 2 Cal.Jur. 1010, sec. 601.)

[3] The contention that the injunction erroneously restrains legislative action by

the Board of Supervisors is meritorious. The temporary restraining order was issued after action on the proposed ordinance was delayed by the motion for reconsideration. The temporary injunction pendente lite, by ordering the Board of Supervisors to refrain from either publishing the ordinance or taking any steps to bring such ordinance into effect, clearly interfered with the legislative action of the legislative body of the county. Regardless of whether the action of the Board of Supervisors would be valid, such an injunction is not the proper remedy in this case.

[4] Plaintiff contends that there is an exception to the general rule of judicial non-interference with the legislative action of a county board of supervisors (Nickersen v. San Bernardino, 179 Cal. 518, 522, 177 P. 465; cases collected Durrett Hardware & F. Co. v. Monroe, 199 La. 329, 5 So.2d 911, 140 A.L.R. 439, 440) when the board is about to adopt an ordinance in excess of its jurisdiction. (See, Glide v. Superior Court, 147 Cal. 21, 23, 81 P. 225.) Even if it be assumed that the contemplated action would be in excess of the Board's jurisdiction in this case, any authority that a court might have to enjoin such action is qualified by the requirement that plaintiff show that there is no other adequate remedy for the protection of his rights and that political rights would not be curtailed. (See, Harnett v. County of Sacramento, 195 Cal. 676, 683, 235 P. 445.) Before an injunction would be available to restrain legislative action in this case it would at least be necessary for plaintiff to show that the passage of the ordinance without "any attempt to enforce it would instantly produce irreparable injury." (6 McQuillan, Municipal Corporations, 731.) Obviously, plaintiff cannot make such a showing, for if the ordinance is illegally enacted, he will have an adequate remedy in his right to seek an injunction restraining its enforcement or restraining any one from building or operating a fish reduction plant pursuant to it.

The principal issue with respect to the validity of the remainder of the injunction is whether the Board of Supervisors under Ordinance 264 of Marin County and under the State Planning Act may issue a use permit after the Marin County Planning Commission had denied an application therefor.

The property in question was located in a district designated as an "M-2" or heavy industry zone by the master plan of Marin County. Section 11.19 of the ordinance in question provides that property in "M-2" zones may be used for "All uses not otherwise prohibited by law; provided however, that none of the following uses shall be established in any 'M-2' district unless and until a use permit in each case shall first have been secured for such use: * * * Reduction, canning, processing or treatment of fish or of animal products of any kind."

Section 20 of the ordinance provides that use permits may be issued for "Any of the uses or purposes for which such permits are required or permitted by the provisions of this ordinance." This section also provides that, "Such permits shall be issued under the same procedure as that specified in Section 19 of this ordinance for the granting of adjustments or variances * * *". with certain exceptions relating to the conduct of hearings by the commission. Section 19 thus contains the procedural provisions applicable to the granting of use permits under section 11.19 of the ordinance.

The first sentence of section 19 concerns the powers of the Board of Supervisors and of the commission with respect to adjustments and variances. The power to grant adjustments and variances, within strictly defined limits, is given to the commission in the following terms: "The Planning Commission, *subject to the approval and confirmation* of the Board of Supervisors in each case, as hereinbefore provided, *shall have the power to grant* adjustments and variances in any of the provisions of the ordinance * * *" (Italics added.) This is not a procedural provision and therefore is not incorporated by reference into section 20. It should be noted, however, that the sentence vests "the power to grant adjustments and variances" in the commission, subject to the approval and confirmation of the Board of Supervisors, and does not reserve any authority in the Board of

Supervisors to *grant* adjustments and variances.

The pertinent procedural provisions of section 19 are as follows:

"Application for any adjustment or variance permissible under the provisions of this section shall be made to the Planning Commission in the form of a written application for a building permit or for a permit to use the property or premises as set forth in said application."

"The Commission shall make its decision on the said application and shall report such decision to the Board of Supervisors."

"No permit shall be issued under the provisions of this section *unless and until a decision of the Planning Commission,* as aforesaid, *approving the same, is approved and confirmed by the Board of Supervisors* * * * Upon receipt of such report, if the decision of the Planning Commission *approved* the granting of the application, the Board of Supervisors either shall, by resolution, *approve and confirm said decision,* whereupon the permit as applied for may issue; *or shall refuse to approve and confirm said decision."* (Italics added.)

[5] Section 19 thus expressly provides that no permit shall be granted without the approval of the Planning Commission. The Board of Supervisors is given power merely to approve or refuse to approve the decision of the commission approving the application for a permit; the Board of Supervisors is given no authority over the application should the commission deny it. Since the only procedure for granting use permits is that specified in section 19 for variances and adjustments, it follows that the Board of Supervisors was not authorized by the ordinance to take affirmative action on the application for a use permit in the face of the disapproval thereof by the Planning Commission.

[6, 7] It is contended, however, that the Board of Supervisors has inherent power to grant a use permit, and that any attempt to confer this power on the Planning Commission would be an unconstitutional delegation of legislative power to a local administrative board. The general rule, however, is that even the broader power to authorize a variance from the terms of a zoning ordinance may be granted to an administrative board without violating the principle against the delegation of legislative powers. (Freeman v. Board of Adjustment, 97 Mont. 342, 354, 34 P.2d 534; State v. Jacksonville, 101 Fla. 1241, 1242, 133 So. 114; L. & M. Investment Co. v. Cutler, 125 Ohio St. 12, 18, 180 N.E. 379, 86 A.L.R. 707; McCord v. Ed. Bond & Condon Co., 175 Ga. 667, 165 S.E. 590, 591, cases collected 86 A.L.R. 714.) The action of the Planning Commission in denying a use permit is wholly administrative. There is no more delegation of legislative authority in this case than is normally involved in vesting administrative officers with authority to grant or deny a permit pursuant to a local ordinance. (See, Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348; Gould v. Western Dairy Products, Inc., 12 Cal.App.2d 188, 191, 55 P.2d 274; see also, Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041.)

[8-11] The Board of Supervisors, moreover, had no inherent power to grant the use permit, regardless of the terms of the ordinance. It has long been recognized in this state that a county board of supervisors performs administrative as well as legislative functions. (Chinn v. Superior Court, 156 Cal. 478, 481, 105 P. 580.) If the Board of Supervisors had power to grant a use permit, it was an administrative power for the same reason that the granting of permits is administrative when done by a local board. When a board of supervisors acts in an administrative capacity, as in granting permits under a zoning ordinance, it is bound by the terms of the ordinance until the ordinance is amended through proper legislative procedure. (See, Magruder v. City of Redwood, 203 Cal. 665, 675, 265 P. 806; Hopkins v. MacCulloch, 35 Cal.App.2d 442, 452, 95 P.2d 950.) The action of the Marin County Board of Supervisors in attempting to grant a use permit contrary to the terms of the ordinance cannot be considered an amendment to the ordinance, for by its terms and by the terms of the State Planning Act under which it was adopted, any amendments to the mas-

ter plan must be submitted to the local planning commission. (Ordinance 264, sec. 21; State Planning Act, sec. 9.)

[12, 13] Defendants invoke the rule of contemporaneous and practical construction of the ordinance to support their contention that the ordinance authorizes the Board of Supervisors to issue a use permit after the Planning Commission has determined that it should be denied. In 1940, over two years after the enactment of the ordinance, the board granted an application for an adjustment after the commission had denied the application. In 1944, some six years after the enactment of the ordinance, the board granted an application for a use permit despite the commission's denial of the application. In neither instance was the action of the Board of Supervisors "made at or near the time of the enactment" of the ordinance. (See, 3 Sutherland, Statutory Construction, p. 515.) Moreover, although contemporaneous construction by officials charged with the administration of a statute or ordinance is given great weight, "final responsibility for the interpretation of the law rests with the courts. 'At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed.'" (Whitcomb Hotel v. Cal. Emp. Comm., 24 Cal.2d 753, 756, 757, 151 P.2d 233, 235, 155 A.L.R. 405, quoting from F. W. Woolworth Co. v. United States, 2 Cir., 91 F.2d 973.) The rule of contemporaneous construction may not be applied when the wording of the statute or ordinance, as in the present case, clearly calls for a different construction. (California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028.)

[14] Defendants also contend that under the State Planning Act, the Board of Supervisors of Marin County had no authority thus to limit its powers over use permits. It is conceded that the Board of Supervisors had no authority to pass an ordinance inconsistent with the State Planning Act. Whether or not the Board might have had authority pursuant to Article XI, section 11, of the California Constitution to provide for some form of zoning plan in the absence of a state statute on the subject of county zoning (see, Gilgert v. Stockton Port District, 7 Cal.2d 384, 391, 60 P.2d 847; Wertheimer, Constitutionality of Rural Zoning, 26 Calif.L.Rev. 175, 177), the County Board of Supervisors could not under this constitutional provision adopt a zoning ordinance conflicting with state legislation on the subject. The question arises, therefore, whether the State Planning Act required a board of supervisors to reserve to itself authority to grant a use permit of the type involved in this case regardless of the decision of the local planning commission.

[15] Section 6.3 of the State Planning Act authorizes the legislative body of a county, in adopting a master plan or part thereof, *"to determine upon reasonable and practical means for putting into effect such master plan* or part thereof, in order that the same will serve as a pattern and guide for the orderly physical growth and development of such * * * county and as a basis for the efficient expenditure of the funds thereof relating to the subjects of such master plan. *Such legislative body may adopt and use such procedure as may be necessary for this purpose."* (Italics added.) This section clearly authorizes a county board of supervisors to provide in the county zoning ordinance for reasonable and practical means for putting the master plan into effect. The ordinance in question provides that fish reduction plants may be constructed and operated in "M-2" zones only when a use permit therefor is obtained on the approval of an application for such a permit by both the Planning Commission and the Board of Supervisors. It could have provided that there should be no fish reduction plants in "M-2" zones; instead it provides for such plants, if a proper permit is obtained. It could have provided that the Board of Supervisors was free to grant such permits; instead it requires approval of both the Planning Commission and the Board of Supervisors for the construction of any fish reduction plant in "M-2" zones.

[16] Section 20 of the ordinance indicates that this limitation was adopted to prevent the issuance of use permits that might "under the circumstances of the particular case, be detrimental to the health,

safety, morals, comfort, convenience, or welfare of persons residing or working in the neighborhood of such use * * *" The requirement of affirmative action by both bodies is certainly a reasonable and practical means of accomplishing this purpose and putting the master plan into effect under section 6.3 of the State Planning Act. (See also section 8 of the State Planning Act.)

[17] The procedure set forth in the ordinance is designed to protect interested citizens and property owners. The requirement that the Board of Supervisors follow this procedure cannot be disregarded on the ground that the board can modify the procedure by amending the ordinance. The State Planning Act prescribes a definite procedure for amending the local planning ordinance. It provides for public hearings before the local planning commission before adoption of the ordinance and before any amendments may be made to the ordinance after its adoption, as a means of protecting interested citizens and property owners. Before any ordinance is adopted, the local planning commission must hold public hearings at which interested parties may appear. (State Planning Act, sec. 5.) A proposed plan is then submitted to the local legislative body, which also holds public hearings. Any change in the proposed ordinance must be submitted to the commission for additional public hearings. (Ibid. sec. 6.)

The Board of Supervisors does not now have unlimited power to make any change in the ordinance. Substantially the same procedure used in adopting the ordinance must be followed in making changes. The board has no power to make changes until it has submitted them to the commission for public hearings, where interested parties may appear and present arguments in opposition thereto. (Ibid. § 9.) If the Board of Supervisors, in an administrative capacity can ignore the clear provisions of the ordinance, it was idle to prescribe the procedure for amendments.

Defendants contend that the Legislature has provided a specific procedure in section 10 of the State Act for the issuance of use permits and that the ordinance in question is inconsistent with that section, which provides: "The body creating such planning commission *may*, by general or special rule, provide for the reference of any *other matter* or class of matters to the planning commission before final action thereon *by the public body or officer* of said city, county, or city and county, *having final authority thereon,* with the provision that final action thereon shall not be taken until said planning commission has submitted its report thereon or has had reasonable time, to be fixed in said rule, to submit the report. The planning commission shall have full power and authority to make such investigations, maps and reports, and recommendations *in connection therewith relating to the planning and development* of the city, county, or city and county, as it seems desirable, providing the total expenditures of said board shall not exceed the funds available therefor." (Italics added.)

[18] There is nothing in this section that requires the body creating the planning commission to reserve to itself final authority over such matters as the use permit involved in this case. It provides the procedure to be followed in certain matters when final authority thereon is within the jurisdiction of some body other than the planning commission. The parties disagree as to what matters are referred to by the phrase "Other matter or class of matters." Defendants contend that it refers to any action with respect to local zoning other than amendments to the master plan provided for in the preceding section (section 9). Plaintiff, on the other hand, construes the phrase as referring to matters affecting zoning that are not otherwise covered in the entire act. Under the latter construction section 10 would be applicable if a local officer or board had final jurisdiction over some matter "relating to the planning and development of the * * * county" that was not an integral part of the zoning plan. It would authorize the local legislative body to require such officer or board to refer the matter to the planning commission before taking action. The last sentence in section 10 lends weight to this construction, for if section 10 refers to the administration of the basic zoning plan itself, it was unnecessary for the legislature

to provide in this section that the "commission shall have full power and authority to make such investigations, maps and reports, and recommendations in connection therewith relating to the planning and development of the city, county, or city and county, as it seems desirable * * *." Such powers are conferred on the commission by section 8 in connection with its duties in "carrying out" the master plan: "The commission, and its members, officers and employees in the performance of their functions, may enter upon any land and make examinations and surveys * * *. In general the commission shall have such power as may be necessary to enable it to fulfill its functions and carry out the purposes of this act."

Even if it be assumed, however, that defendants' construction is correct, section 10 would not apply to the use permit involved in this case. By its terms, the section applies only if final authority over the action referred to is given to some body or officer. There is no provision of either state or local law giving final authority over such use permits to the Board of Supervisors when the Planning Commission has decided against their issuance. Section 10 does not state that the body creating the commission must provide for reference to the planning commission of any matter involving the administration of county zoning before final action thereon is taken by the body creating the planning commission. In order to read the section as if it contained such a provision it would be necessary to ignore the words "public body or officer * * * having final authority thereon." The section obviously applies to action taken by any local public body or officer, and it applies to a board of supervisors only if that body is the one having final authority over the matter involved. Moreover, it is circular reasoning to conclude that this section gives final authority over any matter to any officer or board, for until the question of the final authority of that body is determined, the question of the applicability of section 10 remains undetermined.

[19] Defendants rely on a dictum in Hopkins v. MacCulloch, 35 Cal.App.2d 442, 450, 95 P.2d 950, 955, involving the effect of section 10 on the power of a planning commission over non-conforming use permits: "From an interpretation of * * * section 10, supra, *when construed with the ordinance adopted in pursuance thereof*, it appears to us that the *planning commission created by the* ordinance was more or less an advisory body * * *". (Italics added.) The permit involved in that case was of the non-conforming type under which a property owner might be allowed to continue a use prohibited by the master plan, a different type of permit from that involved in the present case. The ordinance there involved reserved to the city council the power to grant a non-conforming use permit by unanimous vote when the planning commission decided against the applicant. Since final authority was thus expressly given the city council, the reference to section 10 of the State Planning Act was unnecessary. Whether or not this dictum that a nonconforming use permit is "other matter or class of matters" within the meaning of section 10 is correct, the section has no application to a provision for use permits adopted as a method of administering the zoning plan, when there is no provision giving final authority over such permits to some local body or officer. Not only is no provision of the State Planning Act inconsistent with section 19 of the ordinance in question, but authority for that section is contained in section 6.3 of the state act.

The second ground on which the injunction was sought is that the action of the Board of Supervisors, even if authorized by law is invalid because of the disqualification of a member who cast the deciding vote. Since the Board in any event was without authority to grant the use permit, it is unnecessary to decide whether the supervisor in question was disqualified.

[20, 21] Plaintiff alleged in his complaint that the operation of the proposed plant would be offensive and would interfere with the proper use of his property. Defendants contend that the injunction is excessive on the ground that these allegations were designed to show a basis for injunctive relief regardless of whether or not the intervenors obtained a valid use permit. It is contended that the trial court enjoined the operation of the plant on the

ground that it would be a nuisance even if authorized under the zoning regulations. Although plaintiff has argued on appeal that such relief would be proper, there is nothing in the injunction to indicate that the trial court based its order on this ground. Even if the allegations with respect to the offensive nature of the proposed plant can be construed as allegations of a nuisance, they also form the basis of plaintiff's right to injunctive relief against the Board of Supervisors to prevent the issuance of a use permit contrary to the terms of the ordinance. The intervenors were dismissed as defendants and appear only as intervenors. There is therefore no basis for the contention that they were enjoined from operating the proposed plant under a valid permit, for they are not directly enjoined from doing anything. Since the Board of Supervisors could not legally grant intervenors application for a use permit, it is immaterial whether or not the intervenors could be enjoined from operating under a valid permit. (For a collection of conflicting authorities on this question see Note 166 A.L.R. 659; see, also, Civil Code § 3482; Norton v. City of Pomona, 5 Cal.2d 54, 60, 53 P.2d 952.

The order granting the injunction pendente lite is affirmed insofar as it restrains the members of the Board of Supervisors of Marin County from attempting to grant a use permit after negative action by the Marin County Planning Commission. That part of the order purporting to restrain the members of the Board of Supervisors from taking any action to amend the local zoning ordinance is reversed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent from all of the judgment of this court except insofar as it reverses that part of the trial court's order which purports to restrain the members of the board of supervisors from proceeding with the enactment of a regulatory ordinance governing the construction and operation of reduction plants.

The chief question presented for decision is whether under the provisions of the State Planning Act (2 Deering's General Laws, Act 5211b) and of Marin County Ordinance No. 264 the Board of Supervisors of Marin County may grant a use permit despite an adverse recommendation of the county planning commission. For reasons hereinafter stated, I am of the opinion that final authority in such matters rests in the board, that the recommendation of the planning commission is advisory only, and that the order of the trial court based upon a contrary view should be reversed in its entirety.

The majority opinion rests largely, if not completely, as to this phase of the case upon the declaration that "Section 19 [of Marin County Ordinance 264] thus expressly provides that no permit shall be granted without the approval of the planning Commission. The Board of Supervisors is given power merely to approve or refuse to approve the decision of the commission approving the application for a permit; the Board of Supervisors is given no authority over the application should the commission deny it." Having asserted such significance for section 19 of the ordinance the opinion proceeds to interpret other sections thereof in the "light" of unquestioning acceptance of, and dependence on, its primary assertion. If that basic pronouncement falls, so does the whole discussion.

The obvious vice in the above quoted pronouncement lies in the fact that section 19, read in its context, does not even purport to deal with powers of the board of supervisors; it deals expressly with powers of the planning commission. Ordinance 264, enacted by the board of supervisors was not enacted to create a board of supervisors or to define the powers of the creating board; it was enacted to create a planning commission and to define the powers of such commission. Manifestly such ordinance is not intended to constitute a grant of power to the creating board; rather is it a delegation by the creating board of certain powers within its authority. A delegation of authority by a superior to an inferior does not work a complete divestment of the power of the superior; the power of the inferior derives from the superior and the latter is the final repository of all the power, with the right to exercise the same, except as such right may be limited by its own acts. The ordinance does provide for a planning commission; it does specify the powers delegated to that commission; and it does declare limitations on the authority of the commission it creates; but nowhere does it declare that the power of the commission is total or absolute or exclusive or other than advisory; nowhere does it declare that the board of supervisors abdicates, or transfers to the commission, the ultimate power of decision. The language most strongly relied upon by the majority is (Section 19): "No permit shall be issued *under the provisions of this section* [i.e., by the planning commission] unless and until a decision of the Planning Commission, as aforesaid, approving the same, is approved and confirmed by the Board of Supervisors." (Italics added.) This stated limitation of power seems to me to be clearly a limitation upon the commission, not upon its creator, the board of supervisors. It appears to me to be reasonably designed to preclude, not to establish basis for a construction of the law vesting a totality of power in the commission. Theories of absolutism in administrative agencies are not favored in traditional concepts of our ideology and should not be invoked by judicial interpolation. (See Roscoe Pound, "Annual Survey Of Law: Decisions of Courts Show Some Dangerous Trends" (Nov. 1947), 33 Am.Bar Ass'n. Journal 1093.) That it is only by dint of such interpolation that the conclusion of the majority can be reached becomes evident upon consideration of the ordinance as a whole.

Ordinance No. 264 was adopted in 1938, pursuant to the mandatory provisions of the State Planning Act as amended in 1937 (Deering's General Laws, Act 5211b), and sets up a comprehensive zoning system for the county covering all territory therein outside of incorporated cities and towns. By its provisions the county is zoned into various districts, including residential, commercial, and light and heavy industrial, and the uses to which the land lying within the respective districts may be put are specified. Procedures are also set forth for the application for and granting of adjustments or variances, and of use permits for the operation of various types of business in certain districts.

By section 11.18 of Ordinance 264 district "M-1," in which petitioner seeks to establish a fish cannery and reduction plant, is zoned for "1. Commercial excavating * * * 2. All other uses not otherwise prohibited by law, except the following: * * * reduction, canning, processing or treatment of fish or animals products of any kind. * * *" Section 19, which deals with adjustments, variances, and appeals, provides that "The Planning Commission, subject to the approval and confirmation of the Board of Supervisors in each case, as hereinafter provided, shall have power to grant adjustments and variances in any of the provisions of this ordinance to the extent of the following and no further: * * *

"Application for any adjustment or variance * * * shall be made to the Planning Commission in the form of a written application. * * *

"[Following a public hearing] The Commission shall make its decision on the said application and shall report such decision to the Board of Supervisors.

"In granting any adjustment or variance under the provisions of this section, the Planning Commission shall designate such conditions in connection therewith as will, in its opinion, secure substantially the objectives of the regulation or provision to which such adjustment or variance is granted, as to light, air, and the public health, safety, comfort, convenience and general welfare. *No permit shall be issued under the provisions of this section unless and until a decision of the Planning Commission, as aforesaid, approving the same, is approved and confirmed by the Board of Supervisors.* * * * *Upon receipt of such report, if the decision of the Planning Commission approved the granting of the application, the Board of Supervisors either shall* * * * *approve and confirm said decision, whereupon the permit as applied for may issue; or shall refuse to approve and confirm such decision.* * * *" (Italics added.)

Section 20 states that "Use permits may be issued for any of the following:

"1. Any of the uses or purposes for which such permits are required or permitted by the provisions of this ordinance. * * *

"Such use permits shall be issued under the same procedure as that specified in Section 19 * * * for the granting of adjustments or variances, except that: * * * 2. The findings of the Planning Commission, except as otherwise provided in this section, need include that the establishment, maintenance or conducting of the use for which a use permit is sought will not, under the circumstances of the particular case, be detrimental to the health, safety, morals, comfort, convenience, or welfare of persons residing or working in the neighborhood of such use and will not, under the circumstances of the particular case, be detrimental to the public welfare or injurious to property or improvements in said neighborhood.

"* * * All other provisions of said Section 19, including the designation by the Planning Commission of any conditions upon which the use permit may be issued and guarantees that such conditions will be complied with, shall apply to the granting of a use permit."

Sections 9 and 10 of the State Planning Act (Deering's General Laws, Act 5211b), which act concededly is controlling over the local Marin County ordinance, provides as follows:

"§ 9. The legislative body [of a city or county] is authorized and empowered * * * to change or add to the master plan or any part thereof * * * or to change or add to the official plan or any part thereof. The legislative body shall first refer the proposed change or addition to the planning commission for a report thereon. [Public hearings are then required.] * * * Proceedings for any change in * * * the master plan or any official plan, or any part thereof, may also be initiated by the planning commission.

"§ 10. The body creating such planning commission may, by general or special rule, provide for the reference of any other matter or class of matters to the planning commission before final action thereon by the public body or officer of said city, county, or city and county, having final authority thereon, with the provision that final action thereon shall not be taken until said planning commission has submitted its report thereon or has had reasonable time, to be fixed in said rule, to submit the report. * * *"

In support of its position that the board of supervisors cannot lawfully issue a use permit against the adverse recommendation of the planning commission, the majority opinion, as previously indicated, relies upon those portions of section 19 of Ordinance 264 which state that "No permit shall be issued * * * unless and until a decision of the Planning Commission, * * * approving the same, is approved and confirmed by the Board of Supervisors. * * * Upon receipt of such report [of the decision of the commission], if the decision of the Planning Commission approved the granting of the application, the Board of Supervisors either shall * * * approve and confirm said decision, whereupon the permit as applied for may issue; or shall refuse to approve and confirm such decision." For the reasons hereinafter stated I am convinced that, properly construed, the quoted provisions of section 19, as adopted into section 20, grant to the planning commission only the limited power to consider the merit or lack thereof of each application for a use permit and to transmit to the board of supervisors the opinion of the commission thereon; in other words, the commission is to act as an advisory body but is to have no power, under the terms of the ordinance, to issue a final decision either for or against a permit.

By the provisions of section 9 of the State Planning Act quoted hereinabove, power to "change or add to the master plan or any part thereof * * * or to change or add to the official plan or any part thereof" is expressly placed in the legislative bodies of local governmental units—in this instance the board of supervisors of Marin County—subject only to the requirement that the matter first be referred to the planning commission for a report and that public hearings be had, and by section 10 it is provided that "The body creating such planning commission may * * * provide for the reference of any other matter or class of matters to the planning commission before final action thereon by the public body or officer * * * having final authority thereon, with the provision that final action thereon shall not be taken until said planning commission has submitted its report thereon or has had reasonable time * * * to submit the report. * * *" Whether the granting of a nonconforming use permit be regarded on the one hand as falling under the "change * * * to the master plan or * * * to the official plan" as described in section 9, or on the other hand as being one of the "other * * * class of matters" mentioned in section 10, the statute unequivocally contemplates that the ultimate decision is in the hands of the local legislative body. No provision is made that the report of the planning commission shall carry any other or greater weight than that which the legislative body may wish to bestow on it.

Nor, I am convinced, was it the intent of the board of supervisors in adopting Ordinance 264 to irrevocably delegate a controlling power to the planning commission, or otherwise to so limit the authority primarily vested in the board as to render them powerless to grant a nonconforming use permit without prior approval of the commission. Section 19, which treats of adjustments, variances and appeals, and which is to be followed generally in the application for and issuance of use permits under section 20, carries an introductory sentence which, as quoted hereinabove, states that "The Planning Commission, *subject to the approval and confirmation* of the Board of Supervisors in each case, *as hereinafter provided, shall have power.* * * *" (Italics added.) It is to be noted that this section contains the delegation of only a limited power to the commission and that such power is expressly declared to be "subject to the approval and confirmation of the Board of Supervisors in each case." Following the qualified grant there appear procedural and other provisions to be followed by the commission before its decision and report to the board is made. The subsequent statements, so heavily relied upon by the majority opinion, that "No permit shall be issued under the provisions of this section unless and until a decision of the Planning Commission, as aforesaid, approving the same, is approved and confirmed by the Board of Supervisors. * * * [I]f the decision of the Planning Commission approved the granting of the application, the Board of Supervisors either shall * * * approve and confirm said decision, whereupon the permit as applied for may issue; or shall refuse to approve and confirm such decision. * * *", would seem to be, and it is my view that they are, inserted as an explicit recognition of the limitation upon the power of the planning commission and not as creating a controlling delegation of, or limitation upon, the ultimate power of the board of supervisors. The section, of course, contains no grant of power to the board of supervisors because all power not granted or delegated is reposed by the basic state law in the board. Ultimate disposition of the matters dealt with in the sections in question (sections 19 and 20) would, at least normally, be a function of the board. No provision appears in any portion of the ordinance which expressly declares that the board shall be bound by a report of the planning commission adverse to the granting of a nonconforming use permit, and certainly in accord with accepted legal principles such a restriction should not be added by judicial interpolation.

The majority opinion relies upon Magruder v. City of Redwood (1928), 203 Cal. 665, 675, 265 P. 806; and Hopkins v. MacCulloch (1939), 35 Cal.App.2d 442, 452, 95 P.2d 950, (see also Schofield v. City of Los Angeles (1932), 120 Cal.App. 240, 245-246, 7 P.2d 1076) as authority for the proposition that a board of supervisors is bound by county ordinances. I discover nothing in any of those cases which should affect the decision here. In the Magruder case it was held that a city board of trustees which granted a permit to construct a building that was subsequently used for a purpose in violation of a zoning ordinance did not thereby place themselves "in a position that prevented them from thereafter enforcing the terms of the ordinance." (Page 674 of 203 Cal., page 810 of 265 P.) In Hopkins v. MacCulloch (1939), supra, 35 Cal.App.2d 442, 452, 95 P.2d 950, 952, the city council of Newport Beach was held to be without power to grant a nonconforming use permit by a vote of only 4 of its 5 members, inasmuch as a city ordinance required the "full, affirmative vote of all members thereof." No such provision is contained in Ordinance No. 264 of Marin County, nor are analogous requirements set forth. And contrary to the position taken by the majority opinion it is noted that those provisions in the Newport Beach ordinance which dealt with consideration by the planning commission of nonconforming use permits were held (at page 450 of 35 Cal.App.2d, at page 954 of 95 P.2d) not to be "a delegation of power or authority of the city council to the planning commission." Furthermore, the court here expressly observed that "From an interpretation of * * * section 10 [of the planning act] * * * when construed with the ordinance adopted in pursuance thereof, it appears to us that the planning commission created by the ordinance was more or less an advisory body only, and its powers must be limited to its consideration of applications for permits, and to *recommendations* for or against the allowance of the permit. The commission is authorized by the ordinance to hold public hearings on any such application after publication of notice of hearing, to the end that property owners may have an opportunity to object to the granting of the permit on the ground that detriment or injury may result to the neighborhood." The same may be appropriately said in respect to Marin County Ordinance 264.

If there still can remain any doubt as to the proper construction of the ordinance in question it is resolved by the fact that in this case we have for our guidance not only the language of the enactment and the considerations which have been mentioned but also evidence establishing the construction placed upon the ordinance as to the precise point now in dispute by the very legislative body which enacted it. The ordinance was adopted in 1938. The record shows, with no dispute, "That with no exception, the Minutes of the Board of Supervisors show that from August 3rd, 1938, the date of the passage of said Marin County Planning Ordinance No. 264, to date, the Marin County Board of Supervisors has held hearings upon recommendations of the Marin County Planning Commission whether the * * * Commission recommended approval or denial of the said applications for Use Permits, Adjustment Permits or Variance Permits;

"That * * * The Minutes of the Board of Supervisors show specific instances in which the * * * Planning Commission presented to the Board of Supervisors their recommendations denying applications for Adjustment Permits and Use Permits, whereupon the * * * Supervisors held a hearing, reviewed the recommendation of the * * * Planning Commission and either approved the recommendation denying said application or reversed the recommendation of the Planning Commission and granted the application for a Use Permit or an Adjustment * * *

"That * * * the Marin County Board of Supervisors consistently and with no exception, interpreted Section 19 of * * * Ordinance No. 264 as never having divested them of the power to overrule the recommendations of the * * * Planning Commission * * * whether said * * * Planning Commission recommended that said Use Permit be denied or granted."

The record contains certified copies of excerpts from minutes of meetings of the board of supervisors showing that on 16 different applications (previous to the one in this case, which is number 17), at meetings held on November 14, 1938, April 10, 1939, November 25, 1940, February 24, 1941, May 26, 1941, October 14, 1941, April 6, 1942, September 14, 1942, November 9, 1942, November 23, 1942, April 7, 1943, July 26, 1943, November 8, 1943, November 22, 1943 (two applications), and November 13, 1944, the board evidenced its construction of the ordinance by proceeding to hear, consider and pass on applications for use permits or adjustments notwithstanding denial recommendations by the planning commission. There is no suggestion that the record is incomplete or that in any instance, from the enactment of the ordinance to the date of this action, the board deviated from its construction of the ordinance. Thus, in every case wherein the point was involved, the legislative body which drafted and adopted the ordinance construed it as giving the planning commission investigative and advisory powers only and as leaving in the board the jurisdiction which they exercised.

The majority opinion mentions two instances, other than in the matter before us, in which the board granted an adjustment or use permit "despite the commission's denial of the application"; it wholly ignores the 14 other instances in which the board just as clearly evidenced the same construction by considering and passing on the commission's recommendation for denial. The evidence of construction is equally clear whether the planning commission's recommendation for denial was disapproved or approved. If the majority opinion is correct, the action of the planning commission recommending denial was not a mere advisory recommendation, it was a final denial and there was nothing for the board to act on. Yet in every instance it did consider the application and the planning commission's recommendation and did take final action for the granting or denial of the application.

This court has repeatedly stated that the construction of a statute by the officials charged with its administration must be given great weight. (Nelson v. Dean (1946), 27 Cal.2d 873, 880, 168 P.2d 16, 168 A.L.R. 467; Whitcomb Hotel, Inc., v. Cal. Emp. Comm. (1944), 24 Cal.2d 753, 756, 151 P.2d 233, 155 A.L.R. 405; County of Los Angeles v. Frisbie (1942), 19 Cal.2d 634, 643, 122 P.2d 526; Los Angeles v. Superior Court (1941), 17 Cal.2d 707, 712, 112 P.2d 10; Riley v. Thompson (1924), 193 Cal. 773, 778, 227 P. 772.) Here we have contemporaneous and administrative construction by the very body which enacted the ordinance and such construction has been uniform and unwavering and repeatedly acted upon and unequivocally evidenced in a series of proceedings beginning within a few months of adoption of the ordinance and running down to the date of the consistent action in the matter now before us. My attention has never been called to a case wherein the elements demanding respect for contemporaneous and administrative construction are greater.

So far as concerns that portion of the injunction order appealed from which restrains the board of supervisors from proceeding with the adoption of the ordinance to regulate reduction plants, it is only when such a board is acting in excess of its jurisdiction that its legislative actions may be interfered with by the courts. (See Glide v. Superior Court (1905), 147 Cal. 21, 25, 81 P. 225; Muchenberger v. City of Santa Monica (1929), 206 Cal. 635, 646, 275 P. 803; Reclamation District v. Superior Court (1916), 171 Cal. 672, 681-682, 154 P. 845; cf. Brock v. Superior Court (1938), 11 Cal.2d 682, 81 P.2d 931; McKay Jewelers v. Bowron (1942), 19 Cal.2d 595, 599, 122 P.2d 543, 139 A.L.R. 1188.) Inasmuch as the legislature has by the State Planning Act placed in the Board of Supervisors of Marin County final authority to act on zoning matters in that county, it is apparent that the adoption of regulatory ordinances falls within such authority. The conditions to be designated by the planning commission pursuant to sections 19 and 20 of Ordinance 264, should it recommend to the board the granting of a variance, adjustment, or nonconforming use permit are, as are the other recommendations of the commission, advisory only, and deprive the board of none of its ultimate power. Consequently the court below erred in enjoining further proceedings to complete the enactment of the disputed ordinance.

And until such an ordinance were adopted and in effect and appellant Alioto's reduction plant were operating under its terms, it is difficult to perceive upon what basis the trial court could conclude, as would be necessary to sustain the injunction, that, as plaintiff-respondent attempts to plead in his complaint (and as denied in Alioto's answer), such plant would constitute a nuisance in fact. The parties argue the point whether a reduction plant operating under a regulatory ordinance and pursuant to a use permit could lawfully be deemed a nuisance in any event (see Civil

Code § 3482; Norton v. City of Pomona (1935), 5 Cal.2d 54, 59, 53 P.2d 952; Eaton v. Klimm (1933), 217 Cal. 362, 370, 18 P.2d 678). However, in view of the fact that the proposed plant would be constructed and operated in a district already zoned for heavy industry, in view of the further fact that the proposed ordinance does not purport to authorize, and does purport to forbid, conditions which might amount to a nuisance, and because other material conditions under which the plant would operate cannot be determined at this date, the trial court does not appear to have been in a position to properly determine that the plant would constitute a nuisance if and when operating.

Plaintiff-respondent's argument that the actions of the board with respect to both the use permit and the ordinance were void by reason of the fact that Supervisor Thompson, who cast one of the three original affirmative votes, is the husband of one of appellant Alioto's attorneys is based upon contentions that the board in hearing and passing upon an application for a nonconforming use permit is acting in a judicial, or at least quasi-judicial, capacity; that the granting of such a permit "appears to be a right in the nature of a grant or franchise" and therefore is a contract; that because sections 168 and 171 of the Civil Code makes a wife's earnings after marriage liable for necessities of life contracted for by her husband despite a gift to her from him (as was here made by Supervisor Thompson to his wife) of his interest in such earnings, Supervisor Thompson was necessarily interested in assisting his wife to successfully represent Alioto and thus, presumably, to earn a larger fee for her services; and that therefore Supervisor Thompson was by reason of public policy as expressed in various court decisions and of statutory law as set forth in section 170 of the Code of Civil Procedure and section 1090 of the Government Code disqualified from acting in either a quasi-judicial capacity or in the making of a contract by the board of supervisors.

I find no occasion to pass on the question of the asserted disqualification of Mr. Thompson. Such question has become entirely moot. Since the appeal was taken Mr. Thompson has ceased to be a member of the board of supervisors. Immediately following the vote on the application for the nonconforming use permit and again following that on the proposed ordinance, one of the supervisors who had voted against both measures gave notice that, under parliamentary rules of order, he elected to change his vote to the affirmative and moved for reconsideration of the questions at the next meeting of the board of supervisors. The board then adjourned to meet again on March 12, 1945, and two days prior to that date (on March 10, 1945) plaintiff filed his complaint herein. The status of the application is, therefore, that of a pending matter before the board of which Mr. Thompson is not a member. The legal question as to whether Mr. Thompson was qualified or disqualified in respect to participation in the original vote does not appear to have any possible effect upon the validity of the proceedings which must ensue upon the going down of the remittitur. The motion for reconsideration will be acted upon by a board of which Mr. Thompson is not a member and its action will control.

For the reasons above set forth, I would reverse all portions of the order appealed from.

SHENK and CARTER, JJ., concur.

Rehearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

31 Cal.2d 210

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. PAYNE.

S. F. 17304.

Supreme Court of California, in Bank.

Dec. 18, 1947.

Rehearing Denied Jan. 15, 1948.

1. Constitutional law ⚷67
Statutes ⚷190, 220

The construction of statutes is a function of the judiciary, but where a statute is ambiguous various aids may be employed in determining legislative intent, and a subsequent expression of Legislature as to intent of prior statute, although not binding on court, may properly be used in determining effect of prior statute.

2. Statutes ⚷220

Where Unemployment Insurance Act, without ambiguity, suspended running of limitations against state, if no return was filed, and 1943 amendment added provision that intention to evade act must be shown before limitation was suspended, declaration of Legislature that 1943 amendment was merely a clarification of original statute could not be invoked to change clear meaning of original statute. Gen. Laws, Act 8780d, § 45.2; Code Civ.Proc. § 338, subd. 1.

3. Constitutional law ⚷45

A clause in a statute to effect that, if any part of statute is held unconstitutional, Legislature intends remainder to stand, despite its positive terms, does not deprive judiciary of its normal power and duty to construe statute and determine whether unconstitutional parts so materially affect balance as to render entire enactment void, and, if court reaches such conclusion, it will annul statute as a whole.

4. Statutes ⚷179

The language of a clarification provision in a statute cannot be given an obviously absurd effect, and court cannot accept legislative statement that an unmistakable change in statute is nothing more than a clarification and restatement of its original terms.

5. Limitation of actions ⚷6(4)

The 1943 amendment to the Unemployment Insurance Act requiring proof of employer's intent to evade act before running of limitation against state may be suspended, in light of recital that amendment is merely a clarification of original statute, indicates legislative intent that amendment applies to all existing causes of action, and has effect of barring causes of action for recovery of unemployment insurance taxes which accrued beyond limitation period and wherein it is stipulated that employer acted in good faith and without intent to evade the act. Code Civ.Proc. § 338, subd. 1; Gen. Laws, Act 8780d, § 45.2.

6. Statutes ⚷181(1)

When court has ascertained legislative intent, it must give it effect, unless there is some constitutional objection thereto.

7. Constitutional law ⚷308

Since when a statute operates immediately to cut off an existing remedy and by retroactive application deprives a person of a vested right, it is ordinarily invalid as conflicting with due process of law, power of Legislature to lessen a statute of limitations is subject to restriction that an existing right cannot be cut off summarily without giving a reasonable time after act becomes effective to exercise such right. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

8. Constitutional law ⚷308

A statute operating immediately to cut off an existing remedy and by retroactive application depriving an agency of the state of a vested right is not invalid as violative of due process since, except where such an agency is given powers by constitution, it derives its authority from Legislature, which may add to or take away from those powers, at will. Const.Cal. art. 1, § 13; U.S.C.A. Const.Amend. 14.

9. Administrative law and procedure ⚷305
Master and servant ⚷78

The Employment Stabilization Commission was created by and derives its powers from Legislature, and it does not have rights which are superior to legislative will.

10. States ⚷119

Expenditures of public funds or property which involve a benefit to private persons are not "gifts" within meaning of constitutional prohibition against gifts of public money or property to private persons, if those funds are expended for a public purpose, which is a matter primarily for legislative discretion. Const. art. 4, §§ 22, 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

11. States 🔑119

The retroactive application of amendment to Unemployment Insurance Law restoring the three year limitation period against state in actions to collect delinquent unemployment insurance taxes unless an intent to evade act was shown is not violative of constitutional prohibition against "gifts" of public money or property to private persons, in light of public purposes to be served by restoration of such limitation. Code Civ.Proc. § 338, subd. 1; Gen. Laws, Act 8780d, § 45.2; Const. art. 4, §§ 22, 31.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the California Employment Stabilization Commission, successor to California Employment Commission, formerly Unemployment Reserves Commission, against William E. Payne, individually and doing business as Waldorf Beauty Shop No. 2, to recover unemployment insurance taxes. From an adverse judgment, plaintiff appeals.

Affirmed.

Prior opinion, 176 P.2d 716.

Robert W. Kenny, of San Francisco, and Fred N. Howser, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Doris H. Maier and Chas. W. Johnson, Deputy Attys. Gen., for appellant.

Fabian D. Brown, of San Francisco, for respondent.

GIBSON, Chief Justice.

In January, 1944, plaintiff commission sued defendant for unemployment contributions claimed to be due for the year 1937 and part of the year 1938. The trial court concluded that the action was barred by subdivision 1 of section 338 of the Code of Civil Procedure, and that, for certain reasons which need not be noted here, the plaintiff was estopped from collecting the tax. Judgment was accordingly rendered for defendant, and the commission has appealed from this judgment.

Defendant, who owned and operated a beauty shop, paid no contributions under the Unemployment Insurance Act, Gen. Laws, Act 8780d, during the period in question because he believed that he had one less than the number of employees necessary to bring him within the provisions of the act. This suit arises out of the determination by the commission that a janitor who worked for defendant was an employee rather than an independent contractor, and that, therefore, defendant was subject to the act. The correctness of this determination is not disputed, but it is stipulated that, in failing to file contribution reports on the janitor, defendant did not act in bad faith or with intent to evade the act.

This suit was commenced more than three years after the right of action accrued and is barred by subdivision (1) of section 338 of the Code of Civil Procedure, unless the limitation in that section is rendered inapplicable by section 45.2 of the Unemployment Insurance Act.

As originally enacted in 1935, the Unemployment Insurance Act contained no provisions relating to limitations, but in 1939, section 45.2 was added to provide that "no statute of this State shall limit the time within which the commission may enforce the payment of contributions * * * if with respect to such contributions no return has been filed." It has been held that liabilities under the act accruing more than three years prior to the enactment of section 45.2 were not affected by its passage and, accordingly, were barred. (California Emp. etc. Comm. v. Smileage Co., 68 Cal. App.2d 249, 156 P.2d 454.)

In 1943, approximately six months before this action was commenced, section 45.2 was amended to provide that "no statute of this State shall limit the time within which the commission may enforce the payment of contributions * * * if *by reason of any intent to evade the provisions of this act* no contribution report or an erroneous return has been filed." (Italics added.) It was further provided that "the amendment * * * to section 45.2 * * * is hereby declared to be merely a clarification of the original intention of the Legislature, rather than a substantive change, and such section shall be construed for all purposes as though it had always read as hereinabove set forth." (Stats. 1943, ch. 1114, § 4.)

This series of legislative enactments presents two basic questions: (1) what did the Legislature intend by the amendment and the "clarification" provision in 1943 and (2) are there any constitutional objections to giving effect to the legislative intent?

[1-4] The construction of statutes is a function of the judiciary, but where a statute is ambiguous various aids may be employed in determining the legislative intent, and a subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. (Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 90, 97, 162 P.2d 635; Stockton Sav. & Loan Bank v. Massanet, 18 Cal.2d 200, 204, 114 P.2d 592; 2 Sutherland, Stattory Construction [3d Ed. 1943], pp. 316, 526.) In the instant case, however, section 45.2 was not ambiguous as to the matter of intent to evade the act. Under the section as enacted in 1939 the running of the statute of limitations against the state was suspended, if no return was filed, whether or not the employer had an intent to evade the act. The amendment to section 45.2 in 1943 added the further condition that an intent to evade the act be shown before the running of the statute of limitations should be suspended, and the declaration of the Legislature that the amendment in 1943 was merely a clarification of the original statute may not be invoked to change the clear meaning of section 45.2 as first enacted. The situation is similar to that presented by a statute containing a broad constitutional severability clause, to the effect that if any part of the statute is held unconstitutional, the Legislature intended the remainder to stand. Such a clause, despite its positive terms, does not deprive the judiciary of its normal power and duty to construe the statute to determine whether the unconstitutional part so materially affects the balance as to render the entire enactment void. If the court reaches the latter conclusion, it will annul the statute as a whole. (See Robert v. Police Court, 148 Cal. 131, 82 P. 838; Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235.) Similarly, the language of the "clarification" provision in this case cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.

[5,6] It does not follow, however, that the "clarification" provision enacted at the same time as the 1943 amendment is ineffective for any purpose. It is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.

[7-9] Where a statute operates immediately to cut off an existing remedy and by retroactive application deprives a person of a vested right, it is ordinarily invalid because it conflicts with the due process clauses of the federal and state constitutions. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14. (Wells Fargo & Co. v. City etc. of San Francisco, 25 Cal.2d 37, 152 P.2d 625; see Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716.) Accordingly, the power of the Legislature to lessen a statute of limitations is subject to the restriction that an existing right cannot be cut off summarily without giving a reasonable time after the act becomes effective to exercise such right. (See Davis & McMillan v. Ind. Acc. Comm., 198 Cal. 631, 637, 246 P. 1046, 46 A.L.R. 1095.) This principle, however, does not apply where the state gives up a

right previously possessed by it or by one of its agencies. Except where such an agency is given powers by the Constitution, it derives its authority from the Legislature, which may add to or take away from those powers and therefore a statute which adversely affects *only* the right of the state is not invalid merely because it operates to cut off an existing remedy of an agency of the state. The case of Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950, is distinguishable since the court was there concerned with the operation of a statute which applied to private persons as well as the state. This distinction was not noted in Calif. Emp. Stab. Comm. v. Chichester etc. Co., 75 Cal.App.2d 899, 172 P.2d 100, which relied on the Superior Oil case and assumed without discussion that the same rule would apply where the state alone would be adversely affected. It was held in the Chichester case that the amendment of section 45.2 in 1943 could not operate to deprive the commission of the right to sue on existing causes of action until a reasonable time had passed after the statute became effective. The commission was created by, and derives its powers from, the Legislature, and it does not have rights which are superior to the legislative will. By the enactment in 1939 of section 45.2, the three-year limitation contained in section 338 was rendered inapplicable, and the commission was given the right without limit as to time to enforce contributions where no return had been filed. Thereafter in 1943 the Legislature determined that it was unwise and perhaps unfair to allow the commission an unlimited time within which to enforce contributions where there was no intent to evade the act, and as to those cases, the three-year limitation was restored and the right of action was cut off if the period had run. This the Legislature had the power to do insofar as the constitutional requirement of due process is concerned, and the holding to the contrary in the Chichester case, 75 Cal.App.2d 899, 172 P.2d 100, is disapproved.

The question remains whether the retroactive application of the amended statute would conflict with the constitutional prohibition against gifts of public money or property to private persons. (California Constitution, art. IV, §§ 22, 31.) It has been held that a retroactive amendment to the inheritance tax laws releasing the tax liability of an estate was within the constitutional inhibition. (In re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788; Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A.,N.S., 1210; In re Estate of Potter, 188 Cal. 55, 204 P. 826; In re Estate of Lander, 6 Cal.App. 744, 93 P. 202.)

[10,11] It is well settled, however, that expenditures of public funds or property which involve a benefit to private persons are not gifts within the meaning of sections 22 and 31 of Article IV of the Constitution if those funds are expended for a public purpose, which is a matter primarily for legislative discretion. (County of Alameda v. Janssen, 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141.) It would appear that any incidental benefit to the employer in applying this section to existing causes of action so as to cut off the commission's right to sue for the contributions where no intent to evade the act is present may well be outweighed by the public benefit which would result if enforcement officers spent their time on fresh claims rather than stale ones. An additional element of public benefit is present where, as here, the statutory scheme is not purely a revenue measure but is enacted as part of a broad social program involving continuing contributions and benefits. Whether the employer would be able to pay a large assessment based upon many years of innocent delinquencies becomes important. It is possible that an employer who has not made collections from his employees or set aside a fund for the payment of the assessments, would be rendered insolvent or bankrupt if compelled to pay the amount of the accumulated assessments, plus interest and penalties. Under such circumstances, the result would be to force the employer out of business, thereby depriving his employees of work and, to that extent defeating the primary object of the legislation which is to protect employees against unemployment. It may well be that the Legislature considered the collection of a stale claim for delinquent con-

tributions an additional hazard and therefore undesirable to the adequate functioning of the system. Accordingly, the benefits to be derived from the restoration of the three-year period within which to sue on claims based on errors made in good faith and without intent to evade the act may serve a valid public purpose in limiting the expenditures of time and money in the effort to enforce stale claims which may have little or no value and might increase the economic hazards which the statutory scheme was designed to lessen.

We conclude therefore that the trial court properly applied subdivision (1) of section 338 of the Code of Civil Procedure to this cause of action. This conclusion makes it unnecessary to determine the other questions raised by the appeal.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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31 Cal.2d 229

PEOPLE v. McGEE.

Cr. 4782.

Supreme Court of California.

Dec. 19, 1947.

Rehearing Denied Jan. 15, 1948.

1. **Criminal law ⚷1186(4)**

A judgment of conviction for manslaughter and order denying new trial would be affirmed where asserted errors did not operate to defendant's prejudice or result in miscarriage of justice. Const. art. 6, § 4½.

2. **Criminal law ⚷1023(12)**

An order denying defendant's motion in arrest of judgment is not an "order made after judgment", and therefore is not appealable. Pen.Code, §§ 1185, 1237.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Made After Judgment".

3. **Indictment and Information ⚷122(2)**

Under statute empowering district attorney to charge the offense named in order of commitment or any offense shown by evidence taken before the magistrate to have been committed, district attorney can charge murder if evidence at preliminary hearing shows such offense, although defendant has been held to answer for offense of manslaughter. Pen.Code, § 809.

4. **Criminal law ⚷238**
   Indictment and information ⚷122(2)

Evidence before committing magistrate was sufficient to satisfy statutory requirement that public offense had been committed and that there was sufficient cause to believe defendant guilty thereof, and warranted district attorney's filing information charging murder, notwithstanding that defendant was bound over by magistrate to answer charge of manslaughter only. Pen. Code, §§ 809, 872.

5. **Indictment and information ⚷122(2)**

The district attorney is not bound by view of committing magistrate, but is free to construe evidence or draw inferences adversely to defendant and to file an information charging the highest offense of which any reasonable construction of the evidence admits. Pen.Code, § 872.

6. **Homicide ⚷308(3)**

Under statute defining second-degree murder as "all other kinds of murder" than those which are of the first degree, it is not improper in a homicide case in which the crime could be found to be murder to tell the jury what types of murder are of the first degree, in order that they can more readily comprehend what constitutes the "other kinds of murders" which are of the second degree. Pen.Code, § 189.

7. **Homicide ⚷340(4)**

Instruction that murders committed in certain manners or in perpetration of certain crimes are of the first degree, even though there was no evidence that homicide was so committed, was not prejudicial to defendant convicted of manslaughter, where jury, had they taken another view of evidence, could have found that the homicide was second-degree murder, and no attempt was made to mislead jury into believing that defendant might have been found guilty of first-degree murder. Pen. Code, § 189.

8. Homicide ⇨340(4)

An instruction which should never have been given, and which was irrelevant and which was manifestly erroneous as destroying statutory difference in degrees of murder, did not require reversal of judgment of conviction of manslaughter, where defendant was not prejudiced thereby. Pen.Code, § 189.

9. Homicide ⇨340(4)

An erroneous instruction that neither provocation by words only nor gestures without assault upon person, nor trespass against lands or goods, are of themselves sufficient to reduce offense of intentional homicide with deadly weapon from murder to manslaughter, was not prejudicial to defendant convicted of manslaughter.

10. Homicide ⇨300(3)

Justifiable homicide instructions should not reiterate principles slanted from prosecution point of view, but should instruct jury as to principle of apparent necessity from point of view of reasonable person in position of defendant as shown by any tenable view of the evidence.

11. Homicide ⇨340(1)

Justifiable homicide instructions which contained no actual misstatements of law, but which were not clear cut, impartial statements of law, and which were improperly phrased from point of view of prosecution instead of point of view of reasonable persons in position of defendant as shown by evidence, did not require reversal, where jury, had they been otherwise instructed, could not have found that circumstances were sufficient to excite fears of reasonable person, and that defendant shot deceased under influence of such fears alone. Pen.Code, § 198.

12. Homicide ⇨34

A defendant discharging pistol with intent only to frighten and not to shoot deceased, and not doing so in self-defense, can be found guilty of involuntary manslaughter. Pen.Code, § 192.

13. Criminal law ⇨808½

Instruction including code definition of involuntary manslaughter was not error where defendant, who was convicted for manslaughter, could have been found guilty of involuntary manslaughter under the evidence. Pen.Code, § 192.

14. Criminal law ⇨407(1), 781(1), 1169(12), 1172(2)

Where defendant did not merely stand mute in face of police officer's accusatory statements but stated that attorney had advised defendant not to discuss the matter unless attorney was present, admission of testimony of police officer's accusatory statements against defendant and giving of instruction on subject of accusatory statements was error which did not require reversal inasmuch as defendant was not prejudiced thereby.

15. Criminal law ⇨1136

In homicide prosecution, defendant not offering to produce competent evidence to explain discrepancy between hospital records and autopsy records relating to deceased could not complain that evidence to explain discrepancy should have gone to jury.

16. Criminal law ⇨670

Defendant's formal offer of proof, after defendant's medical expert witness was not permitted to answer defendant's hypothetical questions, was unnecessary, where the questions and colloquies with trial judge, in light of previously introduced testimony, clearly disclosed purpose of questions, and answers favorable to defendant were expected inasmuch as questions were directed to defendant's witness.

17. Criminal law ⇨472

What constitutes proper, improper, and grossly improper surgical procedure in a given situation is a subject for expert testimony.

18. Criminal law ⇨485(1)

Hypothetical questions setting forth an assumed state of facts supported by evidence applicable to deceased are sufficient to permit expert medical witness to testify concerning proper and improper surgical procedure in a given situation.

19. Criminal law ⟹1170(1)

In homicide prosecution against defendant who shot deceased who died after surgery, erroneous refusal to permit physician to give expert testimony as to what constituted proper, improper, and grossly improper surgical procedure in a given situation, which evidence disclosed was applicable to deceased, was not prejudicial to defendant, where testimony would not as a matter of law have been sufficient to show a supervening cause of death which would have relieved defendant of criminal responsibility.

20. Homicide ⟹5

A delay in treatment of deceased is not in fact an intervening force and is not in law a supervening cause of death which would relieve defendant from criminal responsibility for shooting deceased.

CARTER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Henry Alexander McGee was convicted of manslaughter. From the judgment of conviction and from an order denying his motion for a new trial he appeals and purports to appeal from order denying his motion in arrest of judgment.

Judgment and order denying new trial affirmed, and attempted appeal from order denying motion in arrest of judgment dismissed.

Prior opinion 177 P.2d 355.

A. Brigham Rose, of Los Angeles, for appellant.

Robert W. Kenny, of San Francisco, Fred N. Howser, Atty. Gen., and Henry A. Dietz and Frank Richards, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

[1, 2] Defendant was charged by information with the murder of Arthur Rypdahl. A jury found him guilty of manslaughter. He appeals from the ensuing judgment of conviction and from an order denying his motion for new trial, and purports to appeal from an order denying his motion in arrest of judgment. From our review of the entire record it does not appear that the asserted errors (hereinafter more particularly discussed) of which defendant complains operated to his prejudice or resulted in a miscarriage of justice. The judgment and order denying a new trial must therefore be affirmed in accord with the mandate of section 4-½ of article VI of the California Constitution. The order denying defendant's motion in arrest of judgment is not an "order made after judgment" and therefore is not appealable. (Pen.Code, §§ 1237, 1185; the cases are collected in 8 Cal.Jur. 493, § 508, note 13.)

[3] Defendant was bound over by the committing magistrate to answer to a charge of manslaughter only. He contends that the evidence before the magistrate failed to show that the crime of murder had been committed; that therefore the district attorney was without authority to file an information accusing defendant of murder and the trial court erred in denying defendant's various motions to set aside the information and to compel a trial on the charge of manslaughter only. The district attorney is empowered by section 809 of the Penal Code to "charge the offense * * * named in the order of commitment, or any offense * * * shown by the evidence taken before the magistrate to have been committed." Under this section the district attorney can charge murder, if the evidence at the preliminary hearing shows such offense, although defendant has been held to answer for the offense of manslaughter. (People v. Bird (1931), 212 Cal. 632, 300 P. 23.)

The evidence before the committing magistrate is as follows: On the evening of July 16, 1945, defendant and one Linck went to the club rooms of a fraternal organization in San Pedro. They had two drinks at the bar, then entered the card room. Linck joined in a card game (with persons with whom defendant apparently had no previous acquaintance) for 15 or 20 minutes. Defendant took Linck's place at the card table when Linck went to the bar, where he remained for about 15 minutes. Defendant then came from the card room and he and Linck went out of the club.

They immediately returned to the card room because Linck believed he had left $40 on the card table. Linck asked, "Gentlemen, do you know what became of the money I left on the table?" One of the players pointed to defendant. Linck asked defendant, "Hank, did you take it?" or "Did you play?" Linck "understood him [defendant] to say yes" and Linck and defendant left the card room. As they walked through the bar, which was dimly lighted, toward the street exit deceased came from the card room. Deceased came toward defendant and when he was "about 6 or 8 feet away" he ("the man coming towards McGee") "pulled his hand around from back of him." At this point (whether just after or just before the described hand movement by Rypdahl is not clear), just as Linck had started to open the door, defendant shot deceased in the abdomen. As a result of hemorrhage from the bullet wound deceased died the next day.

[4, 5] The above summarized evidence clearly met the requirement that it show "that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof." (Pen.Code, § 872; People v. Nagle (1946), 25 Cal.2d 216, 222, 153 P.2d 344.) While the committing magistrate was amply justified in concluding that such evidence showed the public offense to be manslaughter rather than murder he would also have been warranted, on a different view of the same evidence, in concluding that the offense was murder of the second degree. "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree. [Citations.]" (People v. Howard (1930), 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385; People v. Thomas (1945), 25 Cal.2d 880, 895, 156 P.2d 7.) The district attorney, as previously shown, was not bound by the view of the committing magistrate; he was free to construe the evidence or draw inferences adversely to defendant and to file an information charging the highest offense of which any reasonable construction of the evidence admitted.

Defendant complains that the trial court erred to his prejudice in instructing the jury. The asserted errors in large part concern the types of homicide. In order that their effect may appear, the evidence at the trial favorable to defendant as to this subject is summarized.

Before defendant encountered deceased at the club on the evening of July 16, deceased had drunk ten or twelve highballs of scotch and soda. When, as indicated in the above summary of the testimony at the preliminary hearing, defendant's companion Linck left the card table and defendant took his place, deceased was one of the players. Deceased said to defendant, "I don't like your looks. * * * Who asked you to sit down at this poker game?" Defendant replied, "Nobody asked me to sit down. It has always been customary when there is a vacant seat at the game to sit down and play." Defendant played one hand of poker. He apparently was not familiar with the game and he and deceased argued about this. Deceased then told the dealer, "don't deal him [defendant] in this time. * * * I don't think he is a member of this lodge." Defendant upon request produced his "credentials," including his lodge membership card. Deceased examined the card and showed it to the other members, who said, "Well, it looks like everything is in order." Deceased threw defendant's "credentials" at him. Defendant continued to sit at the table but deceased, whose deal it was, dealt defendant no cards. Defendant said, "I was dealt out." Deceased replied, "We don't care whether you are a member or not, you are not going to play in this game." On the next deal defendant was again dealt out. Deceased called defendant a "no good bastard." After he was dealt out the third time defendant said, "well, the hell with it —if you gentlemen don't want me in the game, I will leave." Defendant started from the room. Deceased called defendant back, shoved him against a pool table, and told him "to get out of the club and stay out" or he "would be carried out feet first." Defendant rushed from the card room. He and Linck left the club momentarily, then returned to the card room and Linck inquired whether he had left $40 on the table. When Linck asked the whereabouts of the money deceased pointed to defendant. Linck said to defendant, "Forget it," "Let's go," but defendant looked about under the table and chairs. Deceased said, "Well, you are back again, huh?" Defendant then started to leave. Deceased said, "Just a minute, I want to talk to you again." Defendant was "so scared" that he hurried toward the outer door, which Linck was opening. Deceased followed defendant and said that "You are not going to get out of here that easy. * * * I still mean what I said—you are going out of here feet first," that defendant had tried to make deceased "look like a thief," and that "I ought to cut your God damned throat." When defendant was about 5 feet from the outer door deceased "was running after me, and it seemed like he was right at my back. I had my hand in my right coat pocket [in which was a pistol] and he was yelling at me, and it seemed he was right behind me, and I was so scared I turned around and he looked like a great big gorilla running down on top of me, and I was so scared I fired through my pocket." The gun was a .41 caliber over-and-under Derringer and was carried by defendant because of certain threats which had been made by a person or persons other than deceased. The shooting was in the presence of Linck and the bartender, and at least six other members of the lodge were in the immediately adjoining card room. Defendant "didn't intend to shoot Mr. Rypdahl. I intended to try and scare him—stop him—because he was right on me." Defendant left the club immediately, thereafter left Los Angeles County, and several months later voluntarily surrendered to the authorities.

[6, 7] The first asserted prejudicial error in instructions is that the charge gives "undue prominence" to the crime of murder. The instructions give no more "prominence" to the definition of that crime than to the definition of other types of homicide which might be found under the evidence. It was not only proper but necessary that the jury be instructed as to the crime of murder for, had they taken another view of the evidence, they could have found that the homicide was murder of the second degree. The Penal Code (§ 189) defines such offense as "all other kinds of murders" than those which are of the first degree. It is customary and, because of the wording of the statute, not improper in a homicide case where the crime could be found to be murder to tell the jury what types of murder are of the first degree in order that they can more readily comprehend what constitute the "other kinds of murders" which are of the second degree. (Murder of the second degree has, however, been defined independently of that of the first degree. (People v. Thomas (1945), supra, 25 Cal.2d 880, 903, 156 P.2d 7; People v. Bender (1945), 27 Cal.2d 164, 181–182, 163 P.2d 8.) Hence, it was not error, under the circumstances of this case, to instruct the jury that murders committed in certain manners or in the perpetration of certain crimes are of the first degree, even though there was no evidence that the homicide was so committed. Only forms of verdicts of guilty of second degree murder, manslaughter, and of not guilty, were submitted to the jury and there is no indication of any attempt to mislead the jury into believing that the defendant might have been found guilty of murder of the first degree. The charge concerning the degrees of murder is not a model but defendant points out and we have found no respect in which errors therein could have prejudiced defendant in the circumstances of this case.

[8] Among the instructions to which defendant objects, because it is entirely irrelevant to any issue in the case, is the following stock instruction: "If the accused was engaged in the performance of an unlawful act, and if the deceased attempted in a lawful manner to prevent the performance of such unlawful act, and if, while so endeavoring to prevent the same, the defendant in anger and solely for the purpose of revenge, or to enable him to carry out his unlawful design, so interfered with by said deceased, attacked the latter with a deadly weapon, intending to kill said deceased, and did, under such circumstances, carry such intention into execution, the fact that de-

fendant was in a passion would not mitigate or excuse such homicide, but the crime committed would in such case be murder in the first degree. It is not less murder because the act is done suddenly after the intent to commit the homicide is formed. It is sufficient that the malicious intention precedes and accompanies the act of homicide." As stated in People v. Valentine (1946), 28 Cal.2d 121, 134–135, 169 P.2d 1, 10, "This instruction is manifestly erroneous. According to its first sentence, if the accused in a sudden, violent quarrel growing out of the protests of deceased against the commission by defendant of any unlawful act, however trivial, killed deceased with a deadly weapon, the homicide would be murder in the first degree. That is not the law. The statement as made transgresses the rules both as to voluntary manslaughter and as to the difference between first and second degree murder. The second and third sentences of this instruction are likewise manifestly erroneous if, as they apparently do, they too refer to first degree murder. They destroy the statutory difference in the degrees of murder and authorize conviction of first degree murder upon proof of facts amounting only to second degree murder. [Citations.]" Although this instruction should never be given, no manner in which it could have prejudiced this defendant, upon the record and in the light of the verdict, appears.

[9] Another instruction which was condemned in People v. Valentine, supra (pages 137–144 of 28 Cal.2d, 169 P.2d 11), was given. The instruction reads as follows: "it is a settled rule in law that neither provocation by words only, however opprobrious, nor contemptuous or insulting actions, or gestures without an assault upon the person, nor any trespass against lands or goods, are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter." In fairness to the trial court it should be noted that the Valentine case was decided after the trial of this case and that prior to the Valentine decision there existed two irreconcilably conflicting lines of authority as to the correctness of the rule embodied in the last quoted instruction. Although such rule is not the law of this state, stating it to the jury did not, as appears from their verdict, prejudice defendant.

[10, 11] The instructions as to justifiable homicide, although they contain no actual misstatement of law, are not clear cut, impartial statements of law but are phrased from the point of view of the prosecution. They include the instructions quoted and criticized for this reason in People v. Hatchett (1944), 63 Cal.App.2d 144, 157–159, 162, 165, 146 P.2d 469. Certain of these instructions were similarly criticized in People v. Estrada (1923), 60 Cal.App. 477, 483, 213 P. 67. The District Court of Appeal appropriately remarked, in the Hatchett case (page 159 of 63 Cal.App.2d, 146 P.2d 476), that "It would seem that the criticism of the instructions in the Estrada case, which came up from Los Angeles County, called for their revision and the use of instructions on self-defense which stated the law with complete impartiality." Nevertheless, district attorneys and trial courts have recurrently used these instructions. Persistence in this practice must necessarily result in reversal of the judgment if prejudice is shown. Instead of reiterating principles slanted from the prosecution point of view, the trial court should have instructed the jury as to the principle of apparent necessity from the point of view of a reasonable person in the position of defendant as shown by any tenable view of the evidence, and this despite the fact that defendant's proposed instructions on the subject were in part so confusingly worded as to be properly refused. However, we cannot agree with defendant that the instructions as given are, on the facts of this case, ground for reversal. From the evidence it does not appear reasonable to conclude that the jury, had they been otherwise instructed, would have found that the circumstances were "sufficient to excite the fears [of death or great bodily injury] of a reasonable person" and that defendant shot deceased "under the influence of such fears alone." (Pen.Code, § 198, which was read as an instruction.)

[12, 13] Defendant complains that the instructions included the code definition of

involuntary manslaughter; i. e., a killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192.) If defendant, as he testified, discharged the pistol with intent only to frighten, and not to shoot, deceased, and such act was not done in the exercise of defendant's right of self-defense, he could be found guilty of involutary manslaughter. (See Davis v. Commonwealth, 193 Ky. 597, 237 S.W. 24, 23 A.L.R. 1551, 1554; Hamilton Fire Ins. Co. v. Greger, 246 N.Y. 162, 158 N.E. 60, 55 A.L.R. 921.) The instruction appropriately covers evidence which the jury could—and may—have found true.

It is also contended that testimony of a conversation between a police officer and defendant was improperly admitted and that the instruction given as to accusatory statements is erroneous. The conversation was in material part as follows: The officer told defendant that he "was accused of the murder of Arthur Rypdahl" and "asked him if he cared to affirm or deny that accusation. * * * He answered, 'I am not going to answer that question. My attorney told me not to unless he was present.'" To all subsequent statements and questions of the officer defendant said, "I have nothing to say" or "same answer" or, perhaps, after repeatedly indicating his position, remained silent as to some questions. Such subsequent statements and questions were as to matters concerning which defendant testified at the trial; e. g., that he did go to the club with Linck on the evening of July 16, 1945; that he then had the pistol and there shot deceased; that he left San Pedro and subsequently surrendered to the authorities.

The instruction complained of is as follows: "You are instructed that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge, and unless you are convinced beyond a reasonable doubt that the defendant did stand mute when the accusatory statements were made such statements should be entirely disregarded by you."

[14] The one accusatory statement to the truth of which defendant did not testify, is the statement as to the accusation of murder quoted above. Defendant certainly did not "stand mute" when such statement was made, but explained why he did not "affirm or deny that accusation." Nor can it fairly be said that in legal effect, to constitute a ground for the admission of the accusatory statements, he stood mute as to any of them, for it was only after clearly indicating a proper reason for not replying that he can be found to have remained silent as to any question. Manifestly, in the light of the fact that defendant did not merely "stand mute" and did state in effect that his attorney had advised him not to discuss the matter unless the attorney was present, it was error to admit the evidence in question and to give any instruction on the subject of accusatory statements. (People v. Simmons, (1946), 28 Cal.2d 699, 712–713, 718–721, 172 P.2d 18; see also People v. Flores, (1936), 15 Cal.App.2d 385, 405–406, 59 P.2d 517.) But it does not appear, in the light of the whole record, with particular reference to his own testimony and to the verdict, that defendant was prejudiced either by the admission of the evidence or the giving of the incorrect instruction.

Defendant contends that the trial court erred to his prejudice by excluding evidence which, defendant says, would have tended to show that the proximate cause of Rypdahl's death was not the bullet wound but the manner in which the wound was treated. In 8 A.L.R. at page 516 the general rule as to criminal responsibility of one who wounds another, for the death of the victim, is stated as follows: "When a person inflicts a wound on another which is dangerous, or calculated to destroy life, the fact that the negligence, mistake, or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide." Following this general rule it has been held that where the wound inflicted by the accused operates as a cause of death, the fact that the malpractice of attending surgeons may have had some causative influence will not relieve the accused from full responsibility for the ultimate result of his act. (People v. Kane, (1915), 213 N.Y. 260, 107 N.E. 655, L.R.A. 1915F, 607, Ann.Cas. 1916C, 685.) On the other hand, in qualification of the rule, it is said that (8 A.L.R. 520), "Where a person inflicts on another a wound not in itself calculated to produce death, and the injured person dies solely as a result of the improper treatment of the wound by an attending physician or surgeon, the fact that the death was caused by medical mistreatment is a good defense to a charge of homicide," citing Parsons v. State, (1852), 21 Ala. 300; McDaniel v. State (1884), 76 Ala. 1; Bush v. Com., (1880), 78 Ky. 268; Tibbs v. Com., (1910), 138 Ky. 558, 128 S.W. 871, 28 L.R.A.,N.S., 665; State v. Scott (1857), 12 La.Ann. 274; People v. Kane, 1915, supra, 213 N.Y. 260, 107 N.E. 655, L.R.A. 1915F, 607, Ann. Cas. 1916C, 685. On this subject it has been said to be "the proper, and probably generally accepted, view * * * that mere negligence [in the treating of a wound] is no defense even though it is the sole cause of death because it is a foreseeable intervening cause. But death caused by grossly improper treatment is not the proximate consequence of the defendant's injury unless the injury is an actual contributing factor at the time of death, because such treatment is an unforeseeable intervening cause. [Citing People v. Whithurst (1858), 2 Labatt 178; People v. Dallen (1913), 21 Cal.App. 770, 778, 132 P. 1064.]" (Focht, Proximate Cause in the Law of Homicide, 12 So. Cal. Law Rev. 19, 34; see also People v. Lewis (1899), 124 Cal. 551, 558–559, 57 P. 470, 45 L.R.A. 783.) The evidence as to the nature of the wound inflicted by defendant and the treatment thereof is as follows:

Deceased was shot at about 10:30 p. m. on July 16, 1945. According to hospital records in evidence (Code Civ.Proc. § 1953e) deceased was admitted to the hospital at 11 p. m. on the 16th; X-rays showed that the bullet was at the point from which it was subsequently removed by the autopsy surgeon; on July 17 at 9:05 a. m., some ten hours after admission to the hospital, deceased was taken to surgery; his condition was then "very poor. * * * Surgical Risk, poor"; one hour later, at 10:05 a. m., an operation was commenced; it ended at noon. It further appears from the hospital records that the abdomen was entered through a high midline incision (hereafter called the anterior incision); there were blood and blood clots in the abdominal cavity; *liver, stomach, pancreas, spleen, and intestines were "normal," revealing "no penetration of a foreign body"* (italics added); the abdomen was packed with gauze and closed; a small incision for a drainage tube was made; and deceased's post-operative condition was recorded as "critical." He died about 7 p. m. on July 17.

An autopsy was performed on July 19 at 10:45 a. m., after the body had been embalmed. The autopsy surgeon found the anterior incision which opened the abdomen and the small incision where the drainage tube had been inserted. He testified that the bullet had grazed the liver, *gone through the pancreas and spleen,* and come to rest behind the upper pole of the left kidney; that there was "profuse hemorrhage throughout the course of the wound"; and that *such hemorrhage was the immediate cause of death.* In the opinion of the autopsy surgeon the gunshot wound was such that *"If it was not controlled [by hemostasia, gauze packing, etc.] it would be only a matter of an hour, or an hour and a half, before there would be a profuse hemorrhage sufficient to cause death"* and the anterior incision permitting such control was made "Within at least two hours after the wound." (Italic added.) (It will be remembered that the hospital records show that such incision was not made until some 12 hours after deceased was shot and 11 hours after his admission to the hospital.) The autopsy surgeon also found a posterior incision starting two inches to the left of the spine and following the course of the lower rib for 4 inches. The purpose and time of making this incision and the person by whom it was made, do not appear from the record.

[15] Defendant emphasizes the conflict between the evidence of the hospital records (according to which the liver, pancreas, etc., were not penetrated by any foreign body) and that of the autopsy surgeon (according to whom the bullet had grazed the liver, penetrated the pancreas, etc., and who found the posterior incision not mentioned in the hospital records). Defendant asserts that "any competent evidence that would have helped to explain this mysterious discrepancy * * * should have gone before the jury for proper consideration." But defendant did not offer at the trial, nor does he suggest on appeal that he could have produced, any competent evidence as to the course of the bullet or the making of the posterior incision. Therefore, he cannot complain that the "mysterious discrepancy" was not explained.

[16-18] Defendant produced and qualified Dr. Jesse L. Bloch as a medical expert. Dr. Bloch testified, "I do not know anything about the case" of Rypdahl's injury, treatment and death. Therefore, he could have testified only to his expert opinion in answer to hypothetical questions. Defendant asked such questions, framed on a theory supported by evidence of the autopsy surgeon and the hospital records, for the purpose of showing that Rypdahl would not have died if the surgeon who attended him had not, grossly contrary to proper surgical practice, failed for more than ten hours after Rypdahl's admission to the hospital to take any action to control the hemorrhage from the bullet wound. Defendant made no formal offer of proof, but such offer was not necessary because the questions themselves, together with colloquies with the trial judge, in the light of previously introduced testimony, clearly disclose their purpose, and since they were directed to defendant's own witness they indicate that the answers were expected to be favorable to defendant. (See People v. Duane (1942), 21 Cal.2d 71, 81, 130 P.2d 123; People v. Pereles (1932), 125 Cal.App. (Supp.) 787, 792, 12 P.2d 1093.) The trial court upon erroneous grounds sustained objections to such questions. The objections and the rulings thereon disclose that the court and the deputy district attorney labored under the misconceptions that the question of what constitutes proper, improper and grossly improper surgical procedure in a given situation is not a subject for expert testimony, and that the hypothetical questions were insufficient (even though they set forth an assumed state of facts supported by evidence applicable to Rypdahl) because no "foundation" was laid with respect to Rypdahl.

[19, 20] The refusal to permit Dr. Bloch to testify, however, did not prejudice defendant because the testimony which defendant apparently expected from him would not, as a matter of law, have been sufficient to show a supervening cause of death which would relieve defendant from criminal responsibility for the death of Rypdahl. Viewed most favorably to defendant the evidence sought to be elicited from Dr. Bloch, with the evidence of the autopsy surgeon and the hospital records, together also with the testimony of defendant, would have disclosed the following situation: Defendant, without aiming and without intending to shoot Rypdahl, unlawfully, or "without due caution and circumspection," discharged a pistol which was pointed toward Rypdahl. The immediate result of this unlawful or incautious act was the wounding of Rypdahl. The direct result of the wound was "profuse hemorrhage" which would be "sufficient to cause death" if it was not promptly controlled. Having thus set in motion the events which culminated in Rypdahl's death, defendant departed. The surgeon in whose care Rypdahl was promptly placed neglected for more than ten hours, grossly contrary to good surgical practice, to control the hemorrhage. We assume further that Rypdahl's life might have been saved by prompt and proper surgical treatment. But defendant cannot complain because no force intervened to save him from the natural consequence of his criminal act. The factual situation is in legal effect the same, whether the victim of a wound bleeds to death because surgical attention is not

available or because, although available, it is delayed by reason of the surgeon's gross neglect or incompetence. The delay in treatment is not in fact an intervening force; it cannot in law amount to a supervening cause.

For the reasons above stated the judgment and the order denying defendant's motion for new trial are affirmed. The attempted appeal from the order denying his motion in arrest of judgment is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion in this case shows a record replete with error. One instruction is held to be "manifestly erroneous" in each of the three sentences of which it is composed, and irrelevant to any issue in the case. Another instruction is held to incorrectly state the law as clarified in People v. Valentine, 28 Cal.2d 121, 137–144, 169 P.2d 1. With respect to other instructions (and their number is not stated), bearing on the issue of justifiable homicide, it is said that "although they [the instructions] contain no actual misstatement of law, [they] are not clear cut, impartial statements of law but are phrased from the point of view of the prosecution. They include the instructions quoted and criticized for this reason in People v. Hatchett, 1944, 63 Cal.App.2d 144, 157–159, 162, 165, 146 P.2d 469. Certain of these instructions were similarly criticized in People v. Estrada, 1923, 60 Cal.App. 477, 483, 213 P. 67. * * * Instead of reiterating principles slanted from the prosecution point of view, the trial court should have instructed the jury as to the principle of apparent necessity from the point of view of a reasonable person in the position of defendant as shown by any tenable view of the evidence, and this despite the fact that defendant's proposed instructions on the subject were in part so confusingly worded as to be properly refused."

Testimony of a conversation between a police officer and defendant is held to have been improperly admitted, and in connection with it an instruction on the subject of accusatory statements is held to have been erroneously given. Further errors are held to have been committed by the trial court's rulings excluding evidence which defendant contends would have tended to show that the proximate cause of the victim's death was not the bullet wound but the negligent manner in which the wound was treated. The majority opinion states: "The objections and the rulings thereon disclose that the court and the deputy district attorney labored under the misconceptions that the question of what constitutes proper, improper, and grossly improper surgical procedure in a given situation is not a subject for expert testimony, and that the hypothetical questions were insufficient (even though they set forth an assumed state of facts supported by evidence applicable to Rypdahl [the victim]) because no 'foundation' was laid with respect to Rypdahl [the victim]."

In the face of this plethora of error, the majority opinion concludes that no prejudice was suffered by defendant and that no reversible error was committed. This conclusion is reached by the method of discussing separately with respect to each error the matter of prejudice resulting from it. The question whether the accumulation of error is so heavy as to itself constitute possible prejudice is not mentioned. The subject of the cumulative effect of numerous errors, each of which separately committed might not show prejudice, should be considered. Where mistakes on the part of the trial court abound and touch not only the charge to the jury but also rulings on evidence, it cannot be assumed that defendant has had a fair trial and that no miscarriage of justice has resulted. See People v. Mahoney, 201 Cal. 618, 627, 258 P. 607; Hirshfeld v. Dana, 193 Cal. 142, 150, 223 P. 451; Adkins v. Brett, 184 Cal. 252, 261, 193 P. 251; People v. Newcomer, 118 Cal. 263, 267, 50 P. 405; People v. Hatchett, 63 Cal.App.2d 144, 152, 146 P.2d 469; People v. Flores, 15 Cal.App.2d 385, 406, 59 P.2d 517; Valentine v. Provident Mut. L. Ins. Co., 12 Cal.App.2d 616, 621, 55 P.2d 1243.

As said in People v. Mahoney, supra, at page 627 of 201 Cal., 258 P. 610: "The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the Constitution." Again, as declared in People v. Flores, supra, at page 406 of 15 Cal.App.2d, 59 P.2d 528: "Prejudice is a matter of degree. An incident in the light of one record might not necessarily be prejudicial and reversible error, but a similar incident in the light of another record might be highly prejudicial. The record presented herein is of such character that relatively slight error could have easily resulted in a miscarriage of justice * * *." Lastly, are the pertinent remarks from People v. Hatchett, supra, at page 152 of 63 Cal.App.2d, 146 P.2d 473: "We have found it necessary to discuss a good many of the instructions given and some of those refused, and our conclusion is that the errors were such as to require a reversal. It is the cumulative effect of numerous errors which forces this conclusion, and we reiterate that we are considering the probable effect of such errors upon the jury's determination of guilt in a case where guilt was not firmly established. We consider it not improbable that a conviction would not have occurred but for the errors. * * * We find appropriate to our discussion the statement of the Supreme Court in People v. Newcomer, 1897, 118 Cal. 263, at page 267, 50 P. 405, at page 406, 'Under these circumstances, if the appellant was justified in killing the deceased, as he might have been, he was in the embarrassing position of one who justly kills another when there is no other witness to the homicide, when he has to admit the homicide, and depend greatly upon his own testimony to justify it. In such a case it is evident that a jury will have difficulty in determining the real facts; and in such a case it is apparent that the instructions of the court are very important, particularly when, as in the case at bar, the court instructs at great length. *Under such circumstances, any instruction tending to lead the jury from the real issues in question is material, and, if erroneous, is reversible error.*'" [Emphasis added.]

Added to the confusing situation already outlined, is the fact disclosed by the majority opinion that in the charge to the jury great prominence (although perhaps, as held, not "undue" prominence) was given to the crime of murder. In view of all these circumstances, I cannot see how a reviewing court can be justified in concluding that the jury may not have been misled or that defendant did not suffer prejudice from the weight of the cumulative errors which were committed by the trial court. In my opinion a reversal of the judgment is required.

Rehearing denied; CARTER, J., dissenting.

31 Cal.2d 169

TANNHAUSER v. ADAMS.

L. A. 19885.

Supreme Court of California.

Dec. 16, 1947.

1. Taxation ⇨693

Where neither publication of notice prior to tax deed to state, nor regularity of proceedings whereby realty was sold to the state for delinquent taxes, including sufficiency of notice, prior to sale to the state, was questioned by record owner in action against holder of tax deed to quiet title to the realty, they would be presumed. Code Civ.Proc. § 1963, subd. 15.

2. Taxation ⇨805(1)

Action to quiet title on ground of invalidity of tax deed because of failure to mail notice to record owner before tax deed to the state, was barred by one year statute of limitation, where action was brought more than six and one-half years after recording of tax deed to the state and more than three and one-half years after realty was deeded by the state to defendant. Revenue and Taxation Code, §§ 3521, 3691 et seq.

3. Taxation ⚷805(1)

Where sole attack by record owner of realty on tax deed in suit to quiet title to the realty was directed against proceedings that occurred prior to tax deed to state, one year limitation statute dealing with a proceeding based on an alleged invalidity or irregularity of any deed to the state for taxes or of any proceedings leading up to the deed was applicable rather than under one year limitation statute dealing with a proceeding based on alleged invalidity or irregularity of any proceedings relating to sales to private parties after deed to the state. Revenue and Taxation Code, §§ 3521, 3725.

4. Taxation ⚷805(3)

One year limitation statute was not rendered inapplicable to record owner's action to quiet title to realty against holder of tax deed, because of failure to mail notice to record owner of sale of realty for delinquent taxes. Revenue and Taxation Code, § 3521.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action to quiet title to realty by W. Tannhauser against E. O. Adams. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 182 P.2d 280.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Stickney & Stickney, Edward Strop and Virgil S. Kipp, all of San Diego, for respondent.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment in his suit to quiet title to real property in San Diego County to which defendant holds a tax deed from the State of California. Defendant concedes that plaintiff is the owner of the property unless defendant has acquired ownership thereof through the tax proceedings which culminated in his deed from the state, and except as his interest is protected by the statute of limitations. Plaintiff, to defeat defendant's tax title, relies upon an irregularity in the tax proceedings which occurred subsequent to a tax sale of the property to the state but prior to the deed to the state and the later deed to defendant. For reasons hereinafter stated, we have concluded that by the questioned proceedings defendant acquired at least color of title and that plaintiff's action is barred by the time limitations set forth in section 3521 of the Revenue and Taxation Code, and pleaded by defendant. Consequently the judgment must be affirmed.

In 1933, upon proceedings which are not challenged, the land involved was sold to the state for delinquent 1932 taxes. (See former Pol.Code, §§ 3764, 3771.) The property was not redeemed, and by a tax deed dated July 1, 1938, and recorded August 5, 1938, the San Diego County tax collector deeded or purported to deed it to the state. (See former Pol.Code, § 3771a.) By deed dated January 14, 1941, and recorded January 20, 1941, the state deeded whatever interest it had in the land to defendant. (See Rev. & Tax. Code, Chap. 7.) It is not disputed that upon receipt of the deed defendant took and since then has been in continuous possession of the land, and has cleared it of certain brush at a cost of over $500, cultivated it, added fencing, and paid accruing taxes. On January 12, 1942, the plaintiff herein commenced an action against this defendant to quiet title to the disputed property; the defendant filed his answer on February 3, 1942; and on September 13, 1944, that action was dismissed on defendant's motion for want of prosecution. On February 21, 1945, plaintiff filed a notice of motion to set aside the order of dismissal and on February 27, 1945, the motion to set aside the dismissal was denied. The pending action was commenced on the last mentioned date.

[1] The only attack made by plaintiff upon the deeds and the proceedings leading up to them is directed to the failure of the tax collector, prior to the deed to the state in 1938, to send by registered mail a notice to plaintiff as the last assessed owner, as required by former section 3771a of the Political Code, then in force. That section provided, in part, that "On the day and hour fixed for the sale [for delinquent

taxes] in accordance with subdivision two of section three thousand seven hundred sixty-four of this code, all property which has not been redeemed from the sale to the state or the sale thereon canceled, shall be sold by the tax collector at public auction to the highest bidder * * *; if no sale is had under the provisions of this section, then said property shall be deeded to the state as provided in section three thousand seven hundred eighty-five of this code; provided, that when any property is to be sold at public auction as provided in this section, the tax collector shall, within five days after the first publication of said delinquent list, mail a copy of said list or publication, postage thereon prepaid and registered, to the party to whom the land was last assessed next before such sale, at his last known address, said notice to be mailed at least twenty-one days before the date of sale or in lieu of mailing the entire printed list said tax collector may mail to the party to whom the land was last assessed next before the sale at his last known postoffice address, postage thereon prepaid and registered, a printed notice of such sale * * *." Neither the *publication of* notice prior to *deed* to the state (see former Pol.Code, § 3764), nor the regularity of the proceedings, including the sufficiency of the notice, prior to the *sale* to the state in 1933, is questioned by plaintiff; consequently they will be presumed. (Code Civ.Proc. § 1963, subd. 15.)

[2] Defendant contends that plaintiff's action is barred by the limitations provisions of sections 3521 and 3625 of the Revenue and Taxation Code, and that failure to mail the notice before deed to the state was cured by the validating acts of 1943 and 1945. (Stats.1943, p. 1993, Chap. 458; Stats.1945, p. 2176, Chap. 1134; 3 Deering's Gen.Laws Acts 8443, 8443a). Plaintiff maintains that failure to mail the notice is a "jurisdictional" defect in the tax proceedings and that therefore his right to raise it cannot be cut off by statutes of limitations and the defect is not curable by subsequent legislative validating acts. We are of the view, however, that although such a failure has on occasion been termed a "jurisdictional" defect, a delinquent taxpayer's right to raise it may, at least under the circumstances shown in this case, be terminated by limitations statutes. Consequently it becomes unnecessary to here consider the scope and constitutionally permissible effect of the curative acts.

Section 3521 of the Revenue and Taxation Code became effective on May 19, 1941, and operative on June 1, 1941, and reads as follows:

"A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

"Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section."

Section 3725 of the same code was enacted in 1939. It is found in the chapter dealing with sales to private parties after deed to the state, and provides that: "A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed."

[3] Inasmuch as plaintiff's sole attack is directed against the proceedings prior to deed to the state, it is apparent that this case falls under the purview of section 3521 rather than that of section 3725.) See Davault v. Essig (1947), 80 Cal.App.2d 970, 183 P.2d 39.)

As stated above, plaintiff commenced this suit on February 27, 1945, which was more than six and one-half years after the recording (on August 5, 1938) of the tax deed to the state and more than three and one-half years after June 1, 1941—the last date mentioned in section 3521. If that section applies here, plaintiff's right to institute suit attacking the deed to the state expired on June 1, 1942, and this suit is barred.

Plaintiff does not contend that the limitation period as fixed by the legislature operates within so short a time as to give him no reasonable opportunity to exercise his remedy (see Rand v. Bossen (1945), 27 Cal.2d 61, 65, 162 P.2d 457), but as stated above he urges that the defect in the notice to him prior to deed to the state is "jurisdictional" in nature and that therefore the limitation period cannot apply.

In support of his position plaintiff cites cases from other jurisdictions in which for various reasons the statutes of limitations relied upon by the tax sale purchasers were held to be inapplicable. Thus in certain of such cases the court held the limitation statute under discussion to be inapplicable because by its terms it barred possessory actions whereas the suit before the court was to quiet title (see Farrar v. Clark (1882), 85 Ind. 449, 454; Gabe v. Root (1884), 93 Ind. 256, 259; Kingore v. Wallace (1929), 85 Colo. 381, 276 P. 332; Munson v. Marks (1912), 52 Colo. 553, 124 P. 187; Empire Ranch & Cattle Co. v. Mason (1912), 22 Colo.App. 612, 126 P. 1129; cf. Neilan v. Unity Investment Co. (1910), 147 Iowa 677, 126 N.W. 947) or to cancel the tax deeds (see Kennedy v. Sanders (1907), 90 Miss. 524, 43 So. 913). In other instances the land involved was exempt from the "tax" for which it had been sold (see Hutchison v. Brown (1917), 66 Okl. 250, 167 P. 624; Taylor v. Miles (1870), 5 Kan. 498, (Reprint page 302, 311), 7 Am.Rep. 558; Kennedy v. Sanders, supra), the "taxes" had been levied under a statute which had been decreed to be unconstitutional (Eastland v. Yazoo Delta Lumber Co. (1907), 90 Miss. 330, 43 So. 956), or no actual assessment had ever been made (see Bradshaw v. Brady (1917), 38 S.D. 279, 161 N.W. 195). In still other cases the original sale of the property for delinquent taxes was by the terms of the statute authorized only after court foreclosure proceedings; and it was held that by reason of defective service of summons or other notice of such proceedings no jurisdiction was acquired by the court and consequently the foreclosure decree and all titles dependent thereon were completely void and not protected by limitations statutes (see Elliott v. Clement (1944), 175 Or. 44, 149 P.2d 985, 151 P.2d 739; Powell v. Turpin (1944), 224 N.C. 67, 29 S.E.2d 26; cf. Clifford v. Hyde County (1909), 24 S.D. 237, 123 N.W. 872, in which decree was entered prior to expiration of time allowed to answer). However, as pointed out in Elliott v. Clement, supra, in Washington, where, also, sale was had only after court decree, the opposite view has been taken, and a limitation statute held to bar the right to attack the tax title even though service of summons did not meet statutory requirements (see White v. Gehrman (1939), 1 Wash.2d 504, 96 P.2d 453, 455; Eagles v. General Electric Co. (1940), 5 Wash.2d 20, 104 P.2d 912, 914).

Where, as here, the defect in the tax proceedings has consisted of failure to give the statutory notice prior to application for or issuance of deed to the tax sale purchaser or prior to expiration of time for redemption, it is held in some jurisdictions that the right to raise the defect is not cut off by a limitation statute (see Campbell v. McGrath (1926), 117 Okl. 126, 127, 245 P. 634; McAfee v. Harden (1937), 180 Okl. 546, 71 P.2d 463, 464; Lind v. Stubblefield (1929), 138 Okl. 280, 282 P. 365; Rock Island Improvement Co. v. Davis (1945), 195 Okl. 513, 159 P.2d 728, 732; Smith v. Huber (1938), 224 Iowa 817, 277 N.W. 557, 115 A.L.R. 131, 136–139; Small v. Hull (1934), 96 Mont. 525, 32 P.2d 4, 6–7). In New York the courts have held to the contrary as to defects there considered to be jurisdictional in nature (see Meigs v. Roberts (1900), 162 N.Y. 371, 56 N.E. 838, 840, 76 Am.St.Rep. 322; Dunkum v. Maceck Building Corp. (1931), 256 N.Y. 275, 286–287, 176 N.E. 392, 396; Ostrander v. Darling (1891), 127 N.Y. 70, 27 N.E. 353, 355), and the same view is expressed by the Supreme Court of the United States in Saranac Land, etc. Co. v. Controller of N. Y. (1899), 177 U.S. 318, 330, 20 S.Ct. 642, 44 L.Ed. 786.

However, as pointed out by the court in Small v. Hull, supra (96 Mont. 525, at page 7 of 32 P.2d), the limitations statutes under consideration in the New York cases commenced to run either upon the recording of the deed or the taking of possession by the tax deed purchaser, or both, and under such statutes and the facts of the cases, the original owner had notice as to when the statute would begin to run against him. Thus, in Ostrander v. Darling, supra, the period of limitation was measured from the date of recordation of the tax deed in the county clerk's office and the court held (127 N.Y. 70, at page 355 of 27 N.E.) that after the statutory period attack on the deed by reason of a defective notice to redeem was barred. The land there in question was not occupied by the plaintiffs (the successors in interest of the original owners) or by any one on their behalf, whereas the defendant tax purchaser had exercised acts of ownership over it. In Meigs v. Roberts (1900), supra, 162 N.Y. 371, 56 N.E. 838, 76 Am.St.Rep. 322, upon which defendant in the present case places particular reliance, the former owner was out of possession, the tax deed grantee was in possession, and the statute was held to run. The court observes, however (162 N.Y. 371, at page 840 of 56 N.E.), "It is questionable whether, as to an owner in actual possession of land, the record of a hostile conveyance in the clerk's office is sufficient to set a statute of limitations running against him, so as to destroy his title." Cf. People v. Ladew (1924), 237 N.Y. 413, 143 N.E. 238, 243; People v. Ladew (1907), 189 N.Y. 355, 82 N.E. 431, 432; Dunkum v. Maceck Building Corp. (1931), supra, 256 N.Y. 275, 286, 287, 176 N.E. 392, 396.) As a second ground of decision that the limitation statute was not operative in Lind v. Stubblefield (1929), supra, 138 Okl. 280, 282 P. 365, 367, the court stated, "It must be remembered that the plaintiff [original owner] alleged possession of the premises. In a well-known text (Cyc. vol. 37, p. 1505), under the subject of 'Taxation and Tax Titles,' directly on the point at issue, it is said:

"'So long as the original owner of land which has been sold for taxes remains in undisturbed possession of it, the statute of limitations does not run against him or prevent the maintenance of a suit to set aside the tax sale or remove the cloud on his title.'

"The above text is supported by citation of authorities from nearly all the states, among them being the case of Cadman v. Smith, 15 Okl. 633 [644], 85 P. [346] 347."

In Saranac Land, etc. Co. v. Controller of N. Y. (1900), supra, 177 U.S. 318, 327–328, 20 S.Ct. 642, 44 L.Ed. 786, upon which defendant also relies, it was held that the same New York limitation statute which was applied in the Meigs case, supra, could constitutionally bar the plaintiff's right to attack defendant's tax title even though the defects relied upon be jurisdictional. Here again the original owner was out of possession and the tax purchaser in possession.

Other instances of the general principle that a limitation statute will not run against one in possession of land are found in 34 Am.Jur., where it is said (p. 29), "A person in the possession of property cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property. * * * [P. 296] [A] statute cannot be sustained as one of limitation where it requires one in possession of property to bring an action within a given time or forfeit it, and it is laid down in a number of cases that as a general rule, the statute of limitations does not run against one in possession of land. Thus, the statute does not run against a mortgagee in possession, because he is in the actual possession of all the law gives him and the possession itself is prima facie evidence that the money is not paid. For a similar reason, it has been asserted that the statute does not begin to run against a cestui que trust in possession until the date of his ouster, no matter what the nature of the trust may be, and it is held that no time bars the right, under either statute of limitations or presumption of payment, of a vendor to recover purchase money for land, if he has not parted with the legal title. So also, where a mortgagor of land has remained in possession and brings suit to enforce specific performance of his agreement to purchase the land from the purchaser at the foreclosure sale, the statute of limitations governing actions to recover land held under judicial sales has no application." (See also Buty v. Goldfinch (1913), 74 Wash. 532, 133 P. 1057, 46 L.R.A.,N.S., 1065 and note thereto, Ann.Cas. 1915A, 604.

[4] Regardless of what may be the law under other circumstances it appears to us that there is no sound reason why the right of one out of possession to attack a tax title for the defect here relied upon, whether it be considered jurisdictional or otherwise, should not be barred if his action is not instituted within the prescribed statutory period, provided that such period is a reasonable one. In Miller & Lux Inc. v. Secara (1924), 193 Cal. 755, 765, 227 P. 171, 174, this court declared that although "a total lack of jurisdictional due to absence of notice sufficient to constitute due process of law cannot be cured by a curative act or by a curative provision in the statute, * * * we see no reason why such a defect may not be cured, in effect, by a statute of limitations, provided the latter is not unreasonable, and is therefore valid." (See also Title Guar. & Trust Co. v. Woody (1944), 63 Cal.App.2d 209, 211-213, 146 P.2d 252.)

In Alhambra Addition Water Co. v. Richardson (1887), 72 Cal. 598, 600, 601, 14 P. 379, 381, it was held that although the doctrine that statutes of limitations "are designed to affect the remedy, and not the right or contract" applies with respect to contract rights, "it has been the settled rule ever since the case of Arrington v. Liscom, 34 Cal. 365 [94 Am.Dec. 722], that the possession of property of the requisite character and time confers a title to the property. [Citations.] So far, therefore as the title * * * to real property is concerned, prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right." (See also Churchill v. Leuie (1902), 135 Cal. 608, 610, 67 P. 1052; Beckett v. City of Petaluma (1915), 171 Cal. 309, 312, 153 P. 20.)

To apply the same principle against a tax-delinquent owner out of possession of his property but who seeks to attack the tax title of one in possession is, we believe, to place him at no greater disadvantage than are other litigants who by reason of their lack of promptness in asserting their claim find themselves either without remedy or without right.

As stated above, defendant in the present case appears to have been in uninterrupted possession of the land since the date of the deed to him in January, 1941, and to have exercised various acts of ownership over it, while plaintiff has remained out of possession. The filing by plaintiff, on January 12, 1942, of the earlier quiet title action establishes his actual knowledge at least as early as that date of defendant's claim of title. We are of the opinion that under the circumstances shown there is not, upon any view of the law, a constitutional basis for refusing to apply the limitation statute hereinabove quoted as against plaintiff's claim.

Plaintiff also urges that this is a suit in equity and that we "should take * * * [the] facts into consideration, and not invoke the Statute of Limitations." But we find no tenable basis either in law or in equity upon which plaintiff can avoid the bar of the statute. The statute has been invoked, not by the court, but by defendant under the law of this state. By the running of the statute "the title to the property irrespective of the original right is regarded as vested in the possessor" and even "the subsequent repeal of the limitation law cannot be given a retroactive effect so as to disturb the title." (Peiser v. Griffin (1899), 125 Cal. 9, 14, 57 P. 690, 692; see also Chambers v. Gallagher (1918), 177 Cal. 704, 708-709, 171 P. 931. The doctrine announced by this court in Bollinger v. National Fire Ins. Co. (1944), 25 Cal.2d 399, 406-411, 154 P.2d 399, 407, that in an action which "is in reality a continuance of the earlier action [commenced in time] involving the same parties, facts, and causes of action, and was promptly filed after entry of the judgment on the nonsuit, plaintiff should not be deprived of a trial on the merits * * *" and the running of the statute will be "suspended," is not applicable here. In the Bollinger case the opinion states that plaintiff (at page 410 of 25 Cal.2d, at page 405 of 154 P.2d) "brought his [first] action * * * in good time and *diligently pursued it*" (italics added) but "through error of the trial court [in the first action] was not allowed to proceed to trial." Here the two actions do involve "the same parties, facts [except those occurring subsequent to filing of the first action], and cause of action," but there the similarity ends. The first action brought by this plaintiff was not diligently pursued; it was dismissed for want of prosecution; plaintiff failed to secure a trial on the merits in that action not because of error of the court but because of his own (or his then attoney's) neglect. We are satisfied that the pleaded statute (Rev. & Tax Code, § 3521) is available to defendant and that it bars plaintiff's claim.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

31 Cal.2d 191

In re MILLER et al.

KUCHEL, Controller, v. MILLER.

L. A. 19848.

Supreme Court of California.
Dec. 18, 1947.

1. Husband and wife 🔑249

The character of property is determined by its status at time of its acquisition, and subsequent changes in form of the property do not alter its nature as separate or community.

2. Statutes 🔑188

The meaning of a statute is to be sought in the language used by the Legislature.

3. Constitutional law 🔑70(1)

Words may not be inserted in a statute under the guise of interpretation. Code Civ.Proc. § 1858.

4. Statutes 🔑176

The court's function is to construe and apply the law as it is enacted and not to add thereto nor detract therefrom. Code Civ.Proc. § 1858.

5. Descent and distribution 🔑52(2)

Succession statute providing that upon death of either husband or wife one-half of all personal property, wherever situated, "heretofore or hereafter" acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired or domiciled in California, shall belong to the surviving spouse applies to personal property existing in that form at death. Probate Code, § 201.5.

6. Taxation 🔑856

Death is the generating source for operation of the inheritance tax, consistent with the theory that such tax is imposed on the right to receive a decedent's property.

7. Taxation 🔑856, 872, 886½

Inheritance tax is assessed upon value of property transmitted upon death, but rates and exemptions are based upon relationship of recipient to decedent.

8. Taxation 🔑893

A cardinal purpose of the inheritance tax law is to co-ordinate its assessment as closely as possible with the substantive probate law regulating distribution of decedent's estate. St.1935, p. 1267, § 1(2); Probate Code, § 201.5.

9. Statutes 🔑225

Analysis of provision of the Probate Code relating to status of personal property as community or separate property should proceed upon a parallel basis with contemporaneously enacted provision of inheritance tax statute relating to same matter, so that factors affecting limitation of the words "personal property" in the Probate Code apply with equal force to the words "intangible personal property" in the tax statute. St.1935, p. 1267, § 1(2); Probate Code, § 201.5.

10. Taxation 🔑866, 872

"Intangible personal property" within inheritance tax statute providing that "intangible personal property" wherever situated, "heretofore or hereafter" acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in California should be deemed to be community property, refers to nature of the property at date of death rather than to nature of property as it existed when first acquired at former domicile. St.1935, p. 1267, § 1 (2).

See **Words and Phrases**, Permanent Edition, for all other definitions of "Intangible Personal Property".

11. Taxation ⚷866, 872

Under inheritance tax statute relating to intangible personal property acquired while domiciled elsewhere, real property located in California, representing rents, issues, profits and reinvestments of property acquired by husband as his separate property from earnings of drug business in Iowa was not entitled to community exemption but was subject to inheritance tax as separate property of husband. St.1935, p. 1267, § 1 (2).

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the petition of Marguerite W. Miller and Vivien Miller for an order establishing fact of death of Ralph H. Miller. From an order fixing inheritance tax due and allowing a community exemption in favor of Marguerite W. Miller, Thomas H. Kuchel, controller of the State of California, appeals.

Reversed with directions.

Prior opinion, 182 P.2d 628.

James W. Hickey, Inheritance Tax Atty., of Sacramento, Donald R. Peck, Deputy Inheritance Tax Atty. and Morton L. Barker, both of Los Angeles, and Joseph D. Lear, Asst. Deputy Inheritance Tax Atty., of Sacramento, for appellant.

Hahn & Hahn and A. Hale Dinsmoor, all of Pasadena, for respondent.

SPENCE, Justice.

This is an appeal by the Controller of the State of California from an order fixing the inheritance tax due herein. Appellant challenges the propriety of the probate court's allowance of a "community exemption" in favor of respondent with respect to certain real property. His position is well taken under the provisions of the Inheritance Tax Act of 1935, Stats.1935, ch. 358, p. 1266, in effect at the time of the death of the deceased, as the pertinent language in dispute will be hereinafter discussed and construed.

There is no controversy as to the facts. Prior to 1921 the decedent, Ralph H. Miller, and his wife, Marguerite W. Miller, were domiciled in the state of Iowa. While so domiciled in Iowa, decedent accumulated certain property as a result of his earnings from the operation of a drug business there. These earnings were received during marriage and the property accumulated therefrom would have been the community property of the parties had they been domiciled in the state of California. Iowa, however, is a common-law state and under its laws said property became the separate property of the decedent.

In 1921, upon his retirement, Mr. and Mrs. Miller came to California and established their residence in this state, where they continued to reside until Mr. Miller's death on April 10, 1945. At the time of his death the parties held in joint tenancy property having a total value of $63,653.96, of which $36,600 was the value of real property located in California and the balance constituted intangible personal property. All of this property, both real and personal, represented the rents, issues, profits and reinvestments of the property acquired from Mr. Miller's earnings from the drug business while he was a resident of Iowa.

Upon Mr. Miller's death this proceeding to establish the fact of death was instituted and an inheritance tax appraiser was appointed to make his report herein. The state Inheritance Tax Act then in effect provided that "for the purposes of this act, intangible personal property, wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in this State shall be deemed to be community property." Inheritance Tax Act of 1935, sec. 1, subd. (2), Stats.1935, ch. 358, p. 1267. The inheritance tax appraiser reported the tax due in this estate to be $746.06, based upon his listing of the real estate as separate property of the decedent and his confining of the community exemption to the intangible personal property. Mrs. Miller filed objections to such tax computation, disputing the premise of distinction and claiming that all the property, both real and personal, should be treated as community property. The court sustained her objections and reduced the inheritance tax to $207.41.

The question of the propriety of the inheritance tax reduction herein turns upon the interpretation of the above-quoted provision of the Inheritance Tax Act. The precise issue is whether the words "intangible personal property" refer, as appellant maintains, to the *nature of the property at the date of death,* in which event the provision would have no bearing upon the decedent's real estate; or refer, as respondent maintains, to the *nature of the property as it existed when first acquired at the former domicile,* in which event the provision would be operative as to both real and personal property depending upon the *source* of the funds used to purchase the property owned at the date of death. Thus the focal point of the parties' disagreement is the time when, for the purpose of the inheritance tax, property acquired by a husband and wife in a foreign jurisdiction is subject to reclassification according to the community law of this state. Accordingly, as the facts are here presented in relation to the inheritance tax provision in question, appellant argues that it is immaterial that decedent's real estate was purchased with earnings which would have been community property under the laws of this state, for its status at the time of death excludes it from consideration as "intangible personal property" and leaves it unchanged as decedent's separate property. On the other hand, respondent contends that, in so far as the time of statutory reference here arises, decedent's earnings became community property as soon as she and decedent established their residence in this state, and decedent's real estate as derived from such reclassified "intangible personal property" retained the character of its source despite a change in form existing as of the date of death. A consideration of related legislation will aid at the outset in determining the problem of statutory construction presented.

In 1935 the same legislature which enacted the Inheritance Tax Act of 1935 added to the Probate Code, under the designation of section 201.5, a succession statute setting forth the right of a surviving spouse to property acquired under laws of jurisdictions not recognizing community property. The section provides as follows: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse; the other one-half is subject to the testatmentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, * * *" Stats.1935, ch. 831, p. 2248. With the exception that the Probate Code section refers to "personal property" and the contemporaneously enacted inheritance tax provision above quoted refers to "intangible personal property" in their respective applications of the community property concept, the two statutes are practically identical in wording and present similar considerations as to legislative intent. In Re Estate of Schnell, 67 Cal.App.2d 268, 154 P.2d 437, section 201.5 of the Probate Code was involved but that case concerned only the surviving spouse's right of succession with respect to the proceeds realized from the sale of real estate in a non-community property jurisdiction. Consequently it was not necessary for the court there to consider such arguments of statutory construction as the parties here advance where part of the decedent's property at the date of death consists of real estate.

Section 201.5 of the Probate Code represents the latest effort of the legislature to make the marital property rights of spouses who have accumulated property while living in a common-law state, and then moved their residence here, comparable to those of the husband and wife who accumulate their property while domiciled in California. The legislative history of the section has been long and interesting. It is reflected in the successive changes in the definition of community property under section 164 of the Civil Code. Prior to 1917 it had uniformly been held that where the husband acquired property during coverture in an common-law state while domiciled there and then subsequently brought it to California at the time of establishing residence here, such marital property remained the sole and separate property of the husband, irrespective of the prevailing concept of community property in this state as including all property acquired by either spouse after marriage other than that acquired by gift, bequest, devise or descent. Kraemer v. Kraemer, 52 Cal. 302, 306; In re Estate of Burrows, 136 Cal. 113, 115, 68 P. 488; In re Estate of Niccolls, 164 Cal. 368, 372, 129 P. 278; In re Estate of Warner, 167 Cal. 686, 691, 140 P. 583; In re Estate of Boselly, 178 Cal. 715, 720, 175 P. 4; In re Estate of Arms, 186 Cal. 554, 562, 199 P. 1053. In 1917, the legislature redefined community property to include "real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state." Civil Code, sec. 164, as amended, Stats.1917, ch. 581, p. 827. This court held that the expanded definition was not to be construed retroactively, and so did not apply to property of married persons who had become domiciled in this state and brought their property here prior to the date of the amendment. In re Estate of Frees, 187 Cal. 150, 156, 157, 201 P. 112. In 1923, at the session of the legislature next following the rendition of this decision, the statute was further amended by inserting the following italicized language so as to include "personal property wherever situated, *heretofore or hereafter* acquired while domiciled elsewhere * * *," thus making it clear that retroactive application was intended. Civil Code, sec. 164, as amended, Stats.1923, ch. 360, p. 746. But power to legislate as to the character of property brought to this state prior to 1917 was again held wanting, since it would abridge vested rights of the husband. In re Estate of Drishaus, 199 Cal. 369, 373, 249 P. 515. Thereafter this court was required to determine the constitutionality of the statute where the change of domicile to California occurred after the 1917 amendment. It was held that to attempt thus to convert separate property into community property, even prospectively, was an unconstitutional impairment of vested property rights acquired in another jurisdiction. In re Estate of Thornton, 1 Cal.2d 1, 5, 33 P.2d 1, 92 A.L.R. 1343. So ended the legislature's attempt to make the acquisition of a California domicile by the husband and wife effect a reclassification, according to California categories, of property acquired by the parties while domiciled in another jurisdiction.

In 1935, at the next session of the legislature following the decision in the Thornton case, Probate Code, section 201.5 was enacted. Unlike the earlier legislation which had been declared unconstitutional, this statute does not purport to rearrange property rights between living husbands and wives in marital property brought into this state upon their change of domicile to California. On the contrary, it is a succession statute apparently enacted in pursuance of the theory of the dissenting opinion in the Thornton case, that such legislation affecting the descent of property would not contravene constitutional guarantees since "the rights of testamentary disposition and of succession are wholly subject to statutory control." In re Estate of Thornton, supra, 1 Cal.2d 1, 7, 33 P.2d 1, 3, 92 A.L.R. 1343. Three possible interpretations of the statute might be claimed to be suggested by its wording: (1) that it applies only when the personal property which existed at death is in the *same form* as when acquired while domiciled outside the state and any transmutation into another form of personal property places that property outside the section; (2) that it applies to personal property in that *form at death* which is derived from any property acquired while domiciled elsewhere which would not have been separate property if acquired while domiciled in California; (3) that it applies to *all personal and real property* which had its *origin* in personal property acquired while domiciled elsewhere which would not have been separate property if acquired while domiciled in California.

[1] As a succession statute, it is reasonable to conclude that section 201.5 of the Probate Code was intended to speak

as of the time of death and its language expressly so indicates. Thus, it is provided that *"upon the death* of either husband or wife one-half of all *personal property* * * * shall belong to the *surviving spouse."* With that time period fixed as the date of operation in favor of the "surviving spouse," it is significant that the statute refers solely to "personal property" as the subject words to which the modifying language relating to acquisition at a former domicile points. A literal regard for the language of the statute would favor the number (1) interpretation above listed, but if so read the section would have practically no application and would be meaningless except in the relatively rare situation where personal property acquired in another domicile through the joint efforts of the spouses is brought into California and is retained in that *identical form* to become eventually a part of a decedent's estate. Such restriction of the operation of the section would not coincide with the presumed purpose of the enactment, in view of its legislative history, to effectuate a substantial change in the succession of marital property of the type involved. Moreover, such narrow interpretation would be in conflict with the fundamental concept of property law that the character of property is determined by its status at the time of its acquisition. Bias v. Reed, 169 Cal. 33, 43, 145 P. 516; Palen v. Palen, 28 Cal.App.2d 602, 604, 83 P.2d 36. Subsequent changes in the form of the property do not alter its nature as separate or community. Roberts v. Wehmeyer, 191 Cal. 601, 605, 218 P. 22.

[2-5] On the other hand, the number (2) interpretation above listed not only would conform as well with the express wording of the statute but would have the added advantage of giving a wider application to the section consistent with the recognized principles of property classifications prevailing under the law of this state. The statute relates to the disposition "upon * * * death of * * * one-half of all personal property, wherever situated * * *" language evidencing that the reference is made to personal property at the time of death rather than at the time of acquisition. Such wording would reasonably include personal property that in California has been transmuted into another form of personalty at the date of death. In re Estate of Schnell, supra, 67 Cal.App.2d 268, 273, 274, 154 P.2d 437. However, if the adjective "personal" were construed as referring to the *source* of the property, then the section would refer to *all* property regardless of whether it has been transmuted into real or personal property if its source was "personal property" of the type described in the section. Such would be the number (3) interpretation above listed to bring within the terms of the section "real property" despite the failure of the legislature to so provide. It is true that section 164 of the Civil Code, in attempting to fix the rights of living husbands and wives in marital property acquired elsewhere and brought into California, included "real property situated in this State and personal property wherever situated," while the comparable phrase in section 201.5 of the Probate Code is confined to "personal property, wherever situated." Why the legislature in the latter enactment omitted the express reference to real property does not appear. But the meaning of a statute is to be sought in the language used by the legislature. In re Application of the Monrovia Evening Post, 199 Cal. 263, 269, 248 P. 1017; Anderson v. I. M. Jameson Corporation, 7 Cal.2d 60, 67, 68, 59 P.2d 962; Armstrong v. Smith, 49 Cal. App.2d 528, 536, 122 P.2d 115. Since only *personal property* is specified in section 201.5 of the Probate Code, an interpretation nevertheless including therein real property would require reading into the statute words that are not there so as to bring within its terms substantially all marital property of the type here involved. Such expanded interpretation would give the "surviving spouse" succeeding under that statute practically the same rights as would have existed had the property been acquired while the spouses were domiciled in California. (The exception would be in such rare case where realty acquired by the spouses elsewhere might be exchanged directly for realty in California without the property ever being in the form of personalty; as where the husband, having received an interest in a farm or a deed to

an urban lot instead of wages in cash as compensation for services rendered, exchanged it for California realty. In most cases the property of the spouses acquired elsewhere represents earnings paid in cash or other form of personalty, and from such source—personal property—the investment in real or personal property proceeds following the change of domicile to California.) It is immaterial here that in view of the prevailing concept of community property law in this state, such a result might be deemed desirable as a premise for equalizing the rights of succession of a "surviving spouse" in *all* marital property regardless of whether it be in the form of real or personal property at the date of death. Words may not be inserted in a statute under the guise of interpretation. Code Civ.Proc. sec. 1858; Seaboard Acceptance Corporation v. Shay, 214 Cal. 361, 365, 366, 5 P.2d 882. Rather "it is the function of the courts to construe and apply the law as it is enacted and not to add thereto nor detract therefrom." Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts, 16 Cal.2d 800, 805, 108 P.2d 439, 442. In conformity with these statutory rules of construction, it necessarily follows that the middle ground of the number (2) interpretation above listed permits as broad an application of section 201.5 of the Probate Code as its express language would support and limits its application to "personal property" existing in that form at death.

[6-9] With these matters in mind as to the scope of section 201.5 of the Probate Code, the next point to consider is the significance of the related provision of the Inheritance Tax Act of 1935—section 1, subdivision (2)—here at issue. In this connection certain general observations favoring a like construction of the comparable statutory language appear pertinent. As with a succession statute, death is the "generating source" for the operation of the inheritance tax, consistent with the commonly accepted theory that such tax is imposed on the right to receive a decedent's property. 28 Am.Jur., secs. 9 and 10, p. 12. While such tax is assessed upon the value of property so transmitted, the rates and exemptions are based upon the relationship of the recipient to the decedent. 28 Am.Jur., sec. 4, p. 9. Accordingly, a cardinal purpose of the inheritance tax law would be to coordinate its assessment as closely as possible with the substantive probate law regulating the distribution of the decedent's estate. As so considered, the analyses of section 201.5 of the Probate Code and of section 1, subdivision (2), of the Inheritance Tax Act of 1935—contemporaneously enacted legislation—should proceed upon a parallel basis, so that the above noted factors affecting the limitation of the words "personal property" in the former statute would apply with equal force to the words "intangible personal property" in the latter statute, demonstrating that in both instances the precise references are to the status of the specified class of property at the time of death. Upon this basis neither statute would apply to a decedent's real property by reason of its source or origin in "personal property," on the one hand, or in "intangible personal property," on the other.

[10, 11] But there are other cogent considerations which fortify this view as to the intent of the scope of the words "intangible personal property" in the provision of the Inheritance Tax Act in question. In 1925, the expanded community property concept of section 164 of the Civil Code was first added to the inheritance tax law. Accordingly, it was provided that "for the purposes of this act, personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in this state shall be deemed to be community property." Stats.1925, ch. 284, sec. 1, subd. (2), p. 473. Unlike the community property definition then existing in section 164 of the Civil Code in its amended 1923 form as above noted, the related provision of the inheritance tax law did not include the phrase "real property situated in this State" but only incorporated the extended reference to "personal property." The significance of this omission in the inheritance tax provision of 1925 appears from the amendment of the law in 1935 whereby the only change in

language was the substitution of the words "intangible personal property" for the words "personal property." At the time of the 1925 enactment, referable to the treatment of "personal property wherever situated" as "community property," it was considered permissible for a state, under the doctrine of mobilia sequuntur personam, to levy an inheritance tax with respect to both tangible and intangible personal property of a resident decedent whether at the date of death such property was located within or without the taxing jurisdiction. 28 Am.Jur., sec. 90, p. 57; In re Estate of Hodges, 170 Cal. 492, 495, 496, 150 P. 344, L.R.A.1916A, 837, and numerous cases there cited. Then in 1926 came the decision in Frick v. Commonwealth of Pennsylvania, 268 U.S. 473, at page 496, 45 S. Ct. 603, at page 607, 69 L.Ed. 1058, 42 A. L.R. 316, holding that a state "statute, in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other states, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." Although it was not until 1935—following this court's discussion in the above-cited case of In re Estate of Thornton, 1934, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, relative to the unconstitutional aspects of the reclassification of marital property rights attempted by section 164 of the Civil Code and prompting the legislature's reconsideration of that phase of the community property law incident to its 1935 enactment of section 201.5 of the Probate Code—that the inheritance tax act was modified, the express nature of the amendment shows the "direct bearing" of the Frick decision thereon. Anderson v. I. M. Jameson Corporation, supra, 7 Cal.2d 60, 67, 59 P.2d 962. Accordingly, by section 1, subdivision (2), of the Inheritance Tax Act of 1935, only *"intangible* personal property, wherever situated" was specified to come within its terms rather than "personal property," which would be liable for the tax only if its situs was within the taxing jurisdiction. If the reference in the Inheritance Tax Act of 1935 did not mean "intangible personal property" existing in that form at death as distinguished from its form at date of acquisition in the former domicile, there would have been no need to have changed the specification from "personal property," as all property having its source in "intangible personal property" would have come within the terms of the provision as it read in 1925. But the 1935 amendment of the Inheritance Tax Act unmistakably shows the intent of the legislature that such statute should apply only to "intangible personal property" in that status at death, as the companion provision in Probate Code section 201.5 applies only to "personal property" in that status at death. Thus language in the two inextricably related statutes is given the same meaning to effect the legislative intent on a common subject matter. 23 Cal.Jur., sec. 128, p. 754; Jameson Petroleum Co. v. State of California, 11 Cal.App.2d 677, 680, 54 P. 2d 776.

In passing, it might be said that the question of the import of prior administrative construction of section 1, subdivision (2), of the Inheritance Tax Act of 1935 does not arise here. Examination of the pertinent regulation cited by respondent shows it to be only a restatement of the statute in its reference to "intangible personal property," without attempt to clarify the meaning of the language therein used. As such, it has no significance in relation to the problem of statutory interpretation presented by this case.

Consistent with the foregoing discussion, it was proper for appellant to treat the real property in question as separate property and to compute the inheritance tax upon that basis; and the probate court erred in sustaining respondent's claim of "community exemption" in regard to such property.

The order is reversed, with directions to the probate court to fix the inheritance tax payable by respondent in accordance with the views expressed herein.

GIBSON, C. J., and SHENK, EDMONDS CARTER, TRAYNOR, and SCHAUER, JJ., concur.

31 Cal.2d 117

ANDERSON v. ATCHISON, T. & S. F. RY. CO.

No. L. A. 20037.

Supreme Court of California.
Dec. 12, 1947.

1. **Trial** ⚷158

A motion to exclude evidence by reason of failure of complaint to state a cause of action is in nature of a general demurrer, and may be sustained only if allegations of complaint, which are deemed true for purpose of motion, are totally insufficient to support a judgment in plaintiff's favor.

2. **Commerce** ⚷8(6)
Courts ⚷97(5)

The expansion of doctrines of negligence to impose on employer a duty unknown at common law and neither defined in Federal Employers' Liability Act nor recognized by federal court decision is not within province of a state court in an action brought under such act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. **Commerce** ⚷8(6)
Courts ⚷97(5)

The rights and obligations of the parties to an action under Federal Employers' Liability Act depend upon terms of act and federal decisional law. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. **Commerce** ⚷8(6)
Master and servant ⚷87

The rights which Federal Employers' Liability Act creates are "federal rights" protected by federal, rather than local, rules of law, and federal rules have been largely fashioned from common law except as Congress has written different standards into the act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Rights".

5. **Master and servant** ⚷258(18)

In suit against railroad for death of conductor, complaint, alleging that conductor fell from train, that train departed without receiving conductor's signal, that no search was made for conductor within a reasonable time, and that, as a result of such negligence and conductor's exposure to inclement weather while he was helpless from injuries, he died, failed to state a cause of action for failure to allege any breach by railroad of duty imposed upon it either by Federal Employers' Liability Act or by common law or declared by federal decisions. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

CARTER and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Death action by Doris Anderson, administratrix of the estate of L. C. Bristow, deceased, against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion 174 P.2d 28.

Hildebrand, Bills & McLeod and Louis H. Brownstone, all of San Francisco, for appellant.

Jennings & Belcher and Louis E. Kearney, both of Los Angeles, for respondent.

SCHAUER, Justice.

In this action plaintiff administratrix seeks damages under the provisions of section 51 of the Federal Employers' Liability Act (45 U.S.C.A.) for the wrongful death of her intestate, L. C. Bristow. When the matter came on for trial defendant objected to the introduction of any evidence, on the ground that the complaint fails to state a cause of action. The objection was sustained, judgment was entered in defendant's favor, and plaintiff appeals. The issue presented is forthrightly defined and the pertinent authorities are helpfully collected in the excellent briefs of counsel for the respective parties. After careful consideration of the briefs and arguments, and after independent research which has disclosed nothing persuasive to a contrary result, we have concluded, for the reasons hereinafter elucidated, that under applicable legal principles the judgment must be affirmed.

[1] A motion to exclude evidence by reason of failure of the complaint to state a cause of action is in the nature of a general demurrer and may be sustained only if the allegations of the complaint, deemed true for this purpose, are totally insufficient to support a judgment in plaintiff's favor. See Rannard v. Lockheed Aircraft Corporation, 1945, 26 Cal.2d 149, 151, 157 P.2d 1; Calhoun v. Calhoun, 1947, 81 Cal.App.2d 297, 183 P.2d 922.

Section 51 of the Federal Employers' Liability Act (45 U.S.C.A.) provides, so far as here material, that "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

Plaintiff's complaint, as amended, alleges in material part that on November 24, 1942, at about 5:30 a. m., the deceased, L. C. Bristow, who resided at Clovis, Curry County, New Mexico, was employed as a conductor on defendant's passenger train which was then "westbound from Amarillo, Texas, to Belen, New Mexico, at a point approximately opposite defendant's station at Gallaher, Curry County, New Mexico"; that as one of his duties deceased was then "checking a certain train order signal at said station from the rear vestibule of said train" and while so doing fell from the train and suffered injuries which "made it impossible" for him to secure help; that defendant's train "then proceeded on past defendant's stations at St. Vrain, Melrose, Taiban and Ft. Sumner until said train arrived at Yeso, New Mexico; that at each of said stations said train was caused to come to a stop and at each point defendant, acting by and through its agents, servants and employees, other than decedent, carelessly and negligently failed to ascertain the whereabouts of decedent, notwithstanding the fact that certain employees of defendant on said train made note of the absence of decedent; that at Yeso the regular conductor of said train finally directed a wire to be sent to other employees of defendant asking such employees to ascertain the whereabouts of decedent and decedent was subsequently found lying alongside defendant's right of way adjacent to the point where he fell off the train. That when said message was finally transmitted to certain employees of defendant, at defendant's station at Yeso, defendant, its agents servants and employees, carelessly and negligently failed to transmit said message to Clovis, or any other station of defendant's [sic], for an unnecessarily long period of time; that when said message was transmitted to Clovis, defendant, its agents, servants and employees at said station, carelessly and negligently failed to institute and pursue a search for decedent within a reasonable period of time. That as a direct and proximate result of the carelessness and negligence of defendant in the premises, as aforesaid, and the exposure in very cold weather occasioned thereby, said L. C. Bristow was caused to die on the 27th day of November, 1942."

Plaintiff states that on this appeal the issue presented is whether or not a railroad company "that has notice of the absence of an employee from a moving train is under a duty to use ordinary care to ascertain his whereabouts and render aid to him." No allegation or claim is made that the deceased's original injuries resulted from any negligence on the part of defendant, or its officers, agents or employees. (Nor, it is noted, does plaintiff allege that the train was moving at the time the deceased fell from it. The allegations in respect to the circumstances of the fall are, as previously set forth, that while the train was "at a point approximately opposite defendant's station at Gallaher * * * [deceased was] checking a certain train order signal at said station from the rear vestibule of said train" and while so doing fell from the train.) There is no allegation that defendant company had notice or knowledge of the injuries of deceased in sufficient time to have rendered or procured aid that would have saved his life; there is not even an allegation that defendant had notice or knowledge that decedent had fallen from the train or had left it otherwise than intentionally while it was standing at the station mentioned.

[2] Plaintiff argues "that under the law, as it stands today, from the moment that the master has notice of an injury to his servant and of the fact that the servant is unable to aid himself, and whether or not the injury has been caused by any negligence of the master, the master is under a duty to use ordinary care to obtain medical and surgical aid for the employee. If, as a result of a breach of that duty, the injuries to the servant are aggravated, or the servant dies, recovery is allowed," and "that *the time has come to expand this doctrine one step further and to impose a duty upon the employer to use ordinary care to ascertain the whereabouts of a missing employee who is employed on a moving train* so that care may be given to such employee in the event that he is injured." (Italics added.) The rule of law (as to duty of an employer who *has notice* of injury to his servant) from which outpost plaintiff asks us to take the one step further, has been announced in some jurisdictions (see Hunicke v. Meramec Quarry Co., 1914, 262 Mo. 560, 172 S.W. 43, 54, L.R.A. 1915C, 789, Ann.Cas.1915D, 493; Troutman's Adm'x v. Louisville & N. R. Co., 1918, 179 Ky. 145, 156, 200 S.W. 488, 494; cf. Carey v. Davis, 1921, 190 Iowa 720, 180 N.W. 889, 12 A.L.R. 904), but cases in other jurisdictions, including California, have taken the opposite view (see Hackelberry v. Sherlock Land etc. Co. 1919, 39 Cal.App. 764, 767, 768, 180 P. 37; Voorhees v. New York Cent. & H. R. R. Co., 1909, 129 App. Div. 780, 114 N.Y.S. 242, 244; affirmed in 198 N.Y. 558, 92 N.E. 1105; Allen v. Hixson, 1900, 111 Ga. 460, 36 S.E. 810; Denver & R. G. R. Co. v. Iles, 1898, 25 Colo. 19, 53 P. 222, 225; Matthews v. Carolina etc. Ry. Co., 1917, 175 N.C. 35, 94 S.E. 714, L.R.A. 1918C, 899; Virginia Iron, Coal & Coke Co. v. Odle's Adm'r, 1920, 128 Va. 280, 105 S.E. 107; Stager v. Troy Laundry Co., 1901, 38 Or. 480, 63 P. 645, 648, 53 L.R.A. 459.) However, in the present case we do not pass on that rule for even if we assume for purposes of this decision that we should, if the question were again presented, disapprove the Hackelberry case and adopt the contrary view, we are satisfied that we should not take the "further step" urged by plaintiff. It is not, we think, the province of a state court, in an action brought under the Federal Employers' Liability Act, to "expand" the doctrines of negligence to impose on the employer a duty unknown at common law and neither defined in the act nor recognized by federal court decision.

[3, 4] It has been often pointed out that "the rights and obligations of the parties to an action arising under the Federal Employers' Liability Act depend upon the terms of that Act and the federal decisional law. * * * The question of negligence * * * must be determined not by the decisions of state tribunals ruling on questions of negligence arising under the laws of the states but by the decisions of the federal courts interpreting the Federal Employers' Liability Act." (Jacobs v. Reading Co., 3 Cir., 1942, 130 F.2d 612, 614.) "The rights which the Act creates are federal rights protected by federal rather than local rules of law. [Citations.] And those federal rules have been largely fashioned from the common law * * * except as Congress has written into the Act different standards." (Bailey v. Central Vermont Ry. Co., 1942, 319 U.S. 350, 353, 63 S.Ct. 1062, 1063, 87 L.Ed. 1444, 1447; see also Haskins v. Southern Pac. Co., 1934, 3 Cal.App.2d 177, 183, 39 P.2d 895; King v. Schumacher, 1939, 32 Cal.App.2d 172, 177, 89 P.2d 466; Southern R. Co. v. Gray, 1915, 241 U.S. 333, 339, 36 S.Ct. 558, 60 L.Ed. 1030, 1034; Sadowski v. Long Island R. Co., 1944, 292 N.Y. 448, 55 N.E.2d 497, 499.) Thus, in an action brought under the act in which the intermediate appellate court of Ohio, on a question of defense of assumption of risk, had followed decisions of the Ohio Supreme Court rather than those of federal courts, the Supreme Court of the United States reversed the judgment, and observed that "in proceedings under [the Federal Employers' Liability Act] * * * the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts. [Citations.]

"The court of appeals acted upon the erroneous theory that it should follow the views of the Supreme Court of the state rather than those of this Court in respect of questions arising under the liability act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, federal and state. [Citation.] Where this view is not accepted, as in the present cause, it is within the power of this Court to determine and apply the proper remedy." (Chesapeake & O. R. Co. v. Kuhn, 1931, 284 U.S. 44, 47, 52 S.Ct. 45, 46, 76 L.Ed. 157, 160.)

So far as we have discovered, the point here in issue has not yet been presented to a federal court, and the highest courts of the only two states in which it has arisen have decided adversely to the position of plaintiff in the present case. In Batton v. Atlantic Coast Line R. Co., 1936, 210 N.C. 756, 188 S.E. 383, an action brought under the Federal Employers' Liability Act, plaintiff alleged that while he was performing his duties as a flagman on defendant's train at Weldon, North Carolina, he fell from a platform and suffered injuries which rendered him helpless; that he was not discovered until approximately five hours later; that defendant was negligent in not discovering plaintiff's absence and locating and assisting him promptly; and that as a result of such alleged negligence plaintiff suffered from exposure to the cold and inclement weather and his injuries received from falling were greatly aggravated. It was also alleged that it was plaintiff's duty as flagman to give a signal to the engineer at each stop; that without such a signal the engineer started the train from Weldon in violation of instructions and custom; and that even after the train left Weldon the other members of the train crew should have discovered plaintiff's absence inasmuch as they were instructed, and it was their custom, to get his signals at each stop, and in the absence of such signals they should have known he was missing and have taken prompt steps to discover his whereabouts and condition. On demurrer the trial court, as here, held the facts alleged insufficient to constitute a cause of action and rendered judgment accordingly. On appeal the Supreme Court of North Carolina, affirming the judgment, stated (188 S.E. at pages 387, 388): "'In the absence of a statutory or contractual obligation, there is, as a general rule, no duty resting upon the employer to provide surgical or medical attendance or medicine for an employee who is injured or becomes ill while in his employment, except perhaps in a case in which the employee gives service without compensation.

"'However, there is a tendency upon the part of the Courts to hold that where in the course of his employment a servant suffers serious injury or is suddenly stricken down in a manner indicating immediate and emergent need of aid to save him from death or serious harm, the master, *if present,* is bound to take such reasonable measure or make such reasonable effort as may be practicable to relieve him, even though the master is not chargeable with fault in bringing about the emergency, and in some jurisdictions it is said to be the duty of the employer to provide medical or surgical assistance in the case of an emergency where it is imperatively demanded to save life or prevent serious bodily injury.' * *

"In the instant case, it is not alleged in the complaint that any of the employees of the defendant was present at the time the plaintiff fell from the platform at Weldon, or that the defendant had *actual knowledge* of the condition of the plaintiff as the result of his fall. Nor are facts alleged in the complaint from which it can be held that the defendant had constructive knowledge of such condition. At most, the defendant knew when and after its train left Weldon that the plaintiff while engaged in the performance of his duties as a flagman on said train *had disappeared* from the platform and had not returned to the train. This knowledge did not impose upon the defendant or any of its employees the duty to make an investigation to discover the cause of plaintiff's disappearance from the platform or failure to return to the train. The plaintiff may have disappeared from the platform and failed to return to the train, while it was standing at the station at Weldon, voluntarily. No facts are alleged in the complaint which imposed upon the defendant or its employees the duty to presume to the contrary.

"Conceding that if the defendant had known that the plaintiff had fallen from the platform at Weldon, and had thereby suffered injuries which required immediate attention, medical or otherwise, the law would have imposed upon the defendant the duty to exercise reasonable diligence to provide such attention, we cannot hold that in the absence of such knowledge such duty was imposed upon the defendant. We therefore find no error in the judgment dismissing the second cause of action alleged in the complaint. The judgment is affirmed." (Italics added.)

Haggard v. Lowden, 1943, 156 Kan. 522, 134 P.2d 676, 677, was also brought under the Federal Employers' Liability Act, and an appeal was taken "from an order sustaining a demurrer" to plaintiff's complaint. There plaintiff administratrix alleged that her intestate Haggard, was a conductor on a freight train; that while inspecting the train at Topeka, Kansas, as his duties required, he "was rendered unconscious by a blow on the head" from an unknown source; that the blow itself was insufficient to produce death; that the other members of the train crew, who had been at an eating house, upon returning to the train failed to see Haggard at his accustomed place on or along the train, failed to "exercise ordinary care of prudent persons in determining" his whereabouts, and, although Haggard was the only person authorized to order the movements of the train on its journey, continued the run without knowing where he was or what had happened to him and without attempting to locate him or determine the reason for his absence; that he was left lying unaided for approximately two hours, until discovered by police, and suffered loss of blood and from exposure and lack of prompt medical care which proximately caused his death but which could have been averted if defendants' employees had promptly located and aided him or reported his absence; and that the acts and omissions of defendants and their employees were the proximate cause of his death. The Supreme Court of Kansas, citing the Batton case, supra, affirmed the order appealed from. In so doing it stated the issues and the applicable principles of law as follows (Page 678 of 134 P.2d):

"Where a conductor in interstate commerce is seriously injured from an unknown cause, while performing his duties at a stopping point, and under circumstances where he could have been found and his death prevented by the exercise of care by other members of the train crew, does their failure to so discover him constitute actionable negligence under the federal employers' liability act; and, under such circumstances, where the other trainmen, in alleged violation of company rules, started the train without making any effort to locate the injured conductor, and without discovering his predicament or reporting his absence, thereby delaying securing of medical care until too late to prevent his death which would not have otherwise occurred, does the violation of the rules constitute actionable negligence under the above act? * * *"

(Page 679 of 134 P.2d) "[I]t is conceded by the appellant, that the original injury sustained by Haggard was not occasioned by nor due to any negligence of the appellee. The substance of appellant's contentions is that appellees owed a duty to render aid to an injured employee, regardless of the cause of his injury; that the violation by their employees of company rules was the legal cause of Haggard's injuries not being sooner discovered so that aid could have been rendered, and that it was *not necessary* to liability that appellees have *actual knowledge* of Haggard's injuries at the time they were received by him.

"Without exposition, we think it may be said the appellees would be liable, both under the law and under the company's rules, for failure to render aid, adequate under the circumstances, to an employee injured in the course of his employment, from the time they had actual knowledge of the injuries. We need not pursue this rule further for under the allegations of the petition it cannot be said the appellees had such knowledge. On the contrary the allegations are that after Haggard received his injuries through appellees' negligence he was not found and was permitted to be unaided and without attention, his death resulting from his exposure and lack of medical care. * * *"

(Page 680 of 134 P.2d) "Appellant contends that in order for the company to be liable for negligence, it was not necessary the train crew have actual knowledge that Haggard had been injured, and that the appellees' contention that duty to extend care and aid did not arise until their employees knew of the injuries is too narrow, and that if the train crew knew or should have known that Haggard was in a position of danger, there was negligence in failure to assist him. In support of her contention, appellant does not cite any authority specifically in point, but she directs our attention largely to decisions dealing with injuries sustained in switching cases. * * None of the cases cited support the contention that under circumstances similar to those here involved, notice of the injury is not necessary. * * *"

(Page 681 of 134 P.2d) "We are of opinion that, under the circumstances of this case, the company was not negligent in not extending aid to its injured employee, when it was not aware of such injuries." (Italics added.)

Although, as above stated, we are aware of no federal decision upon the issue here involved, we note that in Cortes v. Baltimore Insular Line, 1932, 287 U.S. 367, 371, 377, 53 S.Ct. 173, 174, 77 L.Ed. 368, 371–374, the court in discussing the liability of shipowners under the Merchant Marine Act of 1920 (41 Stat. at L. 1007, Chap. 250, § 33, U.S.C.A. title 46, § 688) and the bearing of the Federal Employers' Liability Act and decisions thereunder upon the liability of an employer whose negligence had caused personal injury to a seaman declared (speaking through Mr. Justice Cardozo) "The question then is to what extent the ancient rule has been changed by modern statute. * * * We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute. * * * So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty, but the quality of the duty that is born of the relation. * * The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead. * * We are warned, however, that, in giving this content to the statute, we are omitting to give heed to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted. * * True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. * * We do not read the act for the relief of seaman as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. * * * There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act * * * because of the failure of the crew of the train to come to the rescue of their comrade. [Citation.] There is little doubt that rescue is a duty when a sailor falls into the sea, United States v. Knowles, D.C., 4 Sawy. 517, Fed. Cas. No. 15,540, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. [Citations.]

"The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. [Citations.] Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman * *; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail."

[5] Here it does not appear to us that the pleaded facts from which, if the plaintiff is to recover, the breach of duty essential to the cause of action must be derived, disclose any pertinent duty either defined by the act, recognized at common law, or declared by federal decision. As to whether, as urged by plaintiff, "the time has come to expand * * * [the] doctrine [of employer's liability] one step further and to impose a duty upon the employer to use ordinary care to ascertain the whereabouts of a missing employee who is employed on a moving [but sometimes standing] train so that care may be given to such employee in the event that he is injured," we express no view. We are of the view, however, that until and unless such duty is declared by the federal courts we should not, in Federal Employers' Liability Act cases, undertake "expansion" of the common law doctrines of negligence through annexing, by our decision, to an old relation a new quality of duty and thus to impose liability where it is not clearly created by the act in question; the urged innovation in federal law, if it is to come at all, must derive from a federal source.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The legal issue here is whether an employer owes a duty to his employee to render aid when he has been injured in the course of his employment or, under appropriate circumstances, to take preliminary steps to ascertain whether or not his employee is in need of assistance, and if so, to render such aid as may be reasonable under the circumstances. Stated another way the question is whether the employer is guilty of negligence when he fails to exercise ordinary care to ascertain if his employee has suffered an injury in the course of his employment, and if so, to render aid to him. The "appropriate circumstances" in the instant case consist of the chief member of a train crew (a conductor) being missing from the train to the knowledge of the train crew while it is traveling through and over isolated country, and the duties of the conductor require him to be active both on and off the train; the train passed several stations and no report of his absence was made. The majority opinion declares that *no duty whatsoever* is owed by the employer, at least until he has actual knowledge that his employee has suffered an injury. It would apparently find no such duty where a member of the crew, in the course of his duties, was last seen climbing to the top of a train traveling at high speed through an uninhabited country during a violent snowstorm and failed to return. No duty being present there could be no liability, though the only steps necessary to save the absent man would be to look for him.

The majority opinion is founded upon two basic fallacies: First, it is held that because there is no *federal court* case involving the precise situation here presented, then the state court is helpless to fasten liability on the employer even though reasonable minds might differ as to whether its conduct constituted negligence. For illustration, it is said: "It *is not,* we think, *the province of a state court,* in an action brought under the Federal Employers' Liability Act, to *'expand'* the doctrines of negligence to impose on the employer a duty unknown at common law and neither defined in the act nor recognized by federal court decision." And later in the opinion: "As to whether, as urged by plaintiff, 'the time has come to expand * * * [the] doctrine [of employer's liability] one step further and to impose a duty upon the employer to use ordinary care to ascertain the whereabouts of a missing employee who is employed on a moving [but sometimes standing] train so that care may be given to such employee in the event that he is injured,' we express no view. We are of the view, however, that *until and unless such duty is declared by the federal courts we should not,* in Federal Employers' Liability Act cases, undertake 'expansion' of the common law doctrines of negligence through annexing, by our decision, to an old relation a new quality of duty and thus to impose liability where it is not clearly created by the act in question; the urged innovation in federal law, if it is to come at all, *must derive from a federal source.*" [Emphasis added.]

The majority opinion is patently inconsistent. It holds that this court cannot declare the federal law to be that defendant owed a duty of care to investigate the employee's absence from the train because no federal court has so held. *Neither, as it admits, has any federal court held there is no such duty.* There is, therefore, no declared federal law on the subject. That being the case, under the theory of the majority opinion, the only course open to this court is to declare that it does not know what the federal law is—that this court is powerless to state, on its own initiative, what the federal law should be. That necessarily requires a dismissal here of the action without prejudice and leaving the employee to his redress in the federal court, all because of the impotence of this court to declare the federal law. But the majority opinion does not do this. It first states that this court cannot apply the federal law because there is none. Then it proceeds to announce the federal law by concluding that no duty was owed by defendant. Certainly if this court cannot decide there is a duty, neither can it decide there is no duty. The absurdity of such a position is manifest. It gives substantiality to the frequent occurring criticism by laymen of the court's inability to solve the problems presented to them in a manner that accords with common sense and simple justice. In Meredith v. Winter Haven, 320 U.S. 228, 234, 64 S.Ct. 7, 88 L.Ed. 9, under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, the lower federal court refused to decide the case because it felt it could not ascertain the state law. The Supreme Court of the United States declared that it must determine the state law, stating [320 U.S. 228, 64 S.Ct. 11]: "But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

"The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. * * * denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act. * * *

"Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain." Conversely in the instant case it is this court's duty under the Federal Employers' Liability Act to decide the federal law.

No one questions that the federal court cases are controlling on the question of whether there is negligence at common law in the particular case under the Federal Employers' Liability Act. *But where there are no federal cases on the subject then the state courts must declare the law.* It is only where there are such cases on the subject that the state courts are left with the sole course of following them. It is to be noted that the state courts are expressly given jurisdiction over cases under the act. (45 U.S.C.A. § 56.) If the majority opinion is correct then every time a set of circumstances is presented upon which a federal court has not passed, the state court must deny relief. The innumerable factual backgrounds that may be the predicate for negligence and the countless changes and constant growth in the conception of the duties owed by one person to another, compel a recognition of the rule that in the absence of a controlling federal rule on the subject the state courts must perform their duty and arrive at a conclusion that is just and in harmony with current conditions.

There is a close analogy in another field of law. Since Erie R. Co. v. Tompkins, supra, the federal courts must apply the state law when the cases are there by reason of diversity of citizenship. If the state law on the subject cannot be ascertained because of lack of state court decisions, the federal court must state the rule. See, MacGregor v. State Mutual Co., 315 U.S. 280, 62 S.Ct. 607, 86 L.Ed. 864; Meredith v. Winter Haven, supra; Concordia Ins. Co. v. School Dist., 282 U.S. 545, 51 S.Ct. 275, 75 L.Ed. 528; Henry W. Putnam Memorial Hospital v. Allen, 2 Cir., 34 F.2d 927; 92 U.Pa.Law Rev. 330. Conversely in the instant case there being no federal cases to follow this court must decide what is the federal law on the subject.

The question therefore is to ascertain the common law as it would be declared by the federal court. In making that determination we must consider the scope and meaning of the term negligence in the Federal Employers' Liability Act, and the mode of ascertaining whether it exists.

Second, the majority opinion erroneously holds that no duty rested upon an employer to ascertain the whereabouts and condition of decedent conductor though it knew through its crew that decedent was missing while the train was traversing an isolated area.

It should be observed at the outset that the old common law notion that the employer owes very little, if any duty, to his employee, is and has been for many years outmoded and unsuited to modern employer-employee relations. It is aptly said: "The extent of the master's responsibility, although it was said to rest upon the understanding of the parties undoubtedly was fixed by the courts upon the *basis of industrial conditions, and a social philosophy and an attitude toward labor, which are long since outmoded.* The cornerstone of the common law edifice was the economic theory that there was complete mobility of labor, that the supply of work was unlimited, and that the workman was an entirely free agent, under no compulsion to enter into the employment. He was expected therefore to accept *and take upon himself all of the usual risks of his trade,* together with any unusual risks of which he had knowledge, and to relieve his employer of any duty to protect him. The economic compulsion which left him no choice except starvation, or equally dangerous employment elsewhere, was entirely disregarded. The employer's responsibility was limited to certain rather specific obligations, which it was felt that any workman had the right to demand. Even as to these obligations, the employer was not an insurer of safety, and was liable only for a failure to exercise reasonable care; and in addition, he was not responsible for the negligence of fellow-servants of the injured workman, as distinguished from the employer's own misconduct. The result was that for the great majority of industrial accidents there was no recovery, either because no lack of proper care could be charged against the employer, or because the workman was taken to have assumed the risk." [Emphasis added.] Prosser on Torts, p. 506. The principle that the master owes a duty to his employee is recognized in the Restatement: "(2) If a servant is hurt and thereby becomes helpless when acting within the scope of employment in an isolated place, or in a dangerous activity from a risk arising therefrom, and this is known to the master or to a person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to such servant and to care for him until he can be cared for by others. * * * *Not only does a master have a duty to a servant when a danger to him becomes imminent or when a risk has resulted in harm to him, but he may also have a duty before the existence of such imminence of risk or harm to provide means of rescue or relief.* Thus, in a dangerous business where accidents are likely to happen frequently, the employer is under a duty to make provision for some means of taking care of employees who are hurt. This does not necessarily have to be furnished by him, but some provision must be made for its being furnished by some one." [Emphasis added.] Rest., Agency, sec. 512. Under the italicized sentence the employer undoubtedly owes a duty to investigate the absence of an employee under the circumstances present in the case at bar. The overwhelming weight of authority supports the proposition that the duty at least extends to first aid for an employee known to be injured. See, cases collected 7 Cal.L. Rev. 312; 17 Corn.L. Quarterly 505. *It has been recently held that there is such a duty under the Federal Employers' Liability Act.* Szabro v. Pennsylvania R. Co., 132 N.J.L. 331, 40 A.2d 562.

The term negligence as used in the Federal Employers' Liability Act is to be given a broad meaning. As said in Jamison v. Encarnacion, 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082: "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. * * * 'Negligence' is a word of broad significance and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning." It is therefore not an unjustified extension of the rule requiring the employer to give succor to an injured employee to demand that he at least make an endeavor under the proper circumstances to ascertain whether an employee has been injured or is in danger. At most it is only giving, as it must, a liberal construction to the term "negligence." He need only make such inquiries and effort as would a person of ordinary prudence to find what has happened to his employee. He must assume, under facts like we have here, that the employee has not voluntarily abandoned his duties. It is presumed that "a person is innocent of * * * wrong," Code Civ.Proc., sec. 1963 (1), that "the ordinary course of business has been followed," Code Civ.Proc., sec. 1963 (20), and that "things have happened according to the ordinary course of nature and the ordinary habits of life," Code Civ.Proc., sec 1963 (28). Thus it must be assumed in the instant case that the conductor was not voluntarily absent from the train. That being true it was incumbent on the employer to determine what had happened to him. The employer should anticipate that in all probability the employee was the victim of some accident. Accidents to railroad employees are far from uncommon. The employee has no one else upon whom he can depend. The matter is cogently set forth in Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 S.W. 43, L.R.A. 1915C, 789, Ann.Cas.1915D, 493, where the court was discussing the reason for the employer's liability for failure to render aid to an injured employee when he knew he was injured. The language is clearly equally applicable where the employee was missing and no effort was made to investigate. The court said (172 S.W. at page 54): "* * * that duty, in my opinion, grows out of the fact that, when we get down to the real facts in all such cases, there is an unexpressed humane and natural understanding existing between them to the effect that, whenever any one in such a case is so injured that he cannot care for himself, then the employer will furnish him medical or surgical treatment, as the case may be. This is common knowledge. There is not an industrial institution in this country, great or small, where that practice is not being carried on to-day; and that has been the custom and usage among men from the dawn of civilization down to the present day, and will continue to be practiced in the future, just so long as the human heart beats in sympathy for the unfortunate and desires to aid suffering humanity. The same principle underlies all other avocations of life. Even armies, while engaged in actual warfare, observe and obey this rule when possible. The soldier who refuses to render surgical or medical aid to the victim of his own sword is eschewed by all decent men, while, upon the other hand, all who administer to the wants and necessities of the sick and wounded are considered as God's noblemen and as princes among men."

As hereinbefore stated, the legal issue here is whether the employer owed a duty to investigate the absence of the employee under the circumstances here presented. In my opinion it should be declared to be the law of this state and also the federal law that it owed such duty. This being determined as a matter of law, the question of whether such duty was violated in this case is for the trier of fact. The degree of care required by railroads toward their employees is commensurate with the known dangerous character of railroad operations. Under such circumstances the *question of negligence in this case should have been left to the jury*. In Blair v. Baltimore & O. R. Co., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490, the United States Supreme Court was considering a case under the Federal Employers' Liability Act, after a jury had found negligence but the Supreme Court of Pennsylvania found none. The court held the issue to be one to be decided by a jury, stating in 323 U.S. at page 602, 65 S.Ct. at page 546, 89 L.Ed. 490: "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' Bailey v. Central Vermont R. Co., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 [1447]. * * * We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes "more imperative" as the risk increases.' Bailey v. Central Vermont R. Co., 319 U.S. 350, 352, 353, 63 S. Ct. 1062, 1063, 1064, 87 L.Ed. 1444 [1446, 1447]. See also Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610 [617] 143 A.L.R. 967. * * * We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part.' Consequently we think the jury, and not the court should finally determine these issues." We find language to the same effect in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610, 143 A.L.R. 967: "No case is to be withheld from a jury on any theory of assumption of risk and *questions of negligence should under proper charge from the court be submitted to the jury for their determination.* Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee V. & G. R. Co., 128 U.S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences', the case should go to the jury." And in a foot note the following: "It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury." (See, also, Bailey v. Central Vermont Ry., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1440.) Thus in the instant case it cannot be doubted that the question of negligence is at least a "close" one. Being such, *under federal law it must be submitted to a jury* and not decided as a matter of law as does the majority decision.

The cases of Batton v. Atlantic Coast Line R. Co., 210 N.C. 756, 188 S.E. 383, and Haggart v. Lowden, 156 Kan. 522, 134 P.2d 676, relied upon by the majority opinion fail to consider the factors heretofore discussed. With little discussion they merely state a contrary rule, making no endeavor to ascertain or apply the federal law. No application for review by the Supreme Court of the United States was made in either case. Hence they do not even indirectly stand for the common law as declared by the federal courts. Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S.

Ct. 173, 77 L.Ed. 368, is not in point. The most that appears is that there may be doubt that the rule of rescue of an employee applies other than to ships at sea. As before seen under those circumstances the plaintiff is entitled to have the issues decided by a jury. But in a very recent case (decided November 24, 1947) the Supreme Court of the United States by an unanimous decision reversed a federal district court and Circuit Court of Appeals decision which held that a railroad company was not liable under the Federal Employers' Liability Act for injuries to an employee as the result of a felonious attack by a third person, not an employee of the company. The only reference in the opinion of the Supreme Court to any common law on the subject was a comment contained in the Restatement of Torts promulgated by the American Law Institute. Lillie v. Thompson, 68 S.Ct. 140. I do not cite this case as authority in support of plaintiff's position in the case at bar but simply to illustrate that the common law applicable to cases arising under the Federal Employers' Liability Act may be found elsewhere than in the decisions of the federal courts. My position is that since there are no decisions either by the federal courts or courts of this state to the contrary, this court should decide what the law should be. There is nothing new or unusual about this. We do it quite often, and when we do, we are announcing a rule of law which becomes the common law of this state. When a cause of action arises under the Federal Employers' Liability Act, and we find no federal cases laying down a contrary rule, we follow the rule which we have adopted. Otherwise, no action could be brought in a state court under the Federal Employers' Liability Act involving any legal question which had not already been decided by the federal courts. If such were the law, the provision in the act providing for concurrent jurisdiction would be of little value to an injured employee who desires to bring his action in a state court under this provision of the act.

In announcing such a rule of law all that is necessary for the members of this court to decide is that the complaint in this action alleges a factual situation which shows a violation of a duty by defendant. In such case plaintiff has stated a cause of action. In determining whether or not defendant owed such duty, we take into consideration the relationship of employer and employee which existed at the time of the accident, the nature of the employment, the duties of the employee and whether or not it is consonant with modern concepts of justice, fairness and ordinary human impulses that the employer should take sufficient interest in the welfare of his employee to investigate his absence from the train under the circumstances alleged in the complaint. If the court concluded that reasonable consideration for the safety of an employee would justify such an investigation, then we would conclude that the employer owed such a duty, and that would be the common law rule of this state.

Let us assume that on a stormy night when the snow was several feet deep in the Sacramento Canyon in Northern California, a brakeman who got on a train at Dunsmuir was observed missing after the train had left Dunsmuir half an hour and before it had stopped at any station; that although the other members of the crew knew that if he had fallen off the train in that locality he woud be apt to perish from exposure within a few hours, they nevertheless failed to send word back to Dunsmuir or make any report of his absence until the train arrived at Sacramento some ten hours later, and that they could have reported his absence within half an hour after he disappeared; that when he was found,, he had only minor injuries due to the fall from the train but he was dead as the result of being exposed to the elements for several hours. In view of the provisions of the Federal Employers' Liability Act abolishing the defenses of assumption of risk and negligence of a fellow servant, could we say that under the state of the facts narrated a railroad company did not owe a duty to that employee to investigate his absence and render such assistance to him as might have been necessary to save his life? If such a case were submitted to this court, a decision holding that such a duty existed would be the common law of this state. That is all there is to this case so far as the law is concerned. So far as the facts are concerned, it would be a question for the trier of fact to determine whether or not the duty was violated, and if it was, whether such violation constituted negligence for which the defendant would be liable.

This would not be adding a new duty to the relationship of employer and employee, it would be simply recognizing a duty which should have always existed, but which had not been the subject of a judicial proceeding so far as this state or the federal courts are concerned. If this court or the Supreme Court of the United States had held that such a duty did not exist under the Federal Employers' Liability Act, I would agree with the majority opinion that there is no liability on the defendant in this case, but it admits that there are no such cases either of this court or any federal court and that any decision which we render will be the first of its kind in this state.

It should be remembered that when the so-called common law rule referred to in the majority opinion was evolved, the defenses of assumption of risk, negligence of a fellow-servant and contributory negligence were available to an employer in an action brought by his employee for personal injuries or by his heirs under wrongful death statutes, and that the Federal Employers' Liability Act completely abrogates and abolishes the first two of these defenses and modifies the third, thus completely changing the philosophy upon which the employer's liability for injury or death of his employee was based at common law. In other words, the common law rule which should be evolved in view of the philosophy enunciated in the Federal Employers' Liability Act should be based upon the modern concept of the relationship between employer and employee rather than the more conservative and outmoded concept of the common law relationship antedating the adoption of the Federal Employers' Liability Act and other similar acts by national and state Legislatures which extend greater protection to employees than was accorded under the conservative philosophy upon which the so-called common law rule was based. For these reasons I am convinced that a railroad company should be held liable under the Federal Employers' Liability Act for the injury or death of its employee under the circumstances presented in the case at bar and the judgment rendered by the trial court in this case should be reversed.

TRAYNOR, J., concurs.

31 Cal.2d 184

PEOPLE v. McRAE.

Cr. 4823.

Supreme Court of California, in Bank.

Dec. 17, 1947.

Rehearing Denied Jan. 15, 1948.

1. Criminal law 🔑507(7)

In prosecution for sexual offense committed with 15 year old boy not shown to lack normal mentality, boy who submitted to the act without objecting, knowing that it was wrongful, was an "accomplice" whose testimony must be corroborated. Pen. Code, §§ 288a, 872, 995, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑510

The requirement of corroboration of accomplice is in addition to doctrine of reasonable doubt, and requires acquittal if accomplice testimony is not corroborated, even if jury is convinced of guilt to a moral certainty. Code Civ.Proc. § 2061, subd. 4; Pen.Code, § 1111.

3. Criminal law 🔑238

Less evidence is required to support a determination of probable cause for commitment than of guilt for conviction.

4. Criminal law 🔑238

In determining probable cause to hold a defendant, magistrate is not bound by rule that there must be no reasonable doubt as to guilt.

5. Criminal law 🔑238

Magistrate could hold defendant to answer information though only evidence at preliminary hearing was testimony of accomplice as complaining witness. Pen. Code, §§ 288a, 872, 995, 1111.

SCHAUER and CARTER JJ., dissenting.

Appeal from Superior Court Sacramento County; Raymond T. Coughlin, Judge.

Proceeding by the People of the State of California against Robert V. McRae for violation of section 288a of the Penal Code. From an order granting defendant's motion to set aside the information, the People appeal.

Reversed.

Prior opinion, 181 P.2d 965.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld and Clarence A. Linn, Deputy Attys. Gen., for appellant.

Peter Mannino and C. K. Curtright, both of Sacramento, for respondent.

TRAYNOR, Justice.

Respondent was charged in an information with violating section 288a of the Penal Code. The only evidence at the preliminary hearing was the testimony of the complaining witness. The magistrate held respondent to answer. The People appeal from an order of the Superior Court granting respondent's motion under section 995 of the Penal Code to set aside the information on the ground that he was committed without reasonable or probable cause.

Respondent contends that the complaining witness was an accomplice and that his testimony, which was uncorroborated, could not support a determination by the magistrate under section 872 of the Penal Code that there was sufficient cause to believe respondent guilty of the offense charged. Respondent relies on section 1111 of the Penal Code, which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense * * *." Appellant contends that the complaining witness was not an accomplice and that even if he was, his uncorroborated testimony could support the commitment, since section 1111 prohibits only a conviction based solely upon the uncorroborated testimony of an accomplice.

[1] According to his testimony the complaining witness submitted to the act committed upon him without resisting or objecting to respondent's conduct. He was 15 years of age, and there is nothing in his testimony to indicate that he lacked normal mentality. Since his testimony shows that he knew that the act was wrongful and that he willingly participated therein, it follows that he was an accomplice. People v. Robbins, 171 Cal. 466, 472, 154 P. 317; People v. Tenner, 67 Cal.App.2d 360, 363, 154 P.2d 9; People v. Reynolds, 26 Cal. App.2d 219, 221, 79 P.2d 150; People v. Casey, 79 Cal.App. 295, 300, 249 P. 525; see People v. McCollum, 214 Cal. 601, 602, 7 P.2d 301.

It was held in Re Schwitalla, 36 Cal.App. 511, 172 P. 617, that a magistrate can hold a defendant to answer upon the uncorroborated testimony of an accomplice. "While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered, and we think it sufficient to make it appear that there is a 'probability' that a defendant has been guilty of the offense charged against him." 36 Cal.App. 511, 512, 172 P. 617, 618. This case was followed by the Circuit Court of Appeals for the Ninth Circuit in Curreri v. Vice, 77 F.2d 130. A Minnesota statute that also required corroboration of the testimony of an accomplice to support a conviction was similarly construed in State v. Jeffrey, 211 Minn. 55, 300 N.W. 7.

Respondent contends that the Schwitalla case was erroneous and should be disapproved, on the ground that it construed section 1111 according to its literal terms without regard to its underlying policy that testimony of an accomplice must be regarded with distrust. He contends that this policy governs the testimony of an accomplice at a preliminary hearing as well as at a trial and that a commitment, like a conviction, cannot be based on the uncorroborated testimony of an accomplice.

Since the testimony of an accomplice comes from an untrustworthy source and may be given in expectation of immunity, it must be received by a jury with caution and distrust. Code Civ.Proc. sec. 2061(4); People v. Dail, 22 Cal.2d 642, 653, 654, 140 P.2d 828, and cases there cited. A committing magistrate should likewise receive the testimony of an accomplice with caution and distrust. A committing magistrate may nevertheless believe the testimony of an accomplice and conclude that there is probable cause to believe defendant guilty of a public offense to which he should be held to answer.

[2-5] Section 1111 supplements the policy that testimony of an accomplice shall be regarded with distrust by barring a conviction of a defendant based solely upon the uncorroborated testimony of an accomplice, even though such testimony may convince the jury beyond a reasonable doubt. "The requirement of section 1111 of the Penal Code is in addition to the requirement of the doctrine of reasonable doubt; it in effect says that even though the jury are convinced to a moral certainty that the defendant is guilty, yet they must acquit him if the testimony of the accomplice is not corroborated by other evidence which connects or tends to connect him with the commission of the offense charged." People v. Dillon, 68 Cal. App. 457, 477, 229 P. 974, 982; see People v. Clough, 73 Cal. 348, 353, 15 P. 5; People v. Negra, 208 Cal. 64, 280 P. 354; 8 Cal.Jur. 173; 2 Wharton, Criminal Evidence, 11th ed. 1225. Thus by prohibiting a conviction based solely upon the uncorroborated testimony of an accomplice, section 1111 precludes a result that might otherwise follow from such testimony. It is explicit and complete in defining the result that it precludes. In restricting its prohibition to a conviction, section 1111 is in harmony with the principle that less evidence is required to support a determination of probable cause for a commitment than a determination of guilt for a conviction. It is settled that in determining that there is probable cause to hold a defendant, a magistrate is not bound by the rule that there must be no reasonable doubt as to the guilt of a defendant, and that he may commit a defendant, even though there may be doubt as to his guilt. People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344; People v. Tallman, 27 Cal.2d 209, 212, 163 P.2d 857; People v. Mitchell, 27 Cal.2d 678, 681, 166 P.2d 10.

The order appealed from is reversed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. As held in the majority opinion the complaining witness is an accomplice; also as stated in the majority opinion the only evidence received at the preliminary hearing was the testimony of the accomplice. Such testimony, uncorroborated, was wholly incompetent for the proof of any fact (Penal Code, § 1111; 22 C.J.S., Criminal Law, § 813b; State v. Smith (1903), 138 Ala. 111, 35 So. 42, 100 Am.St.Rep. 26); standing uncorroborated the status of the case as to proof of guilt, probable cause, or any other fact is exactly the same as though no evidence whatsoever had been adduced.

The majority opinion errs, therefore, in applying the preliminary hearing rule as to quantum or persuasiveness of proof to a situation where there is *no* proof. I have no quarrel with the rule itself, which is that in a preliminary examination proceeding it is not necessary that a defendant be proved guilty beyond a reasonable doubt; that it is sufficient to warrant binding him over for trial if upon the proof it is reasonable to believe that the defendant is guilty of the offense charged (People v. Mitchell (1946), 27 Cal.2d 678, 681, 166 P. 2d 10, and cases there cited). Under this rule, even though the committing magistrate may view the testimony of an accomplice with caution, suspicion and doubt, he may legally, if the accomplice's testimony is corroborated, hold the defendant to answer. But if the testimony of the accomplice is left wholly uncorroborated and there is no other evidence of guilt then there is no competent evidence at all upon which the order of commitment can be based.

The majority opinion cites and relies upon In re Schwitalla (1918), 36 Cal.App.

511, 512, 172 P. 617, 618, wherein it is said that "While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered, and we think is sufficient to make it appear that there is a 'probability' that a defendant has been guilty of the offense charged against him." In my estimation the quoted statement is wholly erroneous and should be disapproved. Both the Schwitalla opinion and the majority opinion here err in failing to recognize that in dealing with accomplices' testimonies courts may be confronted with either of two materially different situations. One of those situations involves testimony which is competent and admissible but the weight of which is impaired; the other situation relates to testimony as to the weight of which there can be no question because it is wholly incompetent and cannot be considered at all.

Thus, as to the first type of situation, where a witness is shown to be an accomplice but his testimony is corroborated, his testimony is competent and admissible but the weight of it is impaired by the fact that he is an accomplice. The fact that he is an accomplice in itself impeaches him as a witness but when corroborated his testimony becomes competent and may be given whatever relative weight the trier of fact determines. But as to the second class of situation, where an admitted accomplice is permitted to testify and his testimony is left wholly uncorroborated, there can be no question as to the *weight* to be accorded his testimony; it is entitled to no weight whatsoever; it should be stricken from the record; it is wholly incompetent for the proof of any fact in a criminal case. "Where the statutes forbid a conviction on the uncorroborated testimony of an accomplice, it is held to be the duty of the court to direct an acquittal where there is no corroboration within the requirements of the statute, and, even though corroboration is not required by statute, it is held to be within the discretion of the trial court to direct an acquittal where the evidence consists solely of the uncorroborated testimony of an accomplice." (22 C.J.S., Criminal Law, § 813b.)

There is no satisfactory basis for holding that evidence which, in the accumulated wisdom of the law, is wholly incompetent to prove any fact in the superior court, or to be considered at all therein, shall be received and accepted as the sole and complete proof of every essential fact in the committing court. Again, I emphasize, we have here no question as to quantum or degree of proof; we have a total absence of any proof. The exact point now before us was before the Supreme Court of Alabama in State v. Smith (1903), supra, 138 Ala. 111, 35 So. 42, 43, 100 Am.St.Rep. 26; the statute of Alabama is substantially the same as ours. That court said, "The above conclusion leaves but one question in the case; that, is whether the uncorroborated testimony of an accomplice may be sufficient to show probable cause to believe that a felony has been committed, and that the party under inquiry is guilty thereof. * * * It is to be noted that this statute in terms operates only to prevent convictions of felony on the testimony of an accomplice. It does not, in terms, apply to preliminary examinations, nor to trials on habeas corpus, nor to the exclusion of a finding of probable cause for believing that an offense has been committed, and that the accused is guilty thereof, on such examination or trial. Yet, in our opinion, its effect is to stamp a policy upon the administration of the law in this connection which cannot be carried out unless it be given operation upon cases where the inquiry is probable cause vel non, as well as where the inquiry is as to absolute guilt. The statute infects the testimony of accomplices with such absolute infirmity as that not only may the citizen be not convicted upon it, but as also that he should not be deprived of his liberty in anticipation of a final trial upon it. A consideration of practicabilities in the administration of the criminal law, so to speak, would seem to enforce the same conclusion. Why should the citizen be held to the grand jury, or indicted by the grand jury, on testimony upon which no petit jury could possibly convict him? What good end could be served by such a proceeding?

Can there be said to be even probable cause shown in any case by testimony which the law expressly and positively declares to be insufficient to support a conviction? We think not. * * * To hold him would be a vain and useless thing, involving his incarceration not as a punishment for crime, and not really to the end that he should be tried for a crime charged of his probable guilt of which there is evidence to prove, but at the best upon a mere speculation that evidence may be found to corroborate that of the accomplice. The evidence before the probate judge in this case tending to show the guilt of the petitioner was that of the accomplice alone and uncorroborated. The judge correctly discharged the petitioner, and his order to that effect is affirmed." (See also In re Mitchell (1905), 1 Cal.App. 396, 401, 82 P. 347; Ex parte Oxley (1915), 38 Nev. 379, 149 P. 992, 994.)

As in State v. Smith, supra, the order of the trial court should be affirmed.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

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31 Cal.2d 217

CALIFORNIA MOTOR TRANSP. CO., Limited, v. STATE BOARD OF EQUALIZATION.

Sac. 5749.

Supreme Court of California, in Bank.

Dec. 19, 1947.

Rehearing Denied Jan. 15, 1948.

1. Taxation ⚷108

Persons may adopt any lawful means for lessening burden of taxes which in one form or another may be laid upon properties or profits.

2. Statutes ⚷245

Courts, in interpreting statutes levying taxes, may not extend their provisions by implication beyond the clear import of language used, nor enlarge upon their operation so as to embrace matters not specifically included.

3. Statutes ⚷245

In case of doubt, construction of statutes levying taxes is to favor taxpayer rather than government.

4. Automobiles ⚷78

That segregation of motor transport corporation's pick-up and delivery service in two cities from its highway transportation business between such cities might contribute to effecting a tax saving under Motor Vehicle Transportation License Tax Act was no ground for attack upon it, where there was no evidence of fraud or bad faith. Revenue and Taxation Code, §§ 9601–10501, 9651, 9653, 9701; Gen.Laws, Act 6386, §§ 2¾, 50¾.

5. Automobiles ⚷78

Where motor transport corporation operating both a pick-up and delivery service in two cities and a highway transportation service between such cities completely segregated the two operations and operated them as separate enterprises, corporation's receipts for intracity transportation of goods were exempt from license tax imposed by Motor Vehicle Transportation Act under provision in the Act exempting motor vehicles operating exclusively within incorporated cities and towns. Revenue and Taxation Code, §§ 9601–10501, 9651, 9653, 9701; Gen.Laws, Act 6386, §§ 2¾, 50¾.

TRAYNOR, J., GIBSON, C. J., and SPENCE, J., dissenting.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by California Motor Transport Co., Ltd., against State Board of Equalization to recover an amount paid under protest as taxes assessed against plaintiff under the State Motor Vehicle Transportation License Tax Act. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 178 P.2d 805.

Robert W. Kenny, of San Francisco, and Fred N. Howser, Atty. Gen., John L. Nourse and James E. Sabine, Deputy Attys. Gen., for appellant.

Norman A. Eisner, of San Francisco, for respondent.

SCHAUER, Justice.

Defendant board of equalization appeals from a judgment, rendered by the court sitting without a jury, in favor of plaintiff corporation in its suit to recover payments made by it under protest of sums which had been demanded by defendant as additional taxes and interest thereon due from plaintiff for the period of October 1, 1940, to December 31, 1942, under the California Motor Vehicle Transportation License Tax Law (see Stats.1933, p. 928, as amended, Stats.1935, p. 2176; Deering's Gen.Laws, 1937, Act 5130d), which was amended and transferred in 1941 (effective July 1, 1943) to the Revenue and Taxation Code (§§ 9601–10501). Inasmuch as the 1941 amendments did not materially alter those provisions of the law which are here involved, section numbers hereinafter cited will, unless otherwise specifically indicated, refer to the Revenue and Taxation Code.

The law provides for the licensing of operators of motor vehicles who for compensation transport persons or property upon any public highway within the state (§ 9701), and imposes upon such operators a license tax at the rate of 3 per cent of their gross receipts from the operations included within the law (§ 9651). The tax does not apply to "operators of motor vehicles operated exclusively within incorporated cities * * * [nor] to the gross receipts derived from the transportation of * * * property wholly within incorporated cities * * * where no portion of the public highway outside the corporate limits of the cities * * * is traversed in such operation." (§ 9653.) For the reasons hereinafter stated, we have concluded that the trial court must be sustained in its determination that the taxes and interest here sought to be retained by defendant board were assessed and collected by it upon receipts which are exempt under the provisions of the section last above cited and that plaintiff is entitled to the refund decreed.

The record discloses that plaintiff is a highway common carrier as defined in sections 2¾ and 50¾ of the Public Utilities Act of California (2 Deering's Gen.Laws, Act 6386), and as such operates under certificates of public convenience and necessity which restrict plaintiff's common carrier operations to the transportation of express matter of California Motor Express, Ltd., a corporation (hereinafter referred to as the express company), between the latter's terminal depot located at Los Angeles and its terminal depots in San Francisco and Oakland, and which prohibit plaintiff from operating any pick-up and delivery service in any of the three cities as part of its intercity operations. Plaintiff concedes that its gross receipts from the intercity operations, as distinguished from pick-up and delivery service, are subject to the license tax, and no part of such receipts is here involved.

Prior to May 1, 1941, pick-up and delivery service in the city of Los Angeles had been rendered to the express company by one James C. Coughlin, an individual, with equipment owned by him; and in Oakland and San Francisco it had been rendered by Redline Transfer Co., a copartnership (hereinafter referred to as Redline), with equipment which the latter owned. On or about May, 1, 1941, plaintiff purchased from Coughlin and Redline, respectively, the equipment with which they had rendered the Los Angeles and Oakland pick-up and delivery services, and thereupon under a permit issued to plaintiff on April 7, 1941, by the Railroad Commission (now the Public Utilities Commission) of California to operate as a city carrier (Stats.1935, ch. 312), plaintiff undertook with its newly acquired equipment to furnish for the express company the same pick-up and delivery service in Los Angeles and Oakland which Coughlin and Redline had theretofore performed. Redline continued to render that service in San Francisco. The taxes which defendant now seeks to uphold were assessed upon the receipts from pick-up and delivery services rendered by plaintiff in Los Angeles and Oakland, and also upon a 20% portion of the receipts of Redline's San Francisco service which defendant claimed was attributable to plaintiff because of occasional use by Redline, without payment therefor to plaintiff, of certain of plaintiff's equipment. However, defendant now agrees in its brief that plaintiff was entitled to judgment ordering refund of the amount paid as taxes measured by Redline receipts, and confines itself to arguing the point that "the judgment should be reversed to the extent that it gives respondent [plaintiff] a refund of taxes on the receipts from its Los Angeles and Oakland pick-up and delivery business."

It is conceded that neither Coughlin nor Redline had ever paid or been required to pay taxes under the law here involved upon their receipts from any of the described pick-up and delivery services. Plaintiff rendered the services under written contracts with the express company which covered only the pick-up and delivery work and which were separate from the written contracts between plaintiff and the express company covering the intercity and interterminal services. Plaintiff's evidence is to the further effect, and the trial court found, that plaintiff as "a city carrier * * * had separate equipment, lighter and different than that which it employed in its capacity of highway carrier. That the vehicles used by plaintiff in said pick-up and delivery service have not been and are not used in highway transportation, and have not and do not operate outside the corporate limits of Los Angeles or Oakland. It confined its business as a city carrier strictly within the limits for which it was licensed, and intruded in no particular within the field of the highway carrier. It * * * rendered separate and independent bills to California Motor Express, Ltd., for said city carrier services. The plaintiff as a highway common carrier did likewise. Its equipment never deviated from its devotion to the service for which it was licensed. It kept accounts restricted to its character as a highway carrier. * * * That plaintiff is both a highway carrier and a city carrier and it exists in each of these characters by separate authority. Each business [of plaintiff] has a separate license or certificate * * * The businesses were not confused or entangled and did not overlap. The Court finds that the two operations, that of a city carrier and that of a highway carrier, are just as separate and distinct for all purposes of this case as if the two operations had been conducted by separate and distinct corporations or legal entities." The court further found that "plaintiff has at all times kept separate and distinct books and records covering said pick-up and delivery service and entirely independent of books and records covering its intercity operations."

In support of its position that the assessments upon the receipts of pick-up and delivery service performed by plaintiff were lawfully made, defendant relies in particular upon the case of Bekins Van Lines, Inc. v. Johnson (1942), 21 Cal.2d 135, 130 P.2d 421. The situation in that case, however, does not coincide with that now before us. There it was not proven and found by the court, as here, that the plaintiff conducted two separate and distinct business operations, each of which performed distinct and different services under contracts separately executed with the recipient of the services. Rather, the plaintiff there argued that before the tax rate was applied it was entitled to deduct from its gross receipts for the hauling of goods from its customers' dwellings in one city to those in other cities an amount computed as attributable to services rendered in loading and unloading such goods between house and sidewalk, as well as amounts "separately indicated on its way bills received from pick-up and delivery service within municipalities." In its opinion this court continued (page 139 of 21 Cal. 2d, page 423 of 130 P.2d), "In intercity hauls of small consignments the plaintiff found it more convenient to pick up and deliver with the use of smaller trucks between the point of pick-up or delivery and the larger truck or van which was to transport or which had transported the goods over the public highways. In other intercity hauls the van or truck received and discharged the load directly at the door. The plaintiff contends that receipts from such separate pick-up and delivery service within municipalities in connection with intercity hauls should be excepted from assessment under the act because that service is conducted entirely within municipalities and does not employ any part of the public highways." The trial court rendered judgment against plaintiff in its suit to recover taxes paid under protest upon the receipts which it claimed should be exempted as described above, and thereafter counsel for the respective parties waived findings of fact and conclusions of law. There was no contention that the evidence was insufficient to support any essential, implied finding. In that state of the record this court presumed, as it was bound to do and as it emphasized, "that every fact essential to the support of the judgment was proved and found by the court * * * [and] that the proof showed and that the court found and concluded that the services out of which the disputed tax arose were so much a part of the business of plaintiff, were so customarily rendered in that connection, and so directly contributed to the transportation which was the plaintiff's principal business, that money derived therefrom must be regarded as part of the 'gross receipts from operations of said operator' and taxable as such" (page 137 of 21 Cal.2d, page 422 of 130 P.2d) and affirmed the judgment.

It is to be noted, also, that the court in its opinion in the above cited case points out (page 142 of 21 Cal.2d, page 425 of 130 P.2d) that "receipts from intracity business as excepted from the act [Rev. & Tax. Code, § 9653] were not included [by the Board of Equalization] in the computation of gross receipts from operation as defined by the act. Nor were charges for labor furnished for the purpose of packing and crating goods, or warehousing, included in the gross receipts subject to taxation," and that (page 138 of 21 Cal.2d, page 423 of 130 P.2d) in its return to the Board for the years in question "the plaintiff reported its gross receipts from all transportation business in the state exclusive of hauls excepted by section 14 [now § 9653] of the act," but claimed deductions therefrom as described above. It thus appears that only receipts from those services which were found to be integral parts of the single operation of moving goods from a dwelling, over the public highways, to their destination outside of the city in which the moving operation originated, were held subject to the tax. By contrast, plaintiff in the instant case is not moving the goods of its own customers in intercity operations whereof the pick-up and delivery service forms an integral part of a unitary operation, but is rather, as found by the trial court, engaging in two separate and distinct businesses, severally authorized by a certificate of public convenience and necessity and by a permit to operate as a city carrier, in which it renders to an express company, which alone deals with the general public, separate services under separate contracts and with separate and independent bills rendered therefor. Manifestly the fact that the same goods were the subjects of both intracity and intercity transportation does not establish that as a matter of law there was but a single business operation. In truth the plaintiff in its capacity of highway carrier, was, as previously noted, prohibited from rendering pick-up and delivery service in any of its terminal depot cities and, hence, could carry intercity only the identical goods which were the subject of pick-up and delivery by some other operation or agency.

[1-4] Defendant attacks as being without support in the evidence the finding, quoted hereinabove, that "plaintiff has at all times kept separate and distinct books and records covering said pick-up and delivery service and entirely independent of books and records covering its intercity operations." On this point plaintiff's auditor testified that the revenues from the two services are "set up separately in the accounts of the Transport Company. In other words, one under revenue derived from line haul service and the other derived from city carrier service," that the revenue accounts were not kept in physically separate books or "even separate pages; just columns on the page would indicate the line haul and the other." It is thus apparent that the evidence indicated that plaintiff kept separate and distinct records of the income from each of the two services, even though such records were not maintained in physically separate volumes, and that the two businesses were operated as separate enterprises. It is further apparent that the receipts from one of such enterprises—the pick-up and delivery work which was performed entirely within incorporated cities—is expressly exempted from taxation under the Motor Vehicle Transportation License Tax Law. This court has recently reiterated that (Edison California

Stores v. McColgan (1947), 30 Cal.2d 472, 476, 183 P.2d 16, 18) "Persons may adopt any lawful means for the lessening of the burden of taxes which in one form or another may be laid upon properties or profits. Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284 P. 663. It was also reiterated in that case that courts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included. In case of doubt, construction is to favor the taxpayer rather than the government." That plaintiff's segregation of its operations may contribute to effecting a tax saving furnishes no ground for attack upon it where, as the trial court here found, "there is no evidence of fraud or bad faith."

[5] Unless we are to hold that as a matter of law one operator who conducts both a highway common carrier business and a city carrier business cannot segregate the two operations, however separate in fact, for tax purpose, the judgment of the trial court must be sustained. We are satisfied that the true test for tax liability in this case rests in the character of the operation and fact of segregation and not in the identity of the operator.

For the reasons above stated the judgment appealed from is affirmed.

SHENK, EDMONDS and CARTER, JJ., concur.

TRAYNOR, Justice.

I dissent. Under the California Motor Vehicle Transportation License Tax Law as construed by this court, an operator of motor vehicles engaged in intercity transportation of goods must include in the taxable gross receipts from such transportation revenue derived from services incidental to the intercity transportation. This court has held that receipts from a pick-up and delivery service maintained for door-to-door delivery are taxable as part of the gross receipts from intercity transportation of the goods. (Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 130 P.2d 421; Southern California Freight Lines v. State Board of Equalization, 72 Cal.App.2d 26, 163 P.2d 776.) As in those cases, the pick-up and delivery service in the present case was maintained by plaintiff for door-to-door delivery of goods moved between cities, and was as much a part of the intercity transportation. The facts found by the trial court establish no substantial difference between the taxpayers' activities in those cases and the activities of plaintiff in the present case. The holding that even though others must include revenue derived from a pick-up and delivery service in their taxable gross receipts, plaintiff need not, affords plaintiff an unwarranted competitive advantage over others engaged in the same activities.

The California Motor Vehicle Transportation License Tax Law (now incorporated in the Revenue and Taxation Code and hereafter cited according to the section numbers of that code) provides: "A license tax is hereby imposed upon operators at the rate of 3 percent of the gross receipts of the operators from operations." (Sec. 9651.) The term "operator" includes "any person engaging in the transportation of persons or property for hire or compensation by or upon a motor vehicle upon any public highway in this State, either directly or indirectly." (Sec. 9603.) " 'Gross receipts' include all receipts from the operation of motor vehicles entirely within this State. * * * 'Gross receipts' do not include revenue derived by an express company from the shipment of property over the lines of common carriers, but do include revenue derived by an express company from the transportation of property in motor vehicles operated by it." (Sec. 9606.) The statute does not apply to "operators of motor vehicles operated exclusively within incorporated cities". (Sec. 9653.) It exempts "the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation." (Sec. 9653.)

In Bekins Van Lines, Inc., v. Johnson, supra, the plaintiff was engaged in intercity transportation of household goods. It objected to including in its taxable gross receipts compensation for the moving of goods from one house or the placing of them into another before and after its transportation over intercity highways on trucks operated by plaintiff; it also objected to including in its taxable gross receipts compensation derived from an intra-city pick-up and delivery service maintained for the transportation of small consignments to and from its intercity terminals. In holding such compensation to be part of plaintiff's gross receipts from taxable operations, this court stated: "The plaintiff concedes that the words 'operation of motor vehicles' as used in the definition include loading and unloading activities at the sidewalk. However, the goods must be taken to and from the sidewalk as an inseparable preparatory activity connected with the loading and unloading operations. We therefore fail to see how the plaintiff can be excused from the payment of a proportion of the license tax based on its claim that more than 50 per cent of gross receipts from operation of motor vehicles was derived from time devoted to such preparatory activities. The preparatory activities sought to be excepted are just as much a part of and essential to transportation, and therefore, to operation of motor vehicles, as are actual loading and unloading operations which are also preparatory to the rolling of the vehicle along the highways. To adopt the plaintiff's suggestion would be to add to the language of the definition a limitation which the Legislature did not express, and which it must be deemed it did not intend. If the Legislature intended to exclude from 'operation' as defined every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire, it could easily have said so. By failure to use any such limiting words the Legislature indicated its intention of not so limiting or circumscribing the meaning or scope of the act. In re Bush, 6 Cal.2d 43, 56 P.2d 511. * * * Nor may any distinction be made by the plaintiff on its returns between intercity hauls which require for convenience an intracity pick-up and delivery service, and those which do not require such service in the convenient method of initiating or terminating such intercity transportation. * * * No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intracity pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business. In re Bush, supra." (21 Cal.2d 135, 140-142, 130 P.2d 421, 424; see also, Southern California Freight Lines v. State Board of Equalization, supra.)

In the present case plaintiff rendered separate monthly bills to the express company for "terminal to terminal line haul charges" and for "pick-up and delivery services at Los Angeles and Oakland." Plaintiff's bills for May 1941, which are illustrative of plaintiff's dealings with the express company, included as freight hauled from terminal to terminal "Northbound 5,709,572 lbs," and "Southbound 6,631,411 lbs." The same amount of "Northbound" or "Southbound" freight was picked-up or delivered by plaintiff in Los Angeles. Accordingly, there is no dispute that the same goods were moved by plaintiff in its intercity hauls and in its intracity pick-up and delivery service. The latter was the first or last step of the intercity transportation of the goods moved by plaintiff for the express company.

None of the facts found by the trial court, on which the majority opinion relies, affects the decisive fact that plaintiff's intracity pick-up and delivery service was incidental to the moving of the goods between cities. It is immaterial that plaintiff used different trucks for transporting goods within city limits and for hauling them from terminal to terminal. The plaintiff in the Bekins case relied on the use of separate trucks, but this court held that the use of such trucks in operating a pick-up and delivery service was simply a convenient method of starting or terminating intercity transportation. It is also immaterial that for the operation of its pick-up and delivery service plaintiff secured a permit as a city carrier, and that the certificate of convenience and necessity under which it moved freight over intercity highways was limited to the carrying of freight from terminal to terminal. Receipts from activities that are part of intercity transportation of goods are taxable regardless of whether any permit is required to engage in such activities. (In re Bush, 6 Cal.2d 43, 51, 56 P.2d 511.) If a special permit is secured for certain activities, it does not follow that these activities are disconnected from other activities of the carrier.

The present case cannot be distinguished on the grounds that plaintiff engaged in transporting goods for the express company and not for the consignors of the goods, or that it kept separate accounts of its receipts from transporting goods between the terminals and its receipts from the intra-city pick-up and delivery service. It is settled that an operator is taxable on receipts from the transportation of goods whether he rendered his services to one or several customers or whether he engaged in his activities as an agent or as an independent contractor. (In re Bush, 6 Cal.2d 43, 54, 56 P.2d 511.) Separate charges for the pick-up and delivery service were made by the plaintiff in the Bekins case as well as by plaintiff in the present case. The fact that plaintiff entered the receipts from the hauling of goods between the terminals and from its intra-city pick-up and delivery service in separate accounts does not mean that the two activities were unconnected and that plaintiff operated two unrelated businesses. A carrier like any other business may keep separate accounts to ascertain the revenue obtained from its various activities. The tax applies because of the taxpayer's activities in transporting goods for hire on the public highways of the state, not because it keeps accounts in a certain way. Plaintiff's pick-up and delivery service is as much an integral part of its intercity transportation of goods as such service was in the Bekins and Freight Lines cases, supra, and is not made less so by mere bookkeeping entries.

The present case is clearly distinguishable from Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663. In that case different corporations were engaged in making intercity hauls and operating an intra-city pick-up and delivery service. It was contended that there was unity of control as to the two corporations, but this court declined to go behind the corporate entities. In the present case the same corporation is engaged in hauling the goods between terminals and in the intra-city pick-up and delivery service.

The decision of this case depends solely upon whether plaintiff's pick-up and delivery service was part of its intercity transportation service. In my opinion it was, whether or not it may be regarded as a separate business. The majority opinion, however, regards as controlling the question whether the taxpayer has so segregated its activities that the pick-up and delivery service may be regarded as a separate business. Even if such a segregation were the test of taxability under the statute, the question whether the service is operated as a separate business would not present an issue for the final determination of the trial court. The problem would involve questions of both law and fact. What a taxpayer's activities are is a question of fact; whether such activities give rise to tax liability is a question of law depending on what the statute means and how it applies to the facts. (In re Estate of Madison, 26 Cal.2d 453, 456, 159 P.2d 630; Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 326, 109 P.2d 935; County of Sierra v. County of Nevada, 155 Cal. 1, 14, 99 P. 371; Signal Hill v. County of Los Angeles, 196 Cal. 161, 168, 236 P. 304; Mitchel v. Brown, 43 Cal. App.2d 217, 222, 110 P.2d 456; see 23 Cal. Jur. 719; 10 Cal.Jur. 882.)

In this case the purposes of plaintiff in operating the pick-up and delivery service, the conditions under which the service was operated, and its relation to the intercity transportation, are either undisputed or ascertainable from the findings. Even under the separate business test of the majority opinion, the taxability of the receipts from the service in question should be determined as a matter of law, and this court should hold such receipts taxable on the ground that there is no essential distinction between this case and the Bekins and Freight Lines cases where the operators maintained pick-up and delivery service for the same purposes, under essentially the same conditions, and in the same relation to their intercity transportation.

If trial courts can reach different decisions under such circumstances, and such decisions are to be final, some taxpayers may be subject to taxation but others engaged in essentially the same activities may not. The majority opinion, by leaving it to the trial courts to make final determinations whether the statute applies to given facts gives some taxpayers a competitive advantage over others, thus defeating the uniform operation of the statute throughout the state.

GIBSON, C. J., and SPENCE, J., concur.

Rehearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.

* * *

31 Cal.2d 1

FUENTES et ux. v. TUCKER.

NEGRETTE et ux. v. SAME.

L. A. 20121, 20122.

Supreme Court of California.

Dec. 2, 1947.

1. Pleading 🔑1

One of the functions of pleadings is to limit the issues and narrow the proofs.

2. Pleading 🔑376

If facts alleged in complaint are not controverted by answer, they are not in issue, and no evidence need be offered to prove their existence. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

3. Evidence 🔑143

Evidence which is not pertinent to issues raised by pleadings is immaterial, and it is error to allow the introduction of such evidence. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

4. Pleading 🔑376

If an issue has been removed by an admission in the answer, it is error to receive evidence which is material solely to the excluded matter. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

5. Damages 🔑158(1)

An admission of liability will not preclude plaintiff from showing how accident happened if such evidence is material to the issue of damages. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

6. Damages 🔑158(1)

In action for personal injuries, where liability is admitted and only issue to be tried is amount of damages, force of the impact and circumstances surrounding the accident may be relevant to indicate extent of plaintiff's injuries. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

7. Death 🔑95(4)

In action for wrongful death of minor child, the damages consist of the pecuniary loss to parents in being deprived of the services, earnings, society, comfort, and protection of the child.

8. Death 🔑60

Testimony as to circumstances of accident, including fact that defendant was intoxicated at time his automobile struck plaintiffs' minor decedents, where defendant had admitted liability, was not material to any issue before jury in consolidated death actions, and its admission was error. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

9. Trial 🔑55

Trial judge may, in his discretion, exclude cumulative, although relevant, evidence to avoid confusing jury or wasting time of court.

10. Trial 🔑55

Evidence offered with respect to an issue entirely removed by the pleadings is not merely cumulative on a material issue, but is completely irrelevant, and there is no room for exercise of discretion by a trial judge as to whether such evidence should be admitted. Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

11. Pleading 🔑376
Trial 🔑36

The introduction of evidence of admitted facts is permissible where admission is ambiguous in form or limited in scope or where, during trial of the case, a party seeks to deprive his opponent of the legitimate force of material evidence by bald admission of a probative fact. Code Civ. Proc. §§ 462, 588, 1868, 1870, subds. 1, 15.

12. Appeal and error 🔑1170(7)

If amounts awarded plaintiffs in consolidated wrongful death actions were not disproportionate to loss suffered, error in admitting immaterial evidence did not result in a miscarriage of justice and judgments should be affirmed. Const. art. 6, § 4½.

13. Death ⚷95(4)

In determining award for wrongful death of minor son, jury should consider benefits that parents were reasonably certain to have received from earnings and services of child during his minority, support and financial benefit which they would have received from child after it reached majority, and pecuniary loss which parents suffered and will suffer in future by being deprived of comfort, society, and protection of child, and as an offset to such factors consideration should be given to what it would have cost parents to support and educate the child had he lived.

14. Death ⚷99(3)

An award of $7,500 each for death of two 12-year-old boys was not excessive.

15. Appeal and error ⚷1170(7)

Admission of testimony as to circumstances of accident, including fact that defendant was intoxicated at time his automobile struck plaintiffs' minor decedents, where defendant had admitted liability, was error but was not prejudicial on ground that it tended to increase amount of verdicts, where verdicts entered were not so large as to indicate that jury was unduly influenced by admission of the immaterial testimony. Const. art. 6, § 4½.

16. Death ⚷11, 31(1)

The right of action for wrongful death is entirely statutory, and the action must be brought in names of persons to whom the right is given by statute. Code Civ. Proc. §§ 376, 377.

17. Death ⚷42

The persons specified in statute are the only parties entitled to bring wrongful death action, and there is no authority for joinder of other parties regardless of fact that they may have sustained or suffered some damage or loss. Code Civ.Proc. §§ 376, 377.

18. Death ⚷31(7)

The provision in statute authorizing father alone to bring action for wrongful death of minor child is in accord with general rule in state that husband has management and control of community property and ordinarily must bring any action concerning it. Code Civ.Proc. § 376; Civ. Code, §§ 172, 172a.

19. Death ⚷42

The mother is a necessary or proper party in action for wrongful death of minor only in those instances in which statute expressly authorizes her to sue, and mother may not join with father in cases in which father alone is authorized by statute to sue. Code Civ.Proc. §§ 376, 377.

20. Appeal and error ⚷1036(2)

Permitting mothers of boys killed to be joined with fathers as plaintiffs in consolidated wrongful death actions, though error, did not entitle defendant to reversal on ground that presence of mothers as plaintiffs tended to augment damages, where verdicts returned were not disproportionate to loss suffered. Code Civ.Proc. §§ 376, 377; Civ.Code, §§ 172, 172a.

21. Husband and wife ⚷249

The damages in action for wrongful death of minor include loss suffered by both father and mother, and the proceeds of the judgment are "community property". Code Civ.Proc. §§ 376, 377; Civ.Code, §§ 172, 172a.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

22. Death ⚷69
Witnesses ⚷50

In consolidated actions for wrongful death of two 12-year-old boys, mothers of the boys, though not parties to the action, could testify as witnesses, and their relationship to the children could properly be disclosed in their testimony. Code Civ. Proc. §§ 376, 377; Civ.Code, §§ 172, 172a.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Consolidated wrongful death actions by Pablo Fuentes and Carmen Fuentes, husband and wife, against Clarence L. Tucker, and by Andres L. Negrette and Mariana Negrette, husband and wife, against same defendant, arising out of automobile accident. From judgments for plaintiffs, the defendant appeals.

Affirmed.

Prior opinion 175 P.2d 867.

Parker, Stansbury & Reese and White McGee, Jr., all of Los Angeles, for appellant.

V. P. Lucas, of Los Angeles, for respondents.

GIBSON, Chief Justice.

The minor sons of the respective plaintiffs were killed by an automobile operated by defendant. The two actions were consolidated for trial, and in each case the verdict of the jury awarded the plaintiffs $7,500. Defendant appealed from the judgments claiming the trial court erred in permitting plaintiffs to present evidence of facts outside the issues framed by the pleadings.

On the day of the trial defendant filed an amended answer in each case which admitted "that he was and is liable for the death of the deceased * * * and the damages directly and proximately caused thereby." Plaintiffs were nevertheless permitted to prove the circumstances of the accident, including the facts that defendant was intoxicated and that the children were thrown eighty feet by the force of the impact.

It is defendant's position that the introduction of evidence as to the circumstances of the accident was error because it was not relevant or material to the amount of the damages, which was the only issue to be determined by the jury. Plaintiffs contend that defendant could not, by acknowledging legal responsibility for the deaths of the children, deprive them of the right to show the circumstances surrounding the accident, and that therefore it was not error to admit evidence of such facts. They do not claim, however, that the evidence was material to any of the facts in dispute under the pleadings as they stood at the commencement of the trial.

It is a doctrine too long established to be open to dispute that the proof must be confined to the issues in the case and that the time of the court should not be wasted, and the jury should not be confused, by the introduction of evidence which is not relevant or material to the matters to be adjudicated. This is merely one aspect of the larger problem of delay in the conduct of litigation. Every court has a responsibility to the public to see that justice is administered efficiently and expeditiously and that the facilities of the court are made available at the first possible moment to those whose cases are awaiting trial. It would be an unwarranted waste of public funds, and a manifest injustice to the many litigants seeking an early trial date, to allow counsel in a particular case to occupy substantial periods of time in the useless presentation of evidence on matters not in controversy; and we know of no well considered opinion which asserts such a right.

[1-3] One of the functions of pleadings is to limit the issues and narrow the proofs. If facts alleged in the complaint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existence. Travellers Ins. Co. v. Byers, 123 Cal.App. 473, 482, 11 P.2d 444; Code Civ.Proc., §§ 462, 588, 1868, 1870, subds. (1), (15); see I Wigmore on Evidence, 3d Ed. 1940, p. 9, § 2. Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. Estates of Boyes, 151 Cal. 143, 147, 90 P. 454; Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689, 692; Nantahala Power & Light Co. v. Sloan, 227 N.C. 151,*

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* In the cited case it was squarely held that it was error to admit evidence on an issue not raised by the pleadings. A prior judgment was held to be not admissible either to prove the existence of an easement or to establish the amount of damages. As to the first ground the court stated: "Here the existence and the extent of the original easement are alleged in the petition and not denied in the answer. Therefore, the respondent admitted the existence and extent of the peti-

41 S.E.2d 361, 362; see 10 Cal.Jur. 797, § 98; 21 Cal.Jur. 157, § 106; Code Civ.Proc., § 1868; cf. Kurn v. Counts, 247 Ala. 129, 22 So.2d 725; Hanskett v. Broughton, 157 Minn. 83, 195 N.W. 794.

[4-6] It follows, therefore, if an issue has been removed from a case by an admission in the answer, that it is error to receive evidence which is material solely to the excluded matter. This, of course, does not mean that an admission of liability precludes a plaintiff from showing how an accident happened if such evidence is material to the issue of damages. In an action for personal injuries, where liability is admitted and the only issue to be tried is the amount of damage, the force of the impact and the surrounding circumstances may be relevant and material to indicate the extent of plaintiff's injuries. Johnson v. McRee, 66 Cal.App.2d 524, 527, 152 P.2d 526; Martin v. Miqueu, 37 Cal.App.2d 133, 137, 98 P.2d 816. Such evidence is admissible because it is relevant and material to an issue remaining in the case.

[7, 8] The defendant here by an unqualified statement in his answer admitted liability for the deaths of the children, and the sole remaining question in issue was the amount of damages suffered by the parents. In an action for wrongful death of a minor child the damages consist of the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child. Bond v. United Railroads, 159 Cal. 270, 285, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas. 1912C, 50. The manner in which the accident occurred, the force of the impact, or defendant's intoxication could have no bearing on these elements of damage. The evidence, therefore, was not material to any issue before the jury, and its admission was error.

In support of their contention that they had a right to prove the circumstances of the accident, although such evidence had no relation to the sole remaining issue of damages, plaintiffs strongly rely on Martin v. Pacific Gas & Elec. Co., 203 Cal. 291, 264 P. 246. The plaintiff in that case was injured by contact with a highly charged power line owned and operated by defendant. The complaint alleged in one paragraph that defendant so negligently maintained the line that a wire broke and fell to the ground, and in a separate paragraph it was alleged that defendant negligently left the wire unguarded on the ground. At the opening of the trial defendant admitted that it was negligent in allowing the wire to remain on the ground and that plaintiff was thereby injured. Plaintiff was nevertheless permitted to present evidence in support of all acts of negligence alleged in the complaint, and a judgment in his favor was affirmed on appeal.

The views of the justices who participated in the Martin decision, 203 Cal. 291, 264 P. 246, were expressed in four separate opinions with the unfortunate result that considerable confusion has arisen with respect to the holding of the case. Three members of the court, in an opinion written by Justice Preston, took the position that defendant's admission covered only one of two specific acts of negligence charged in the complaint and that therefore the trial court properly refused to limit the proof. In a separate opinion, two justices expressed the view that, since it was not alleged that one of the asserted acts of negligence constituted a proximate cause of the injury, it was error to allow the introduction of evidence of that act. They were of the opinion, however, that it was not reversible error because the verdict was not excessive. These two justices did not discuss the propriety of presenting evidence of the circumstances of an acci-

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tioner's easement prior to raising its dam one vertical foot. Such admission is as binding on the parties as if found by the jury, and 'evidence offered in relation thereto is irrelevant.' * * * It having been admitted that the petitioner held an easement * * * the judgment was admissible in this proceeding, if admissible at all, only upon the question of damages." With respect to the question of damages the court held that the evidence was not admissible because it was too remote and because it was a consent judgment. Nantahala Power & Light Co. v. Sloan, 227 N.C. 151, 41 S.E.2d 361, 362, 363.

dent after an admission of liability. A sixth justice stated that, while it might have been error for the trial court to permit proof of negligence after defendant's admission, the judgment should be affirmed because there was no miscarriage of justice. The seventh justice dissented on the grounds that defendant's admission amounted to a withdrawal of every denial of negligence, that it was error to allow any evidence of matters which were no longer at issue, and that the error was prejudicial. It thus appears that, although six justices were of the view that the judgment should be affirmed, a majority of the court did not agree upon the reasons for the result.

The Martin case does *not* hold that it is proper to introduce evidence of the circumstances of an accident after a full and complete admission of liability where such evidence is not material to the sole remaining issue of damages. The most that can be said in that regard is that three members of the court took the position that it was not error to allow proof of the circumstances of the accident because the oral admission made on behalf of defendant at the opening of the trial was so limited that it did not constitute a full admission of liability. There is, however, an erroneous statement in the opinion written by Justice Preston which the trial court relied on in the present case and which has been followed in three district court of appeal decisions. House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 342, 95 P.2d 465; Rowe v. Rennick, 112 Cal.App. 576, 579, 580, 297 P. 603; Behrendt v. Times Mirror Co., 30 Cal.App.2d 77, 83, 85 P.2d 949. The statement reads: "Indeed, it never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it." 203 Cal. 291, 299, 264 P. 246, 249. We do not agree. The test of the admissibility of evidence, so far as relevancy and materiality is concerned, is not whether the judge presiding at the trial is patient or impatient but whether the evidence is relevant and material.

[9, 10] It is true that the trial judge may, in his discretion, exclude cumulative, although relevant, evidence to avoid confusing the jury or wasting the time of the court. Douillard v. Woodd, 20 Cal.2d 665, 128 P.2d 6; Estate of Wineteer, 176 Cal. 28, 167 P. 516; 6 Wigmore on Evidence, 3d Ed.1940, 576–578. A different rule applies, however, to evidence offered with respect to an issue entirely removed by the pleadings. Such evidence is not merely cumulative on a material issue but is completely irrelevant and there is no room for the exercise of discretion. The cases of House v. Pacific Greyhound Lines, 35 Cal. App.2d 336, 95 P.2d 465, Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603, and Behrendt v. Times Mirror Co., 30 Cal.App.2d 77, 85 P.2d 949, are disapproved insofar as they are inconsistent with the views expressed herein.

[11] The introduction of evidence of admitted facts is permissible in cases where the admission is ambiguous in form or limited in scope or where, during the trial of a case, a party seeks to deprive his opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact. See Dunning v. Maine Cent. R. Co., 91 Me. 87, 97, 39 A. 352, 356, 64 Am.St.Rep. 208; Baumier v. Anteau, 79 Mich. 509, 44 N.W. 939, 941; Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78, 137 N.W. 663, 664; Webster v. P. W. Moore & Son, 108 Md. 572, 71 A. 466, 469; John Hancock Mutual Life Insurance Co. v. Moore, 34 Mich. 41, 43; Ruppel v. Clayes, 230 Mo.App. 699, 72 S.W.2d 833, 835, 836; Bank of North America v. Crandall, 87 Mo. 208; Henderson v. Ball, 193 Iowa 812, 186 N.W. 668, 672; Stevens v. Citizens Gas & E. Co., 132 Iowa 597, 109 N.W. 1090, 1091; Carter v. Ray, 70 Ga.App. 419, 28 S.E.2d 361, 369; Priest v. Inhabitants of Groton, 103 Mass. 530, 538-540; McHenry v. United States, 51 App.D.C. 119, 276 F. 761, 766, 34 A.L.R. 1109; State v. Young, 52 Or. 227, 96 P. 1067, 18 L.R.A.,N.S., 688, 132 Am.St.Rep. 689; People v. Fredericks, 106 Cal. 554; In re Mason's Will, 82 Vt. 160 72 A. 329, 330; see also IX Wigmore on Evidence, 3d Ed.1940, § 2591; 53 Am.Jur. 94.

These cases must be distinguished from the present case where an entire issue has been completely eliminated by a clear and unequivocal admission in the pleadings. For example, in the case of Dunning v. Maine Cent. R. Co., 91 Me. 87, 97, 39 A. 352, 356, 64 Am.St.Rep. 208, which is cited in the Martin case, 203 Cal. at page 299, 264 P. 246, the plaintiff sued to recover damages for loss caused by a fire alleged to have been started by one of defendant's locomotives. Against objection plaintiff was permitted to introduce evidence to show that defendant's engines emitted sparks which spread fires and that such fires had been seen in the immediate vicinity of the track shortly after the passage of trains. Defendant sought to prevent plaintiff from presenting this evidence by an oral statement admitting "the possibility of engines setting fires." The admission was not only more limited in scope than the evidence but its obvious purpose was to "rob the evidence of much of its fair and legitimate weight." 91 Me. 87, 97, 39 A. 352, 356. The court properly held that it did not lie within the power of one party to limit the proof by this device.

[12] In determining whether the defendant here was prejudiced by the erroneous admission of immaterial evidence which may have tended to increase the amount of the verdict, we are not, of course, confronted with identically the same problem as that presented in a case where the claim of excessive damages is based solely on the contention that the verdict is the result of passion or prejudice. It is true, as argued by defendant, that we cannot say with certainty to what extent the jury in arriving at the amount of the verdict may have been influenced by the admission of the immaterial evidence. If, however, the amount awarded plaintiffs is not disproportionate to the loss suffered the error has not resulted in a miscarriage of justice, and the judgment should be affirmed. See Cal.Const., Art. VI, § 4½.

[13] The parents in each case were entitled to recover for the pecuniary loss they suffered by reason of the death of their son, and in determining that loss the jury could take into consideration the benefits that the parents were reasonably certain to have received from the earnings and services of their child during his minority, the support and financial benefit which they would have received from the child after it reached majority, and also the pecuniary loss which the parents suffered and will suffer in the future by being deprived of the comfort, society and protection of the child. As an offset to these factors, consideration must be given to what it would have cost the parents to support and educate the child had he lived. It is manifestly difficult to measure some of these factors in dollars and cents, and a rough estimate of the pecuniary loss which the parents have suffered is the most that can be expected in these cases.

[14, 15] In O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, it was held that $10,000 was not an excessive amount to allow as general damages for the death of a boy seven years of age. The boys involved in this accident were approximately twelve years old when they were killed. Certainly the sum of $7,500, which was awarded by the jury in each case, cannot be said to be an unreasonable amount to allow for the wrongful death of a child of that age, and the verdicts are not so large as to indicate that the jury was unduly influenced by the admission of the immaterial testimony in question. It does not appear, therefore, that the error resulted in a miscarriage of justice.

[16-19] Defendant also contends that it was error to permit the mothers of the boys to be joined as plaintiffs. The right of action for wrongful death under Code of Civil Procedure, sections 376, 377, is entirely statutory, and the action must be brought in the names of the persons to whom the right is given by statute. Salmon v. Rathjens, 152 Cal. 290, 294, 92 P. 733; Evans v. Shanklin, 16 Cal.App.2d 358, 60 P.2d 554; see 24 Cal.L.Rev. 231. The persons specified in the statute, therefore, are the only parties entitled to sue, and there is no authority for the joinder of other parties regardless of the fact that they may have sustained or suffered some damage or loss. Except in certain circumstances not here present, the father alone is authorized to

bring an action for the death of a minor child. Code Civ.Proc., § 376. This provision is in accord with the general rule in California that the husband has the management and control of community property and ordinarily must bring any action concerning it. For the general rule, see Civ.Code §§ 172, 172a; Sanderson v. Niemann, 17 Cal.2d 563, 567 et seq., 110 P.2d 1025; Moody v. Southern Pacific Co., 167 Cal. 786, 789 et seq., 141 P. 388; Johnson v. National Surety Co., 118 Cal.App. 227, 229, 230, 5 P.2d 39; Sternes v. Sutter Butte Canal Co., 99 Cal.App. 465, 471, 472, 278 P. 921. The mother is a necessary or proper party in an action for the death of a minor only in those instances in which the statute expressly authorizes her to sue. The suggestion made in House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 344, 95 P.2d 465, Keena v. United Railroads of S.F., 57 Cal.App. 124, 131, 207 P. 35, and Abos v. Martyn, 10 Cal.App.2d 698, 700, 52 P.2d 987, that the mother may be a proper party and may join with the father in cases in which the father alone is authorized by statute to sue, must be disapproved.

[20-22] Defendant claims he was prejudiced by the misjoinder because the presence of the mothers "as plaintiffs would tend to augment the damages." It has already been determined that the verdicts are not disproportionate to the loss suffered, and, moreover, it does not appear that the joinder of the mothers as parties tended to increase the amounts awarded. The damages include the loss suffered by both the father and the mother, and the proceeds of the judgment are community property. Sandberg v. McGilvray-Raymond, etc., Co., 66 Cal.App. 261, 272, 226 P. 28; see opinion on denial of hearing in Keena v. United Railroads of S. F., 57 Cal.App. 124, 132, 207 P. 35. The mothers, of course, could be present at the trial and testify as witnesses even though they were not parties to the action, and their relationship to the children was properly disclosed in their testimony.

The judgments are affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the conclusion reached in the majority opinion but I cannot agree with the reasoning upon which it is based. It is in direct conflict not only with all of the decisions of this court and the District Courts of Appeal during the past 20 years but is out of harmony with the uniform rule announced in other jurisdictions as well as the leading texts on the subject including the Model Code of Evidence adopted and promulgated by the American Law Institute. Notwithstanding this array of authority, and without the citation of any authority whatever which supports its position, the majority decision overrules and disapproves the cases of Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246; House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 95 P.2d 465; Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603, and Behrendt v. Times Mirror Co., 30 Cal.App.2d 77, 79, 85 P.2d 949, and fails to even mention the numerous decisions which support the rule announced in these cases.

The majority opinion in overruling the decision of this court in Martin v. Pacific Gas & Electric Company, 203 Cal. 291, 264 P. 246, 249, disapproves the statement in that decision that "It never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it." The majority opinion fails to state, however, that the above holding in the Martin case was at the time said decision was rendered and still is in accord with the weight of authority. In support of the above quoted statement from the decision in the Martin case, the following authorities are cited: 26 R.C.L., sec. 40, p. 1036; Dunning v. Maine Cent. Ry. Co., 91 Me. 87, 39 A. 352, 64 Am.St.Rep. 208. Other authorities supporting this rule are: 64 C. J. 112, sec. 116d; 53 Am.Jur., sec. 105; Ann.Cas.1916D, p. 698; Wigmore on Evidence, 3rd Ed., sec. 2591; Model Code of Evidence, Rules 3, 4, 303; Ruppel v. Clayes, 230 Mo.App. 699, 72 S.W.2d 833; Carter v. Ray, 70 Ga.App. 419, 28 S.E.2d 361; State v. Young, 52 Or. 227, 96 P. 1067, 18 L.R.A.,N.S., 688, 132 Am.St.Rep. 689;

People v. Fredericks, 106 Cal. 554, 39 P. 944. In re Mason's Will, 82 Vt. 160, 72 A. 329; McHenry v. United States, 51 App.D.C. 119, 276 F. 761, 34 A.L.R. 1109; Henderson v. Ball, 193 Iowa 812, 186 N.W. 668; Dalton v. Calhoun County Dist. Ct., 164 Iowa 187, 145 N.W. 498, Ann.Cas.1916D, 695; Stevens v. Citizens Gas & Elec. Co., 132 Iowa 597, 109 N.W. 1090; Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78, 137 N.W. 663; Baumier v. Anteau, 79 Mich. 509, 44 N.W. 939; Hammond v. Hammond, 247 Mass. 239, 142 N.E. 44; Brown v. Brown, 208 Mass. 290, 94 N.E. 465; Terre Haute Electric Co. v. Kiely, 35 Ind.App. 180, 72 N.E. 658; Branner v. Nichols, 61 Kan. 356, 59 P. 633; Schroth v. Philadelphia Rapid Transit, 280 Pa. 36, 124 A. 279; Hambleton v. U. AJA Granite Co., 95 Vt. 295, 115 A. 102; Webster v. P. W. Moore & Son, 108 Md. 572, 71 A. 466; John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 41; Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am.Rep. 558; Jones v. Allen, 8 Cir., 85 F. 523; Clayton v. Brown, 30 Ga. 490; Priest v. Inhabitants of Groton, 103 Mass. 530; Dorr v. Tremont Nat'l Bank, 128 Mass. 349; Bank of No. America v. Crandall, 87 Mo. 208. The rule is stated as follows in Corpus Juris, supra: "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting the fact which such evidence tends to prove. A party is not bound to take his adversary's admission. That no attempt is made to disprove a fact does not necessarily exclude proof of it. Although the burden is on a party to show a fact, the opponent is not thereby prevented from introducing evidence to negative such fact so as to avoid adverse inferences, at least the admission of evidence to prove matters not controverted is within the discretion of the court. The court is not bound to hear evidence of admitted facts, and if it does hear the evidence, it must be limited to what would be admissible if the concession had not been made." 64 C.J. sec. 116d.

And American Jurisprudence states the rule thus: "It does not lie in the power of one party, however, to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove. The admission of such evidence is a matter resting in the discretion of the judge presiding at the trial. While he is not bound to receive or to take the time to hear evidence offered in proof of a fact admitted by one's adversary, if, in his discretion he deems it proper to receive such evidence, no exception lies to its admission, assuming that it is relevant and competent under the circumstances. Parties, as a general rule, are entitled to prove the essential facts—to present to the jury a picture of the events relied on. To substitute for such a picture a naked admission might have the effect of robbing the evidence of much of its fair and legitimate weight. Thus, in a number of criminal cases the defendant's offer to concede or stipulate certain facts has been held not to preclude the prosecution's rejection of the offer and introduction of evidence to establish the same facts." 53 Am.Jur. sec. 106.

Mr. Wigmore states the rule as follows: "Nevertheless a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. *Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances.*" (Emphasis added.) Wigmore on Evidence, 3rd Ed., sec. 2591.

The Model Code of Evidence adopted and promulgated by the American Law Institute contains the following provisions relative to the admission of evidence to prove an admitted fact: Rule 3. "If the judge makes a formal finding that there is no bona fide dispute between the parties as to a material matter, all evidence relevant thereto shall be admissible, subject to Rule 303 and to any valid claim of privilege." Rule 4. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission or exclusion of evidence relevant to a matter if the court which passes upon the effect of the error determines from concessions of counsel or any part of the record that there was no bona fide contention as to the matter inconsistent with the verdict or finding." Rule 303. "(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. (2) All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated." Model Code of Evidence, pp. 76, 77, 78, 180.

The authorities cited in support of the foregoing texts include cases from California, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Pennsylvania and Vermont. All of these authorities support the rule announced in the Martin case and the other cases following this rule which are disapproved by the majority opinion. The majority opinion cites some of the above cited cases but makes the following erroneous and misleading statement with respect to the rule announced therein: "The introduction of evidence of admitted facts is permissible in cases where the admission is ambiguous in form or limited in scope or where, during the trial of a case, a party seeks to deprive his opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact." To conclusively demonstrate the inaccuracy of the last quoted statement from the majority opinion I shall analyze each of the cases which I have cited and set forth excerpts from the opinions accurately disclosing the holding therein.

The case of Ruppel v. Clayes, 230 Mo. App. 699, 72 S.W.2d 833, cited in the majority opinion, was a personal injury action in which the plaintiff alleged that the defendant while intoxicated negligently caused his automobile to collide with plaintiff causing the personal injury complained of. The defendant's answer denied the allegations of the complaint, but prior to the introduction of evidence his counsel made an admission of liability. Over defendant's objection plaintiff was permitted to introduce evidence showing defendant's intoxication. Plaintiff recovered a judgment and on appeal defendant claimed that the admission of such evidence was error because there was no issue as to his liability after his admission. In answering defendant's contention, the Missouri Court of Appeals stated: "Defendant further complains that the court erred in permitting plaintiff, over the objection of defendant, to introduce evidence indicating that the defendant was under the influence of liquor at the time of the accident. In support of his contentions defendant argues that, inasmuch as liability was admitted at the start of the case, the evidence complained of had no bearing on the extent of plaintiff's injuries, or the amount of damages to be awarded, and, since there was no prayer for punitive damages in plaintiff's petition, such opening statement and such evidence were only calculated to inflame and prejudice the jury against defendant. * * *

"We are of the opinion that, even if defendant had made an unqualified general 'admission of liability' instead of the decidedly qualified one which he did make, it would, nevertheless, have been the privilege of plaintiff to make such statement to the jury and to introduce, in his own way, such evidence as was relevant to the issue referred to. We know of no rule of law under which plaintiff could have been deprived of this privilege by such qualified admissions as were made by defendant herein. * * *

"Having this principle in mind, we think it is proper to say in the case at bar that, if defendant was under the influence of intoxicating liquor at the time of the accident, it was his misfortune, but defendant's misfortune in this respect cannot deprive plaintiff of the right to present to the jury, in his own way, competent and relevant evidence to show all the circumstances attending the accident.

"Counsel for defendant cite no case, and we have not been able to find any, in which it has been held that a party plaintiff is bound to accept the admissions of a party defendant with respect to an issue in the case and is precluded by such admission from presenting his evidence to prove his case in his own way.

"The general rule is stated in 22 C.J. p. 330, as follows: 'A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.' * * *

"We are of the opinion that plaintiff was under no duty to accept defendant's offer of an admission of liability, qualified or unqualified, and we see nothing in the record tending to show any effort on the part of plaintiff, or his counsel, to inflame the minds of the jurors against defendant in presenting this feature of the case.

"We therefore hold that the court committed no error in overruling defendant's objection to the statement made to the jury by plaintiff's counsel, nor did the court commit any error in permitting plaintiff to introduce the evidence referred to." [Emphasis added.] 72 S.W.2d pages 833, 835, 836.

In the case of Carter v. Ray, 70 Ga.App. 419, 28 S.E.2d 361, 369, the court said: "'Evidence that is relevant cannot be kept from the jury by a waiver of proof on that point or admission of fact, if the party desires the testimony out.' * * * If there were two legal methods of procedure by which the plaintiff could make out the case, the one the plaintiff preferred to follow, and the other, the one that the defendant preferred that the plaintiff should follow; there was no error in the allowing the plaintiff to elect which legal method of procedure he would adopt."

In the case of State v. Young, 52 Or. 227, 96 P. 1067, 1068, 18 L.R.A.,N.S., 688, 132 Am.St.Rep. 689, defendant was convicted of assault with a dangerous weapon. He appealed and claimed as error the admission of testimony by two physicians as to the number and character of the gunshot wounds on the body of the victim, on the theory that defendant having admitted the assault and pleaded justification, the extent of the injury done and the manner in which it was done became incompetent and immaterial. In answer to this contention the Supreme Court of Oregon held that the plea of not guilty is a denial of the allegations in the indictment. "The burden of proving each material element of the charge beyond a reasonable doubt was, therefore, upon the state, and the right to offer and have received evidence relevant and material to the issue cannot be taken away by the defendant admitting or offering to admit that the part of the charge sought to be proven is true. 'Evidence of facts which in themselves are relevant to the guilt of the accused are not inadmissible because he admits or offers to admit that such facts are true.'" Here the evidence offered was material and relevant so no error was committed.

In the case of People v. Fredericks, 106 Cal. 554, 39 P. 944, the defendant was convicted of murder and on appeal contended as error the admission of evidence as to the pursuit and capture of defendant after facts in connection therewith were admitted by him. The court held that the prosecution in a criminal case has the right to prove facts pertaining to the crime when it deems that course advisable rather than take the admission of the defendant as to such facts.

In the case of In re Mason's Will, 82 Vt. 160, 72 A. 329, the contestants against whom a decree was entered in a will contest appealed claiming it was error to allow a witness to testify as to an interview showing that the testatrix was sane at a certain time when such had been admitted by contestants. In affirming the judgment, the Supreme Court of Vermont said: "It is ordinarily within the discretion of the court to reject or receive evidence of a fact that is conceded. (Citations) But the nature of the evidence offered and its relation to the conceded fact and to the main issue may be such that any action of the court thereon will be revisable." Page 330 of 72A.

In the case of McHenry v. United States, 51 App.D.C. 119, 276 F. 761, 34 A.L.R. 1109, defendant appealed from a judgment of conviction of murder which occurred while a policeman was attempting to arrest him on a suspected charge of robbery. On appeal defendant claimed that since he had admitted that at the time of the shooting of the officer he was suspected of having committed a robbery, it was error for the court to allow, over defendant's objection, evidence of the details of the robbery. In affirming the judgment of conviction the Court of Appeals for the District of Columbia held that such admission was insufficient to require the exclusion of evidence of the previous robbery and murder, for which the arrest was attempted, since the offer did not disclose as did the evidence, defendant's motive for resisting the arrest. The court has considerable latitude on questions of motive and if the evidence has a legitmate bearing on the question in issue, there is no error in admitting it.

In the case of Henderson v. Ball, 193 Iowa 812, 186 N.W. 668, 672, plaintiff brought an action for damages as the result of fraudulent and misleading advertisements and correspondence promulgated by defendant. Defendant's answer alleged that whatever statements are shown to have been made by him such were knowingly made. At the trial defendant contended that this admission had the effect of rendering immaterial and inadmissible any evidence of proof of defendant's fraudulent intent. The trial court refused to allow plaintiff to show defendant's fraudulent intent and directed a verdict for defendant. In reversing the judgment the Supreme Court of Iowa held that such evidence was admissible stating: "A hypothetical admission of that nature will not preclude the other party from proving the wrongful intent in the usual manner by other competent testimony."

In the case of Stevens v. Gas & Electric Co., 132 Iowa 597, 109 N.W. 1090, a fireman in the course of his duty ran his buggy into a pile of dirt allegedly negligently left there by defendant gas company as the result of certain excavations. Defendant's answer pleaded consent and permission of the city to make the excavations. Plaintiff admitted defendant had permission of the city to lay the gas main and objected to defendant's offer of evidence of a permit giving permission by the city. The objection was sustained, and on appeal it was held to be error to have sustained the objection but not prejudicial. The court stated in substance that it was not for the plaintiff to control the introduction by defendant of its evidence by making an admission nor could the scope and effectiveness of the evidence offered be limited or controlled in such a manner.

In the case of Baumier v. Anteau, 79 Mich. 509, 44 N.W. 939, 941, plaintiffs brought suit for damages for unlawful dispossession and recovered judgment. On appeal defendants claimed that by reason of their offer on the trial to admit that plaintiffs were kept out of possession of the premises by defendants, it was error to permit them to give evidence of that fact and the circumstances attending it. The court in affirming the judgment said "the right of the plaintiffs to present their proofs to the jury, in their own way, subject to the rules of evidence, was a substantial and important one. Defendant by his proffered admission, could not deprive them of it. The res gestae of a transaction are usually significant, and tend to enlighten the jury upon the matters in issue."

In the case of Terre Haute Elec. Co. v. Kiely, 35 Ind.App. 180, 72 N.E. 658, 661, plaintiff sued for the wrongful death of her husband who was a motorman killed while operating one of defendant's street cars due to defective brakes. At the trial a physician who attended the deceased was allowed over defendant's objection to testify relative to the character of his injuries and resulting death. Pending the examination of the physician, defendant offered to admit that the death was caused by the injuries received in the accident, and on appeal from an adverse judgment, it contended that the admission of such evidence was error. In holding it was not error the Supreme Court of Indiana stated that: "One may not thus limit his adversary's method of making proof."

In the case of Schroth v. Philadelphia Rapid Transit Co., 280 Pa. 36, 124 A. 279, 280, plaintiff claimed injuries as the result of the negligent operation of one of defendant's street cars while she was riding thereon as a passenger. Defendant admitted negligence and objected to evidence offered by plaintiff to the effect that immediately before the car left the track it struck a curve and a passenger was thrown against a window. The Supreme Court of Pennsylvania held that the evidence was properly admitted as a part of the res gestae of the accident itself, and as tending to show that the car left the track because of the excessive speed at which it was running, thus furnishing some evidence of the cause of the accident and tending to show defendant's negligence. The court stated: "The mere fact that defendant made no attempt to disprove negligence did not necessarily exclude proof of it."

In the case of Webster v. P. W. Moore & Son, 108 Md. 572, 71 A. 466, 469, an action was brought to recover the contract price for a carload of tomatoes. During the trial one Simmons, a canned goods broker through which the sale from plaintiff to defendant was made, was asked what was the value of No. 3 standard tomatoes on September 8, 1906, for the purpose of showing that the contract price was the full market price. Plaintiff objected, but conceded that the contract price was the full market price that day and the court sustained the objection. Later in the trial the same question was read from a deposition and the answer of 75¢ was also read. Plaintiff objected and defendant stated he expected to show by the answer that he had agreed to give a price equal to the market price. The court sustained the objection on the ground that the matter thus proposed to be proved had already been conceded when the ruling on the first question had been made. On appeal the case was reversed on other grounds but the court went on to say that "upon principle it would seem *that there ought not to be laid down a hard and fast rule compelling a party, against his will, to accept his adversary's concession of a bare fact sought to be proved in lieu of the evidence by which the fact is proposed to be established.* There are, no doubt, cases in which no actual injustice would be worked by such a rule, but there are others in which the strength of a proponent's case would be greatly weakened by its application. * * * The excluded answer showed that the contract price was 2½ cents above the market price of that day, and thus illustrates the obvious difference in effect in some cases between a naked concession of a fact and the production of the evidence by which the fact is proposed to be established. We have not had pointed out to us any specific injury worked to the defendant in this case, by the ruling complained of; and, in the absence of injury, the error cannot be held reversible, *but we cannot give our sanction to the laying down of a general rule which would deprive a party of his right to produce to the jury, in his own time and way, the evidence upon which he relies, and which is legally admissible for that purpose.*" (Emphasis added.)

In the case of Dunning v. Maine Central R. Co., 91 Me. 87, 39 A. 352, 64 Am.St.Rep. 208, plaintiff brought an action to recover for the loss of property by fire alleged to have been caused by one of defendant's locomotives. Plaintiff introduced evidence to the effect that other fires had been caused by defendant's locomotives. Before this testimony was admitted defendant's counsel expressly admitted the possibility of engines setting fires and objected to the evidence offered by plaintiff on the ground that because of this admission the testimony even if otherwise relevant and admissible to show such a possibility should be excluded. The court overruled defendant's objection and on appeal from a judgment for plaintiff, defendant contended that the admission of such evidence was reversible error. In affirming the judgment for plaintiff the Supreme Court of Maine stated: "Also, before the testimony concerning other fires was admitted, the defendant's counsel expressly admitted, the possibility of engines setting fires; and he now claims that, because of this admission, the testimony, even if otherwise relevant and admissible to show such a possibility, should have been excluded. We do not think so.

"It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts,—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances." Page 356 of 39A.

In the case of John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41, a beneficiary under a policy of insurance brought action to recover on the policy. Defendant insurance company admitted that proofs of death had been submitted to the company under the requirements of the policy. At the trial plaintiff offered such proofs in evidence and defendant objected on the ground that the same were irrelevant because of the admission. On appeal the Supreme Court of Michigan held there was no error in the reception of the evidence. That the admission by defendant that such proofs had been furnished did not render it improper to produce the documentary evidence thereof and thus prevent any subsequent excuse as to the meaning and extent of the admission. The court said: "It would be difficult to see how a party can be damnified by proof which accords with his admissions."

In the case of Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am.Rep. 558, plaintiff brought an action for breach of warranty against defendant corporation. Defendant's counsel admitted that the defendant was a corporation and objected to the production of its articles of incorporation. On appeal it was held by the Supreme Court of Michigan that the articles of incorporation were properly received, as *"it would be absurd to hold that any party by his bald admissions on trial could shut out legal evidence."*

In the case of Clayton v. Brown, 30 Ga. 490, plaintiff brought an action against the defendant for conversion of a negro slave. Defendant admitted the conversion. Over defendant's objection plaintiff was allowed to put in evidence as to the conversion. On appeal the Supreme Court of Georgia held that such evidence was properly admitted. That the testimony was relevant to the issue, showing a conversion of the negro by defendant and could not be excluded simply because the opposite party was willing to admit a conversion, and the plaintiff was not bound to accept defendant's admission.

In the case of Priest v. Inhabitants of Groton, 103 Mass. 530, plaintiff was injured by a defect in a highway which defendant town was bound to keep in repair. At the trial the only defect contended for was the absence of a railing by the side of the way at the time of the accident and the defendant did not deny there was no such railing at that time but only that the absence of it was not a defect and conceded that it had been in substantially the same condition for the five years past and that its condition was well known to all. On appeal the Supreme Court of Massachusetts held that plaintiff was not bound to accept this concession, and might prove both that the defect existed more than 24 hours and that the town had notice of it.

In Dorr v. Tremont National Bank, 128 Mass. 349, an action was brought to compel defendant corporation to issue certificates of stock to plaintiff. Plaintiff objected to the introduction of certain correspondence offered in evidence by defendant on the ground that the facts sought to be established thereby were conceded and the court excluded the evidence. On appeal by defendant, and in response to its contention that the correspondence was admissible, the Supreme Court of Massachusetts said: "Whether further evidence shall be received upon a point expressly admitted by the adverse party is wholly within the discretion of the judge presiding at the trial."

While the 18 cases above analyzed constitute only a few of the decided cases which support the rule announced in the Martin case (overruled by the majority decision), there are two other cases which deserve mentioning. They are Kurn v. Counts, 247 Ala. 129, 22 So.2d 725, and Hanskett v. Broughton, 157 Minn. 83, 195 N.W. 794. These cases purport to support the rule announced in the majority decision but the opinion in each case is poorly reasoned and no authority is cited in support of either case. In the case of Kurn v. Counts, supra, there was involved an action under an Alabama homicide statute which provided for a recovery of punitive damages only. Plaintiff's husband was killed in a railroad crossing accident and she sued the railroad company for damages. At the trial defendant stipulated that the deceased died as the result of the injuries received in the accident. Over defendant's objection plaintiff was permitted to testify as to deceased's age, health and absence of physical defects at the time of the accident. Plaintiff recovered a judgment which was reversed on appeal, the Supreme Court of Alabama holding that since defendant stipulated that deceased died as the result of the injuries received in the accident, "that counsel for plaintiff did not have any further burden in that respect, and he was not authorized to introduce prejudicial matters to prove an admitted fact." [247 Ala. 129, 22 So.2d 729.] The alleged "prejudicial matters" was the testimony as to deceased's age, health and absence of physical defects at the time of the accident. I am confident that even those who join in the majority opinion in the case at bar would not sanction the rule announced in the Kurn case. The case is obviously unsound and no authority is cited for the rule announced therein. I am sure none can be found.

In the case of Hanskett v. Broughton, supra, plaintiff brought an action for personal injuries arising out of an automobile collision. Defendant by his answer denied negligence and pleaded contributory negligence on the part of plaintiff. Before the introduction of any evidence defendant's counsel withdrew the denial of negligence and admitted that the defendant was negligent. Notwithstanding this admission, plaintiff's counsel in his opening statement asserted that defendant was to some extent under the influence of intoxicating liquor at the time of the accident and during the presentation of plaintiff's case witnesses were called who testified to facts relative to defendant's intoxication. This evidence was admitted over the objection of defendant. Plaintiff recovered a judgment which was reversed by the Supreme Court of Minnesota on the ground that plaintiff's counsel was guilty of misconduct in his statement to the jury and in presentation of evidence relating to defendant's intoxication and on the further ground the verdict was excessive. The court stated: "The introduction of that proof at the time and in the manner it was introduced was prejudicial error. There is such a general and righteously angry attitude of the public against drunken automobilists that the prejudice must be presumed. In consequence the error requires a reversal.

"Where a reversal is necessitated by such conduct on the part of counsel for the prevailing party, we are not much disposed to search the record for circumstances calculated to cure the error. We have done so, however, and find none. The attempt to prove contributory negligence was not of such a nature as to lay a foundation for proof of defendant's intoxication. That evidence, scant at best, had to do with plaintiff's doings and condition, instead of those of defendant. Neither was there any issue as to the credibility of defendant which would have made material evidence of his then condition, as to sobriety or the lack of it.

"There is another reason why there must be a reversal. The amount of the verdict is large. An examination of the record convinces us that it is too large; but, confirmed as it is by the learned trial judge, we would not direct a new trial for excessive damages were it not for our conviction that the size of the verdict may be, and probably is, explained by the grossly unfair tactics of counsel for plaintiff. The proof of defendant's intoxication, improper as it was, is the least of his offending." 195 N.W. 794, 795. No authorities are cited in the opinion in support of the holding that the admission of the evidence of intoxication was error, and on a petition for rehearing the Court stated that: "The respondent's petition for rehearing is denied; but it makes one criticism of the opinion which is well taken, and we are grateful to counsel for calling attention to it. The point referred to is that the opinion seems to place the reversal in part squarely upon misconduct alone. Obviously, that is a proper interpretation, although not the one intended, of the concluding paragraph of the opinion. It does not say just what should have been said. The fact is that the portion of the opinion dealing with misconduct is predicated solely upon our conclusion that the verdict seemed excessive, and that its size may have been due to misconduct of counsel." Pages 795, 796 of 195 N.W.

I think it can fairly be said that the last cited case is the only decision of a court of last resort in any American jurisdiction which supports the rule announced in the majority opinion in the case at bar. As stated before, no authority is cited in the Hanskett case in support of the rule there announced and the court does not in that case predicate its decision solely upon the inadmissibility of the evidence but upon the alleged misconduct of counsel for plaintiff in attempting to disclose the intoxication of the defendant at the time of the accident. As appears from the opinion of the court in denying the petition for rehearing in that case the reversal of the judgment was based upon excessive damages and the misconduct of counsel was treated as merely incidental to the excessive damages.

The basic theory of the majority opinion in the case at bar is that facts admitted are not in issue; that proof must be confined to the issues, and it is therefore error to admit evidence to prove an admitted fact. The opinion first cites the case of Travelers' Ins. Co. v. Byers, 123 Cal.App. 473, 474, 11 P.2d 444, which holds that if the facts alleged in the complaint are not denied, no evidence need be offered to prove their existence. This is elementary. But it does not follow that a court would commit error by permitting plaintiff to prove such facts.

The majority opinion next cites the cases headed by Estate of Boyes, 151 Cal. 143, 90 P. 454, which hold that evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. But these cases simply hold that evidence, in order to be relevant and material, must come within the purview of some allegation in the pleadings otherwise it is not germane to any issue in the case. Estate of Boyes did not involve the question under discussion here but merely the question of whether the evidence was responsive to any allegation in the pleadings in that case. The case of Nantahala Power & Light Co. v. Sloan, 227 N.C. 151, 41 S.E.2d 361, 363, cited in the majority opinion, was a proceeding in eminent domain to acquire a flowage easement. A previous judgment had been entered by consent establishing the easement and the complaint in the eminent domain proceeding pleaded the existence of such easement. At the trial plaintiff offered the previous judgment in evidence and it was admitted over the objection of the defendant. The court held the judgment inadmissible because it recited the amount which had been awarded to the condemnee for the easement already acquired by the condemnor. The court stated: "The Town of Franklin, pursuant to the terms of the consent judgment entered in 1928, paid this respondent and her children, the heirs at law of J. S. Sloan, the sum of $1,200 in full settlement for all damages growing out of the erection of the town's hydro-electric plant and the construction and maintenance of its 25-foot dam, which plant is now owned, maintained and operated by the petitioner herein. Evidence of the price paid for the original easement in 1928 is inadmissible to establish the value of the additional land taken in 1943. It is too remote. 'When the evidence is too remote in point of time to throw any light on the fact at issue, to wit, the fair market value of the property at the time of the taking, it is incompetent and should be excluded.' State Highway Comm. v. Hartley, supra [218 N.C. 438, 11 S.E.2d 314, 315]." It is obvious that this case does not support the rule announced in the majority opinion in the case at bar.

The majority opinion discusses the public policy of the rule announced in the Martin case, and states that to permit the application of that rule will result in delay in the conduct of litigation. There are two obvious answers to this argument; first, experience has shown that there are very few cases in which the problem arises, and trial judges are alert to prevent an abuse of the privilege of proving facts which are not in dispute if and when a party seeks to invoke the rule. Ordinarily more time is consumed by objections to the evidence than is required for its introduction. Second, since the rule is a part of the body of law of this state through judicial pronouncement for a period of over 20 years, its repeal or repudiation is for the consideration of the

Legislature and not the courts. Declarations of public policy are for the Legislature—not the judiciary.

In arguing against the soundness of the rule announced in the Martin case the majority opinion states: "It is true that the trial judge may, in his discretion, exclude cumulative, although relevant, evidence to avoid confusing the jury or wasting the time of the court. Douillard v. Woodd, 20 Cal.2d 665, 128 P.2d 6; Estate of Wineteer, 176 Cal. 28, 167 P. 516; 6 Wigmore on Evidence [3d ed., 1940] 576–578. A different rule applies, however, to evidence offered with respect to an issue entirely removed by the pleadings. Such evidence is not merely cumulative on a material issue but is completely irrelevant and there is no room for the exercise of discretion." No authorities are cited in support of the last two sentences in the above quoted excerpt and the rule therein announced is based upon the mere ipse dixit of the majority. While the majority opinion does not so state, I presume we are to assume that a different rule applies where a fact is admitted by the pleadings than where it is admitted in open court during the trial of the action. In other words, the majority opinion appears to draw a distinction between a case where negligence is admitted by the defendant in his answer and one where at the commencement of the trial the defendant in open court admits and offers to stipulate that all of the allegations of plaintiff's complaint are true. The latter admission, I presume, would be what the majority opinion refers to as "the bald admission of a probative fact," by which a party might seek "to deprive his opponent of the legitimate force and effect of material evidence." However, the majority opinion does not attempt to explain why the latter admission should not be as effective as an admission in the pleadings to render evidence of an admitted fact irrelevant and immaterial. I challenge the soundness of such a distinction and I am sure that no authorities can be found which support the view expressed in the majority opinion.

The cases which have given consideration to the problem here involved make no distinction between a situation where the admission is made in the pleadings or by stipulation in open court during a trial either orally or in writing. The cases may be differentiated by their discussion as to the effect of the admission, rather than as to the manner in which it is made. Generally speaking the cases may be classified in three groups: First, those which hold that evidence of an admitted fact is admissible and may not be excluded from the consideration of the trier of fact. Ruppel v. Clayes, 230 Mo.App. 699, 72 S.W.2d 833; Carter v. Ray, 70 Ga.App. 419, 28 S.E.2d 361; State v. Young, 52 Or. 227, 96 P. 1067, 18 L.R.A.,N.S., 688, 132 Am.St.Rep. 689; People v. Fredericks, 106 Cal. 554, 39 P. 944; McHenry v. United States, 51 App.D.C. 119, 276 F. 761, 34 A.L.R. 1109; Henderson v. Ball, 193 Iowa 812, 186 N.W. 668; Stevens v. Gas & Electric Co., 132 Iowa 597, 109 N.W. 1090; Baumier v. Anteau, 79 Mich. 509, 44 N.W. 939; Terre Haute Electric Co. v. Kiely, 35 Ind.App. 180, 72 N.E. 658; Schroth v. Philadelphia Rapid Transit 280 Pa. 36, 124 A. 279; Webster v. P. W. Moore & Son, 108 Md. 572, 71 A. 466; John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 41; Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am.Rep. 558; Clayton v. Brown, 30 Ga. 490; Priest v. Inhabitants of Groton, 103 Mass. 530; Branner v. Nichols, 61 Kan. 356, 59 P. 633; Bank of No. America v. Crandall, 87 Mo. 208. Second, those which hold that the admission of such evidence is within the discretion of the trial court. Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246; House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 95 P.2d 465; Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603; Behrendt v. Times Mirror Co., 30 Cal.App.2d 77, 79, 85 P.2d 949; Dorr v. Tremont Nat'l Bank, 128 Mass. 349; Dunning v. Maine Cent. R. Co., 91 Me. 87, 39 A. 352, 64 Am.St.Rep. 208; In re Mason's Will, 82 Vt. 160, 72 A. 329; Dalton v. Calhoun County Dist. Ct., 164 Iowa 187, 145 N.W. 498, Ann.Cas.1916D, 695; Hammond v. Hammond, 247 Mass. 239, 142 N.E. 44; Hambleton v. U. AJA Granite Co., 95 Vt. 295, 115 A. 102; Jones v. Allen, 8 Cir., 85 F. 523; Ridgway v. Longaker, 18 Pa. 215. Third, those which hold that the admission of such evidence, even if error, could not be prejudicial. Moss v. Youngblood, 187

Ga. 188, 200 S.E. 689; Beckerleg v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n, Mo.App., 274 S.W. 917.

The majority opinion concedes that the trial judge may exercise his discretion in the admission or exclusion of evidence and that he may in the exercise of that discretion exclude cumulative evidence that is relevant and material to the issues in the case without committing error. While discretion may be something more than patience, I think it has been the experience of most trial lawyers that a patient judge is more apt to exercise a sound discretion than one who is impatient, and to that extent at least the amount of cumulative evidence which a party may be permitted to introduce is largely dependent upon the patience of the trial judge. Therefore, if it may be said that evidence offered to prove an admitted fact is in the nature of cumulative evidence, the extent to which the introduction of such evidence may be permitted may largely depend upon the patience and discretion of the trial judge. As I have heretofore pointed out, such evidence is not irrelevant nor immaterial if it is within the purview of any allegation in the pleadings even though such allegation is not denied or is expressly admitted.

While courts may and sometimes do refuse to follow rules which appear to be well settled and overrule cases which have been accepted as authorities over a period of many years, it seems rather unusual to me to find a majority of this court joining in an opinion overruling four cases which have never been heretofore questioned in any decision of this court, which cases are in accord with the uniform rule throughout the United States and are supported by all of the textwriters who have given expression to their views on the subject. No reason is stated in the majority opinion why California should establish a rule out of harmony with the general rule throughout the United States as well as all of the prior decisions of this court and the District Courts of Appeal. I submit that such a policy is out of harmony with the judicial process which recognizes the importance of maintaining settled rules with respect to procedure and practice as well as those affecting personal and property rights. Especially is this true where it is not apparent that any sound reason exists for the overruling of prior decisions announcing a rule in harmony with the weight of authority.

It may be true that the possible effect of the evidence introduced in the case at bar was to increase the award of damages, but it has been held that the fact that evidence admitted might, as an incidental feature thereof, be inflammatory or have a tendency to unduly arouse the jury does not render such evidence inadmissible. Mohn v. Tingley, 191 Cal. 470, 217 P. 733. What the effect of the evidence was in the case at bar is a matter of pure speculation. This is true in every case. After the verdict is returned, and a motion for a new trial is made upon the ground that the damages are excessive, it then becomes a question for the trial judge to determine as to whether the damages are excessive. In making this determination he gives consideration to the various factors which enter into the determination of the amount of damages to which an injured person is entitled. When such determination is made by the trial judge, it is binding upon an appellate court unless the amount of damages awarded is so plainly and outrageously excessive as to suggest at first blush, passion, prejudice or corruption on the part of the jury. 8 Cal. Jur. 834, sec. 88; Johnston v. Long, 30 Cal. 2d 54, 181 P.2d 645; Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768; Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513. If the damages awarded are excessive, they should be reduced. But whether they are reduced or permitted to stand at the amount fixed by the jury, the determination of the amount to be awarded should not be affected by the fact that evidence relating to the negligence of the defendant was introduced notwithstanding the admission of the defendant that he was guilty of negligence which proximately caused the injury suffered by plaintiff.

The effect of the majority holding in this case is to deny to an injured person the benefit of presenting to the trier of fact the entire factual situation surrounding the accident out of which the injury arose. It cannot be denied that either a jury or a trial judge is more disposed to award a substantial amount of damages in a case where the defendant is shown to have been guilty of gross negligence and his conduct was such as to indicate a reckless disregard for the safety of others, than where the negligence amounted to only an error in judgment. The present holding will make it possible for a defendant who has been guilty of the most heinous kind of reckless and wanton conduct, including intoxication, to conceal from the trier of fact the extent of his culpability, and thereby gain any advantage which might flow from the absence of such disclosure. Theoretically and technically, and judged by academic standards, this practice may be justified, but when gauged by actual experience in the administration of justice it favors the worst offenders by permitting them to escape from a larger award of damages which the trier of fact might feel justified in awarding if the entire picture were presented. This does not mean that a person injured as the result of the negligence of another should receive more damages because his tortfeasor was grossly and wantonly negligent than another with like injuries whose tortfeasor was only slightly negligent. But it simply recognizes the human tendency to weigh liability against culpability. Since the law must be administered by human beings, the effect of this tendency must be considered as incidental to its administration. To argue to the contrary requires a denial of the obvious.

Therefore, if I were disposed to hold, contrary to the weight of authority and the long settled rule in this state, that it was error for the trial court to permit plaintiff to prove the facts relating to defendant's negligence, I would be required to hold that such error was prejudicial and compelled a reversal of the judgment. This conclusion would be required because of the probability that the damage award was increased as the result of the evidence erroneously admitted. If it cannot be said that the effect of such evidence was to increase the award of damages in this case, it likewise cannot be said that such evidence would have the effect of increasing the award of damages in any case. It must necessarily follow that the admission of such evidence could not be prejudicial in any case, and to hold its admission erroneous is as idle as fighting a windmill.

In my opinion there was no error whatever in the admission of the evidence of defendant's negligence and the judgments should therefore be affirmed.

31 Cal.2d 139

DE MILLE v. AMERICAN FEDERATION OF RADIO ARTISTS.

L. A. 19407.

Supreme Court of California, in Bank.
Dec. 16, 1947.

1. Trade unions 🔑1, 3, 6

Purposes of national and local union of radio artists, as expressed in articles of agreement and constitution of national union, authorized lawful opposition to contemplated legislation which in opinion of members would be inimical to their welfare, individually or collectively.

2. Trade unions 🔑6

A trade union may take measures otherwise legal for its own protection and preservation.

3. Trade unions 🔑8

The union shop is a valid objective of organized labor, and compulsion to join a union, brought about by moral force, has not been made contrary to public policy by any statute of state. Labor Code, § 923.

4. Associations 🔑15(3)

An unincorporated association, acting in conformity with will of majority of its members, has right to devote its funds to any purpose calculated to promote objects of the association.

5. Trade unions 🔑1, 3, 4

The articles of agreement, constitution and by-laws of both national and local union of radio artists constitute a contract with the members, and are binding on plaintiff, as a member.

6. Trade unions 🔑1, 3, 4

The contract between trade union and its members, consisting of the articles of agreement, constitution and by-laws of union, may prescribe terms upon which membership in the union may be gained, and it may also define conditions which will entail its loss.

7. Trade unions 🔑4, 7

Subsequent approval by national union of radio artists of local union's levying of assessment to oppose initiative measure appearing on ballot in state election constituted a "ratification" thereof, and assessment thereby became valid.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

8. Associations 🔑18

The practical and reasonable construction of constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts.

9. Trade unions 🔑4

Local union of radio artists had authority to assess members $1 to oppose initiative measure appearing on ballot in state election and deemed harmful by majority of members of union to organized labor under its organic law and regulations.

10. Trade unions 🔑4, 6

Dues and assessments paid by members to trade union become property of union, and any severable or individual interest therein ceases upon such payment, and as property of union they are subject to disbursement and expenditure by union in pursuit of lawful objects for which they were designated to be expended.

11. Trade unions 🔑4

Mere disagreement with majority does not absolve dissenting minority from compliance with action of trade union taken through authorized union methods.

12. Constitutional law 🔑90, 91
Elections 🔑10½

Requiring member of local union of radio artists to pay assessment to oppose proposed initiative law deemed harmful by union to organized labor did not infringe member's constitutional right of suffrage, freedom of speech, press and assembly, even though member personally favored the proposed initiative law.

13. Elections 🔑320

Assessment by local union of radio artists to oppose initiative measure appearing on ballot in state election and deemed harmful by union to organized labor did not violate provisions of Elections Code making intimidation of voters a criminal offense. Elections Code, §§ 11580, 11582.

14. Constitutional law 🔑275(1)

The right to earn a living is deemed to be "property" within concept of Fifth Amendment, and a trade union, in service of its interest, may not deprive a person of his constitutional rights of liberty and property. U.S.C.A.Const. Amend. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

15. Constitutional law 🔑275(1)

Membership in a trade union is a "property right" within Fifth Amendment which the courts will protect. U.S.C.A. Const. Amend. 5.

16. Constitutional law 🔑275(1)

Automatic suspension of member of local union of radio artists pursuant to by-laws upon member's failure to pay assessment to oppose initiative measure appearing on ballot in state election and deemed harmful by union to organized labor was not invasion of member's constitutional right to earn a living. U.S.C.A.Const. Amend. 5.

17. Elections 🔑317

Assessment by local union of radio artists to oppose initiative measure appearing on ballot in state election and deemed harmful by union to organized labor did not violate the federal Corrupt Practices Act denouncing contributions by labor organization in connection with congressional and presidential elections, since Act did not purport to cover labor organizations in respect to state activities. Federal Corrupt Practices Act of 1925, §§ 301 et seq., 313, as amended, 2 U.S.C.A. §§ 241 et seq., 251.

18. Statutes ⚷241(1)

Penal statutes include only those offenses coming clearly within import of the language, and will not be given application beyond their plain intent.

Appeal from Superior Court, Los Angeles County; Emmett H. Wilson, Judge.

Action by Cecil B. DeMille against American Federation of Radio Artists, Los Angeles Local, an unincorporated association, and others, to restrain defendants from suspending the plaintiff for his refusal to pay assessment. From judgment dismissing action, following order sustaining defendants' demurrer to complaint without leave to amend, the plaintiff appeals.

Affirmed.

Prior opinion, 175 P.2d 851.

Neil S. McCarthy, of Los Angeles, for appellant.

Beilenson & Berger and William Berger, all of Los Angeles, for respondents.

Charles J. Janigian, of San Francisco, as amicus curiae on behalf of respondents.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment dismissing his action following an order sustaining the defendants' demurrer to the complaint without leave to amend.

The record shows the following:

The defendant, American Federation of Radio Artists, herein designated as AFRA or National, is an unincorporated association or union of radio entertainers and performers. It is a component part of the Associated Actors and Artists of America whose jurisdiction is over all performers in the field of entertainment, and an affiliate of the American Federation of Labor. AFRA'S jurisdiction is in the field of radio broadcasting and entertainment. It is governed by a National Board, Regional Boards, and Local Boards. It is organized on a union shop basis. It has collective bargaining contracts with all employers of radio artists and performers which provide that only members of the union will be engaged to perform radio services or produce radio programs. Since only members of the union may perform in radio broadcasts, a producer of a radio program is required under his union contract to employ only union members. The union, however, is open to all persons who desire to broadcast, produce programs or perform for radio listeners. An applicant for membership in the union is required to sign an agreement to be bound by the respective Constitutions of the National and the Local, the by-laws, rules, regulations and orders existing, and all lawfully adopted amendments.

For more than eight years prior to December, 1944, the plaintiff was engaged in the production of a radio program which was broadcast over the Columbia network. For his services he received $98,200 a year. Since he could not produce the program after the union shop had been effected by AFRA without becoming a member of the union, the plaintiff applied for membership in, and on February 13, 1939, became a member of the defendant AFRA, Los Angeles Local, herein designated as Local. He was a member and was producing his program on December 7, 1944, when the complaint herein was filed.

At the general election of 1944, pursuant to the initiative provisions of the Constitution, Proposition No. 12 entitled "Right of Employment" was submitted to the electors of the State. The adoption thereof would have added the following provisions to Article I of the California Constitution: "Every person has the right to work, and to seek, obtain and hold employment, without interference with or impairment or abridgment of said right because he does or does not belong to or pay money to a labor organization." It purported to make unlawful anything done or threatened which would interfere or tend to interfere with, impair or abridge such right; to provide that legal or equitable relief in a civil action be available, and that the provisions be self-executing and supersede all provisions in conflict therewith.

except legislation which might be enacted to facilitate, but not to limit or restrict its operation. As the wording of the proposed measure indicated, it was designed to prohibit the union shop in California, and to insure means for effecting the policy of an open shop.

A regular membership meeting of the defendant Local was held on July 17, 1944. The notice of the meeting contained in the AFRA official bulletin announced that the so-called Right of Employment measure would be explained at the meeting. The announcement declared that the measure, if adopted, would be detrimental to organized labor, and required educational programs to disseminate information on the true nature of the proposition. At the membership meeting a resolution was unanimously adopted authorizing the Board of Directors to take any action deemed proper and necessary to defeat Proposition No. 12. Subsequently the Central Labor Council of Los Angeles requested from AFRA Local a contribution of $1.00 per member to a fund to be used in a campaign of public education by the California State Federation of Labor to bring about the defeat of the proposition. The Board of Directors thereupon on July 21st adopted a resolution levying an assessment of $1.00 per member, the proceeds to be placed in a separate fund to be administered by the board in opposing Proposition No. 12.

The AFRA National, in convention at Cleveland, Ohio, on August 27, 1944, by resolution opposed and condemned all similar propositions pending in various states, and authorized any and all duly constituted means "to defeat such anti-labor legislation."

On October 23, 1944, at a regular meeting of the membership of the Local, a resolution was adopted approving an assessment of $1.00 per member to provide a fund for the purpose stated, and making the assessment payable with the current dues. On October 26, 1944, at a regular meeting, the National Board by resolution approved the assessment. The fund thus collected was used solely for the purpose designated.

The Local Board in meeting fixed a 30-day delinquency period for payment of the assessment to commence November 1st and directed that all members delinquent in the payment of the assessment be notified. At the board's December meeting it was declared that unless payments were made prior to December 11th, suspension of membership would become automatic. This, of course, was subsequent to the time when it became known that the proposition was defeated at the polls.

The plaintiff received notices of the above membership meetings, and of the assessment. He did not pay the assessment, and received notice of his delinquency and impending automatic suspension. Within four days of the suspension date, he commenced this action for injunctive relief against the National and Local federations, and various executive officers, and obtained an order to show cause and a temporary restraining order. It is assumed that the suspension became effective upon the entry of the order denying further relief and dissolving the temporary restraining order.

Because this court desired to give more extended consideration to the contentions that the actions of the defendants were unauthorized and that they infringed the plaintiff's constitutional rights, the petition for hearing after decision of the District Court of Appeal, Second Appellate District, Division One, affirming the judgment, was granted.

The first contention of the plaintiff to be considered concerns the validity of the conduct of the internal affairs of the defendant federations with respect to the levy of the assessment. He contends that the AFRA had no authority under its organic law and regulations to levy the assessment for the purpose stated, but that if it did, the power was not duly exercised.

The objects and purposes of the organized radio artists and performers are stated in the "Articles of Agreement and Constitution of the American Federation of Radio Artists". Among others, they are, "to protect and secure the rights of the above described persons in their professional activities; to secure proper legislation upon matters affecting their professions; to promulgate and carry into effect such policies as shall secure the united action of all members of the said professions for the common good; to prevent and abolish abuses from which those coming under the jurisdiction of this Association shall or may suffer; to assist such persons in securing just and equitable contracts, agreements, working conditions and minimum compensation in their dealings with employers, agents, managers, impresarios and others connected directly or indirectly with the radio business; * * * and to take united action to abolish any unfair dealings or abuses or other conditions which are detrimental to persons engaged in the said professions; * * * to combine and co-ordinate the activities of the Association with the activities of other organizations, whenever such combination or coordination shall be to the best interests of the members of the Association * * *."

The "Articles of Agreement and Constitution" of the Local embrace as objectives the purpose to "secure employment advantages and prevent unfair dealings; the Local to have power to do or cause to be done or to refrain from doing such other acts or things as may be lawfully done or omitted as shall be advantageous during or on account of employment * * *." The members of the Local agree also to be bound by the Constitution, by-laws and regulations of the National, subject to the Constitution, by-laws and rules of the Associated Actors and Artists of America and of the American Federation of Labor.

[1, 2] The foregoing objects and purposes on the part of the National as well as of the Local without question cover authorized and lawful opposition to contemplated legislation which in the opinion of the members of the federation would be inimical to their welfare individually or collectively. Such an association may take measures otherwise legal for its own protection and preservation. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A,N.S., 550, 16 Ann.Cas. 1165; Davis v. International Alliance, etc., Employees, 60 Cal.App.2d 713, 715, 141 P. 2d 486; O'Keefe v. Local 463 of Ass'n of Plumbers, etc., 277 N.Y. 300, 14 N.E.2d 77, 117 A.L.R. 817.

The merits or demerits of Proposition No. 12 and the extent to which its adoption would have accomplished the intended purpose are not pertinent to the issues in this case. It is sufficient that the advocates of the open shop considered that labor's program for the union shop had progressed to such a point that a constitutional amendment was deemed necessary to achieve the aim of the proponents of the measure.

The history and development of the union shop have been set forth in various studies: Rev. Jerome L. Toner, The Closed Shop (American Council on Public Affairs, 1944); Harry Millis and Royal Montgomery, Organized Labor (McGraw Hill & Co., 1945); Samuel Gompers, Annual Report to American Federation of Labor Convention, Pittsburg, Pa., November, 1905, and The Union Shop and Its Antithesis (Pub. 1920, American Federation of Labor); Milton Handler, Cases and Materials on Labor Law (West Pub. Co., 1944); Metz, Labor Policy of the Federal Government (The Brookings Institute, Washington, D. C., Banta Publishing Co., 1945). See also U. S. Bureau of Labor Statistics, "Extent of Collective Bargaining at Beginning of 1942", (1942) 54 Monthly Labor Review, 1066, 1069; "Types of Union Recognition in Effect in January, 1943," (1943) 56 Monthly Labor Review 284.

[3] Beginning with Parkinson Co. v. Building Trades Council in 1908, supra, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, the courts of this state have upheld the union shop as a valid objective of organized labor and have said that compulsion to join a union, brought about by moral force, had not been made contrary to public policy by any statute of this state. To the same effect are McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, at page 322, 106 P.2d 373, citing further authorities; and C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 396, 106 P.2d 414. Section 923 of the Labor Code declaring the public policy as to labor organizations states: "In dealing with such employers, the individual unor-

ganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." Similar language appears in section 2 of the Norris-LaGuardia Act, Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U.S.C.A. § 101 et seq.; see also section 1 of the National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A. § 151 et seq., also as amended by the Labor-Management Relations Act of 1947, Ch. 120, Public Law 101, 29 U.S.C.A. § 141 et seq.; section 6 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, 15 U.S.C.A. § 17.

[4] Thus it may not be said that the opinion of labor union advocates that legislation such as Proposition No. 12 would be inimical to the interest of labor was unfounded in the light of the history of the labor movement. Therefore if the AFRA, through the exercise of its established legislative processes, reached the conclusion that the members collectively should act in any valid way to defeat Proposition No. 12 at the polls, the courts should not say that the objective was outside the purposes of the organization; or that if the expenditure was otherwise lawful the defendants might not expend funds to accomplish their objective. "An unincorporated association, acting in conformity with the will of the majority of its members, has a right to devote its funds to any purpose calculated to promote the objects of the association." Myrick v. Holmes, 151 Ga. 437, 107 S.E. 324; 5 Cor.Jur. p. 1344, citing Parker v. Oliver, 198 Mass. 488, 84 N.E. 860; Carter v. Strafford Sav. Bank, 70 N.H. 456, 48 A. 1083; and other cases.

[5, 6] The articles of agreement, Constitution and by-laws of AFRA both National and Local constitute a contract with the members, and are binding on the plaintiff. Grand Grove, etc., v. Garibaldi Grove, 130 Cal. 116, 120, 62 P. 486, 80 Am.St. Rep. 80; Lawson v. Hewell, 118 Cal. 613, 621, 50 P. 763, 49 L.R.A. 400; Harris v. Geier, 112 N.J.Eq. 99, 104, 105, 164 A. 50; O'Keefe v. Local 463 of Ass'n of Plumbers, supra, 277 N.Y. 300, 304, 14 N.E.2d 77, 117 A.L.R. 817; Cameron v. International Alliance, etc., 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594; Amalgamated Clothing Workers of America v. Kiser, 174 Va. 229, 6 S.E.2d 562, 564, 125 A.L.R. 1251. As that contract may prescribe the terms upon which membership in a union may be gained, so may it define the conditions which will entail its loss. Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833.

[7] The Constitution and by-laws of the Local do not expressly deal with the subject of assessments. But Article XI of the Constitution of the National treats of initiation fees, dues and assessments. Section 1 of that Article provides that initiation fees, dues and assessments of members shall be fixed by the Locals for all members of such Locals, subject to the approval of the National Board. As has been noted, the Local Board, pursuant to authorization by the membership of the Local in meeting, levied an assessment of $1.00 on each member of the Local, for the stated purpose. Subsequently that action was approved both by the Local membership and by the National Board. The section grants the qualified authority to the Local to fix and levy assessments. Its language does not imply a prohibition upon action first and approval by the National Board afterward. In fact, it infers that the resolution may come first. The delinquency period which commenced November 1st was fixed by the Local Board after approval by the National Board. Automatic suspension provided in the by-laws was not effective until December 11. But assuming that the applicable section be deemed to require approval by the National Board first and action afterward, the matter may be said to be governed by the rule that subsequent ratification is the equivalent of prior authorization. Russell v. International Alliance of Theatrical, etc., Employes, 66 Cal.App.2d 691, 698, 152 P.2d 737; O'Keefe v. Local 463 of Ass'n of Plumbers, supra, 277 N.Y. 300, 306, 307, 14 N.E.2d 77, 117 A.L.R. 817; Amalgamated Clothing Workers of America v. Kiser, supra, 174 Va. 229, 6 S.E.2d 562, 565, 125 A.L.R. 1251.

[8, 9] Furthermore, the Constitution of the Local provides that all matters or questions relating to the definition, clarification or interpretation of the Constitution or any term or provision thereof, or of the by-laws, be determined by the National Board, and that its determination shall be conclusive. On December 11, 1944, the National Board in special meeting approved the assessment procedure followed by the Local as being in conformity with the provisions of the Constitution and by-laws of both the National and the Local. The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts. Simpson v. Grand International Brotherhood, 83 W. Va. 355, 98 S.E. 580, 587; State ex rel. Smith v. Kanawha County Court, 78 W. Va. 168, 88 S.E. 662, 664, 20 A.L.R. 1030; Harris v. Missouri Pac. R. Co., D.C., 1 F. Supp. 946, 949; Shaup v. Grand International Brotherhood, 223 Ala. 202, 135 So. 327, 328; Norfolk & W. R. Co. v. Harris, 260 Ky. 132, 137, 84 S.W.2d 69. It follows that on this phase of the case the plaintiff was just as much bound by the union organization's Constitution and laws as any other of its members, and that thus far he has not presented a case for judicial interference. See also Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 270, 271, 120 P. 874; Stein v. Marks, 44 Misc. 140, 89 N.Y.S. 921, 922, 923.

The plaintiff next contends that the levy of the assessment and the consequent suspension upon his refusal to meet it, infringed his constitutional right of suffrage, freedom of speech, press and assembly. He does not contend that he was prevented from voting as he pleased at the polls, or from exercising his free choice on the ballot; nor that he was prevented from expressing publicly and privately his personal views in support of Proposition No. 12; nor does he contend that the union engaged in any political activity to put coercion upon him personally to vote in any particular way or to express himself individually as opposing Proposition No. 12. Admittedly the defendants did not prescribe what should be the members' individual beliefs nor declare that acts or expressions of individual members favorable to Proposition No. 12 would constitute grounds for charges of disloyalty. The plaintiff asserts that nevertheless the compulsion by assessment of $1.00 on each member to provide a fund to be used by the union to oppose Proposition No. 12 was a violation of each and all of his stated individual rights.

The ground of the plaintiff's assertion is that his payment of the assessment would be an expression on his part contrary to his personal beliefs. He says: "To compel appellant to put his hand in his pocket and to give money to AFRA leaders to be used to oppose Proposition No. 12 to be voted on at the election of November 7, 1944, when he was unwilling to oppose it and when appellant's sentiments were in favor of Proposition No. 12, compelled appellant to give expression to sentiments and to act contrary to his sentiments and to his thoughts, and * * * to his opinion, * * *. The giving of the money in opposition to appellant's sentiments was more eloquent than the use of actual words." He thereby seeks to draw an analogy to the flag salute cases (West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674, overruling Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493; Morgan v. Civil Service Commission, 131 N.J.L. 410, 36 A.2d 898; Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823; see also Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed 1117, 73 A.L.R. 1484), on the theory that if a salute to the flag is a symbol of speech, the payment of the assessment in this case was an equivalent symbol, a confession of belief "more eloquent than the use of actual words." Those cases might be more nearly analogous if the issue involved therein had been that payment of taxes assessed for the support of school districts requiring flag salute ceremonies was a symbol of speech and therefore interfered with constitutional freedoms—in which event we doubt that the disposition would have been the same.

In the flag salute cases the required ritual was deemed a compulsory personal expression contrary to the tenets of the performer's religious worship, and violated the First and Fourteenth Amendments to the Federal Constitution. In making his attempted analogy the plaintiff assumes that compulsory contribution to the union fund to be used to defeat Proposition No. 12 would be an individual expression of his personal views, i. e., a personal endorsement by him of opposition to Proposition No. 12. His contention further assumes that the use by the Local of the assessment fund to defeat Proposition No. 12 would be a use of the plaintiff's money for that purpose. Neither assumption may properly be indulged.

[10] The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest. "Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union." United States v. White, 322 U.S. 694, at page 701, 64 S.Ct. 1248, at page 1252, 88 L.Ed. 1542, 152 A.L.R. 1202. Dues and assessments paid by members to an association become the property of the association and any severable or individual interest therein ceases upon such payment. Lawson v. Hewell, supra, 118 Cal. 613, 622, 50 P. 763, 49 L.R.A. 400; Rohde v. United States, 34 App.D.C. 249; Lamm v. Stoen, 226 Iowa 622, 284 N.W. 465, 121 A.L.R. 627; Carpenters Union, etc., v. Backman, 160 Or. 520, 86 P.2d 456; Textile Workers Union v. Barrett, 19 R.I. 663, 36 A. 5; South Shore Country Club v. People, 228 Ill. 75, 81 N.E. 805, 12 L.R.A.,N.S., 519, 119 Am.St.Rep. 417, 10 Ann.Cas. 383; Franklin v. Burnham, 40 Misc. 566, 82 N.Y.S. 882. As such property they are subject to disbursement and expenditure by the association in pursuit of the lawful object or objects for which they were designated to be expended.

It has been seen that union opposition to the adoption of Proposition No. 12 was an object within the sphere of the organic law of the Federation and its Local. Indeed, the plaintiff does not contend that the union may not thus speak. What he contends is that the union may not use his money for that purpose.

The Local's declaration to pursue the objective and to authorize the raising of a fund for the purpose was expressed by the membership through democratic procedures. It is therefore safe to assume that the Local's action was in accordance with the opinion of the majority of the members of the Local. In no wise may it be said that it necessarily represented the opinion of every individual member thereof, and consequently that of the plaintiff.

[11] Mere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods. And compliance—here payment by the plaintiff of the assessment—would not stamp his act as a personal endorsement of the declared view of the majority. Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views. A member of a voluntary association should not be permitted successfully to seek a similar avoidance.

[12] The plaintiff states that this is a case of first impression. But the principles involved and applicable to the facts are not new. Here novelty is present only in the assertion that the proper use of association funds may be avoided by a member who is committed to a minority view. Other organizations, such as Medical As-

sociations, Bar Associations, and the like, have used their funds to support favorable legislation or defeat measures considered in the opinion of the majority or its duly authorized representatives to be inimical to the public interest or to its own welfare. It has never been considered that a difference of opinion within the association as to the use of association funds for such purposes, where otherwise lawful, was a matter for judicial interference.

[13] The plaintiff invokes sections 11580 and 11582 of the Elections Code. Those sections make intimidation of voters a criminal offense. But he does not contend that he suffered any threat, coercion, duress, force, abduction, fraud, menace, bribery, or attempted intimidation in the exercise of his choice at the polls. He invokes the sections as indicating an intimidation upon him in the exercise of the right of suffrage because of an asserted invasion of his freedom of thought or speech regarding his personal views. Since, however, he asserts no interference or intimidation upon him by threat, menace, force, or other interference with his exercise of his choice at the ballot, and since he had and continued to have absolute freedom to think or announce what views he pleased, the concept is untenable. The sections contemplate restraints on the use of corrupt means of influencing voters. Obviously there was no unlawful influence brought to bear on the plaintiff in the absence of a requirement for his personal endorsement of the defeat of Proposition No. 12. No such endorsement was asked. All that was sought was a contribution by assessment to provide funds to enable the union to pursue one of its lawful objectives.

Cases relied on by the plaintiff are consistent with the foregoing conclusions. He quotes the following from Amalgamated Society of Railway Servants v. Osborne, 1 British Ruling Cases 56, at 94 (1909, 1 Law Re.Ch.Div. 163, at 195): "It is not enough to say that a man's vote has not been influenced. It is also necessary for his freedom that he shall not have been coerced into supporting by money or otherwise the candidate whom he wishes to oppose. It is really ludicrous to suggest that his choice is confined to voting on the day of the poll. * * * Unless freedom of choice is to be reduced to an absurdity, it must extend to the whole conduct of the elector towards the candidate from beginning to end." In that case the court condemned as illegal and unauthorized under the English Trade Union Acts an objective of a union to provide a fund for the election and maintenance of parliamentary representation, candidates for which should "sign and accept the conditions of the Labour Party and be subject to their whip." A double aspect of the case was the inhibition upon parliamentary conduct of an elected representative, and the coercion by demands for political and financial support at the expense of expulsion upon members of the trade union who might be opposed to the Labour Party candidate. The general language in the various opinions in that report must be deemed to have been confined to the point at issue, that is, the validity of the coercion upon members for their political and financial support of candidates for election who would be favorable to labor, an object clearly opposed to the public interest and which legislatures in this country have sought to control by the enactment of corrupt practices acts. An inference may not be drawn from that report to the effect that in England the courts would condemn the use of union funds derived from an assessment for the purpose of conducting educational programs and public debate on legislative matters touching labor interests. In fact, in Linaker v. Pilcher, (1901) 70 L.J., K.B. 396, 87 L.T. 421, it was held that financial support of a newspaper was within the lawful objects of the union. The opinion states at page 426 of 87 Law Times Reports that the enterprise was within the lawful objects of the society to improve the condition and protect the interests of its members because the newspaper was published entirely in the interests of the members of the trade union and to protect their interests. The Osborne case may not be deemed authority for the condemnation of the use of union funds in any and every political campaign. The purposes and objects of the Trade Union Acts, together with the declared public policy that a union, as any other organization, may not campaign to elect and support a representative in Parliament required to be favorable to its interests, determined the issues in that case. The decision does not indicate that the English court would have deprived the trade union of any valid means at its command to protect the collective interests of its members.

The Osborne case is consistent with an affirmance of the judgment in the present case, as are also other cases cited by the plaintiff in support of general principles relied on by him but which do not control the decision in this case. Some of those cases are:

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155; and Ex parte Winnett, 73 Okl.Cr. 332, 337, 121 P.2d 312 (two of the Jehovah's Witnesses cases); Communist Party of United States of America v. Peek, 20 Cal.2d 536, 127 P.2d 889 (involving the word "communist" in party designation); Commonwealth v. Antico, 146 Pa.Super. 293, 22 A.2d 204 (conspiracy to violate election laws); Lockheed Aircraft Corporation v. Superior Court, Cal. App., 153 P.2d 966, Id., 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701 (wrongful discharge of employees); State v. Kohler, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348 (validity of an election of a candidate for governor); Neelley v. Farr, 61 Colo. 485, 158 P. 458, Ann.Cas.1918A, 23 (election contests); United States v. United States Brewers' Ass'n, D.C., 239 F. 163, and Egan v. United States, 8 Cir., 137 F.2d 369 (involving violations of certain corrupt practices acts); Stein v. Marks, supra, 44 Misc. 140, 89 N.Y.S. 921 (unlawful pledge of political support by a non-political organization); Vulcan Last Co. v. State, 194 Wis 636, 217 N.W. 412 (unlawful attempt to influence votes of employees); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (intimidation of and assault on Negro voters in a Congressional election); Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443 (unlawful by-law of a mutual benefit society providing for expulsion of members who engage in antagonistic political activity); Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (state prohibition against picketing; see also, A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Carpenters and Joiners Union, etc., v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; Ellis v. Journeyman Barbers' etc., 194 Iowa 1179, 191 N.W. 111, 32 A.L.R. 756); Collins v. International Alliance of T.S.E., etc., 119 N.J.Eq. 230, 182 A. 37, and Cameron v. International Alliance etc., supra, 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594 (union discrimination between senior and junior members); James v. Marinship Corporation, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900 (union discrimination against Negroes); Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343 (discrimination restricting membership in union).

In his reliance on the foregoing and other similarly distinguishable cases, the plaintiff has assumed that the union's action in levying an assessment for the purpose stated was some sort of compulsion upon him to adopt the union view of what was best for union interests, and that payment thereof would be an expression on his part of the union belief. As has been seen the assumption is not warranted by the facts.

[14, 15] The plaintiff contends that the action of the union has deprived him of his right to work. The right to earn a living is deemed to be property within the concept of the Fifth Amendment to the Federal Constitution, and a union, in the service of its interest, may not deprive a person of his constitutional rights of liberty and property. Cameron v. International Alliance, etc., supra, 118 N.J.Eq. 11, 176 A. 692, 697, 700, 97 A.L.R. 594. Consequently it has been held that membership in a union is a property right which the courts will protect. Lo Bianco v. Cushing, 117 N.J.Eq. 593, 177 A. 102; Dusing v. Nuzzo, Supreme Court of New York, 177 Misc. 35, 29 N.Y.S.2d 882. It is insisted that to decline to belong to a union and to continue to work as a non-member is a right equally protected by the Constitution. The position of the plaintiff is somewhat reflected in re-

cent Federal legislation relating to the closed shop. See Labor-Management Relations Act of 1947, Ch. 120, Pub. Law 101. It was the judicial declarations in this state approving the union shop as a valid labor objective that undoubtedly inspired the advocacy of Proposition No. 12 as a measure to re-establish what the plaintiff conceived to be his constitutional right. His arguments favor the adoption of such a measure as Proposition No. 12 as a statement of state policy, or the overruling of the cases in this state approving the union shop objective. Unfortunately for his position there seems to be little likelihood of the latter, and relief for him and others like-minded through state legislative processes, at least for the time being, was foreclosed by the rejection of the measure at the polls. If the Congress in 1947, within its legislative sphere, outlawed the closed shop that fact could not, in any view, apply to transactions in 1944.

The plaintiff contends that the assessment was a "tax" on his right to work. If that be so, then also are union dues such a tax. Whether denominated a charge or a tax the plaintiff, when he became a member, agreed to pay his share of the support of the union by discharging his obligation to pay dues and assessments. It is not contended that refusal to pay dues would be other than the equivalent of a voluntary withdrawal from the union. Refusal to pay a reasonable assessment for a lawful union object, where otherwise valid, has no greater significance.

Automatic suspension pursuant to the bylaws following the failure to pay union dues does not contravene the requirements of due process. No distinction may properly be made between an organization on a union shop basis and any other lawfully recognized organization. The plaintiff voluntarily chose not to pay a lawful union assessment. Automatic suspension was the consequence of his own choice. In Tinker v. Modern Brotherhood of America, D.C., 13 F.2d 130, 132, the court upheld automatic termination of membership for non-payment of tax and dues as a voluntary relinquishment, saying that the plaintiff "had the right of terminating his contractual relations and obligations to the society by the mere nonpayment of his dues."

Such a provision for automatic suspension upon failure to pay dues, a tax, or an assessment, is distinguished from a provision for suspension or expulsion based on charges of misconduct or the like, in which latter case notice and hearing on the preferred charges are considered mandatory, and their omission to constitute a noncompliance with the requirements of due process. Grand Grove of U. A. O. of Druids of California v. Garibaldi Grove, etc., 105 Cal. 219, 224, 38 P. 947; Grand Grove, etc., v. Garibaldi Grove, supra, 130 Cal. 116, 120, 62 P. 486, 80 Am.St.Rep. 80; Supreme Lodge, etc., v. Los Angeles Lodge No. 386, 177 Cal. 132, 169 A. 1040; Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 215 P. 673, 27 A.L.R. 1508; Lo Bianco v. Cushing, supra, 117 N.J.Eq. 593, 177 A. 102; Polin v. Kaplan, supra, 257 N.Y. 277, 177 N.E. 833.

[16] There was thus no invasion of any constitutional right of the plaintiff. His membership in the union was suspended. This followed automatically his voluntary choice of action. By his own choice and act he likewise may terminate that suspension. He possessed and, it is assumed, still possesses the means of affording his own relief.

[17, 18] It follows that no ground for reversal is presented unless it appear that the union's money contribution to the defeat of Proposition No. 12 was contrary to the Federal Corrupt Practices Act, 2 U.S.C.A. § 241 et seq. It may be assumed that the assessment and consequent suspension of the plaintiff for failure to pay it would be void if the use of the proceeds of the assessment in contributing to the defeat of Proposition No. 12 were contrary to that act. Section 251, originally applicable to corporations and amended in 1943 to apply also to labor unions, 2 U.S.C.A. § 251, as amended June 25, 1943, ch. 144, sec. 9, 57 Stat. 167, provides in part: "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political officer, or

for any corporation whatever, or any labor organization to make a contribution in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section." The section also contains punitive provisions.

A reading of the foregoing language indicates that the Congress thereby extended its regulatory processes only to (1) banks and corporations organized under federal laws in respect to any political office (necessarily including state, municipal, county, etc. offices); and to (2) any corporation or labor organization in respect to federal elective office. Therefore, insofar as state activities are concerned, the Congress appears to have covered federal corporations in respect to political office in the state; and state corporations and labor organizations in connection with election to federal office. Obviously the Congress did not purport to cover state corporations and labor organizations in respect to state activities. There also appears a distinction between the political and legislative functions of the electorate, by failure to mention the legislative function. The language does not express an intent to include within the scope of regulation state legislative matters appearing on the ballot; and the inclusion of matters of such doubtful permissible federal regulation will not be implied. Penal statutes will not be given application beyond their plain intent. Such acts include only those offenses coming clearly within the import of the language. State v. Terre Haute Brewing Co., 186 Ind. 248, 115 N.E. 772; United States v. Brewer, 139 U.S. 278, 11 S.Ct. 538, 35 L.Ed. 190; United States v. Gradwell, 243 U.S. 476, 37 S.Ct. 407, 61 L.Ed. 857; Newberry v. United States, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913; La Belle v. Hennepin County Bar Ass'n, 206 Minn. 290, 288 N.W. 788, 125 A.L.R. 1023. In State v. Kohler, supra, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348, in regard to a state corrupt practices act, it was said that the circulation of pamphlets, the writing of letters, or the discussion in other proper ways of questions relating to public affairs which do not have for their immediate objective the promotion of the candidacy of a particular person, could not be said to be done for political purposes as that term was used.

Our conclusion in this respect renders it unnecessary to determine whether the union's use of the funds in the manner involved constituted a "contribution" or something else; or to dwell upon the question whether the act, if it extended to the activities held to be excluded, would be violative of the First Amendment to the United States Constitution prohibiting enactment by Congress of laws abridging the freedoms of speech, press, or assembly.

The foregoing sufficiently disposes of the contentions of the plaintiff.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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83 Cal.App.2d 105

In re CROPPER'S ESTATE.

MALCOLM v. STEVENS.

Civ. 16183.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1947.

Hearing Denied Feb. 19, 1948.

1. Executors and administrators 🔑210

Claimant's cause of action on alleged agreement by decedent that he would leave a will at time of his death making claimant his sole beneficiary of whatever estate he might possess at time of his death was one against decedent alone, and was not enforceable in probate against personal representative of decedent's estate.

2. Executors and administrators 🔑314(11)

In estate proceeding, probate court has duty to distribute estate to persons entitled under the will or by succession or their grantees, and it is without jurisdiction to determine rights of parties asserting title adversely to the estate and to those who take by will or the laws of succession.

3. Executors and administrators ⚷315(9)

Upon finding that condition of decedent's estate was such as to admit of partial distribution, probate court had duty to order partial distribution, notwithstanding claim under alleged agreement of decedent that he would leave a will making claimant his sole beneficiary of whatever estate he might possess at time of his death.

4. Descent and distribution ⚷71(3)
Executors and administrators ⚷314(12)

One asserting that decedent had agreed to leave will at time of his death making her his sole beneficiary was not a party to proceeding to determine heirship and for partial distribution of decedent's estate and her rights were not affected thereby, and, hence, she was not "aggrieved" by the order of partial distribution and had no right to appeal therefrom. Code Civ.Proc. § 938; Probate Code, § 1233.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Francis Malcolm Cropper, deceased. Ben H. Brown, public administrator, and Theodore Malcolm filed petition to determine heirship and for partial distribution, and objections were filed thereto by Tina Stevens. From a judgment ordering partial distribution, Tina Stevens appeals.

Appeal dismissed.

Chambers & Lyman, Robert Chambers and Edward L. Conroy, all of Los Angeles, for appellant.

Newmark & Hamblin and Donald W. Hamblin, all of Los Angeles, for respondent Theodore Malcolm.

SHINN, Acting Presiding Justice.

Francis Malcolm Cropper died intestate in the city of Los Angeles, leaving a large estate consisting of personal property. His only heir at law is Theodore Malcolm, a cousin, who resides in the state of New York. The public administrator, as administrator of the estate, filed his accounts and his petition to determine heirship and for partial distribution. When the petition came on for hearing, Tina Stevens, appellant herein, appeared and objected to any order of partial distribution. She alleged that she was an intimate friend of decedent and a foster daughter of his aunt, Mrs. Edwin Stevens; that in the month of June, 1923, at the request of decedent, she entered into a written agreement with him by the terms of which she agreed that she would forsake her theatrical profession and devote her life to maintaining a home for Mrs. Edwin Stevens for as long as Mrs. Stevens lived, and after the death of Mrs. Stevens that she would maintain a home and care for the said Francis Malcolm Cropper until his death, rendering filial services, society and affection, and that in consideration thereof the said Francis Malcolm Cropper agreed that he would leave a will at the time of his death making her his sole beneficiary of whatever estate he might possess at the time of his death; that in reliance upon the agreement, she gave up her theatrical profession and faithfully performed the agreement on her part until the death of Mrs. Stevens, and thereafter rendered full performance to decedent, until his death on March 15, 1946. She prayed for an order that she be declared the sole beneficiary of his estate, that the contract be specifically enforced and that the administrator or anyone else having estate of the decedent in his possession, be declared a trustee holding the same for her use and benefit. She also alleged that she had instituted in the superior court of Los Angeles county, an action in which she sought specific performance of said agreement; that the action had been removed to the federal court, a motion to remand was pending, and that the action had not been tried. Upon the hearing for partial distribution, the court sustained an objection to an offer of appellant to prove the facts alleged in her objections, holding that the issues raised thereby were not within the probate jurisdiction of the court in the estate matter. The estate was found to be in condition for partial distribution and the same was ordered. Tina Stevens has appealed and seeks a reversal of the order for partial distribution.

Theodore Malcolm has moved to dismiss the appeal upon the ground that Tina Stevens was not a party to the probate proceeding, was not aggrieved by the order, and is therefore not a party entitled to appeal therefrom.

[1-3] Upon the death of Francis Malcolm Cropper such property as he then owned passed by the laws of succession to Theodore Malcolm, as his sole heir at law, subject to administration. The right under the agreement which appellant seeks to enforce is to impress a trust upon the whole of this property. The relief which appellant seeks in her independent action is known as "quasi specific performance" and if she is successful, Theodore Malcolm will be charged as trustee as to any property belonging to appellant which he may have received from the estate. So far as the estate proceedings are concerned, appellant's cause of action on the alleged agreement must be deemed one against him alone, and not enforceable in probate against the personal representative of the estate. McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Lee v. Zimmerman, 75 Cal.App. 617, 243 P. 62; Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Rundell v. McDonald, 62 Cal.App. 721, 217 P. 1082. In an estate proceeding it is the duty of the court to distribute the estate to the persons entitled under the will or by succession, or their grantees. Estate of Crooks, 125 Cal. 459, 58 P. 89; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459. It is without jurisdiction to determine the rights of parties asserting title, as appellant does, adversely to the estate and to those who take by will or the laws of succession. Estate of Harris, 9 Cal.2d 649, 664, 72 P.2d 873; Estate of Rolls, 193 Cal. 594, 599, 226 P. 608; Fuller v. Nelle, 12 Cal.App.2d 576, 55 P.2d 1248; Bath v. Valdez, 70 Cal. 350, 11 P. 724. The rights of appellant are not concluded or affected by the decree of partial distribution. Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; Estate of Rowland, 74 Cal. 523, 16 P. 315, 5 Am.St.Rep. 464. Upon finding that the condition of the estate was such as to admit of partial distribution, it was the duty of the court to order partial distribution, notwithstanding the claims of appellant under her alleged agreement. Estate of Dutard, 147 Cal. 253, 81 P. 519; Johnson v. Superior Court, 102 Cal. App. 178, 283 P. 331.

[4] Since appellant was not a party to the proceeding to determine heirship and for partial distribution and her rights are in no manner affected thereby, she is not aggrieved by the order and has no right to appeal therefrom. Her attempted appeal should be dismissed. Code Civ.Proc. sec. 938; Probate Code, sec. 1233; Estate of Crooks, supra; 2 Cal. Jur. p. 215; Estate of Thor, 11 Cal.App.2d 37, 52 P.2d 966; Estate of Burdick, 112 Cal. 387, 44 P. 734.

The appeal is dismissed.

WOOD, J., and VALLEE, J. pro tem., concur.

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83 Cal.App.2d 101

MUSGROVE et al. v. ZOBRIST.

Civ. 16048.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1947.

Hearing Denied Feb. 19, 1948.

1. Automobiles 🔑245(35, 42)

Evidence was sufficient to take to jury questions whether truck's left front tire blew out as result of collision with approaching automobile and whether truck swerved to left side of highway into automobile because truck was out of control in consequence of owner-driver's fatigue following long drive without sleep.

2. Automobiles 🔑170(1), 242(1)

Driving of motor vehicle on wrong side of highway is prima facie evidence of driver's negligence, and burden is on him to excuse or justify his position on highway.

◆

Appeal from Superior Court, Los Angeles County; James M. Allen, Judge.

Action by Wayne Musgrove and another, infants, by their guardian ad litem, and Marjorie Musgrove, against Paul Zobrist for the deaths of Edwin W. Musgrove and Phyllis Musgrove and personal injuries to named plaintiffs as the results of a collision between an automobile and defendant's truck. Judgment for defendant, and plaintiffs appeal.

Reversed.

Kendall, Howell, Deadrich & Wooldridge and Kendall, Howell & Deadrich, all of Bakersfield, for appellants.

Syril S. Tipton, of Los Angeles, for respondent.

WILSON, Justice.

This action was brought to recover damages for the wrongful death of Edwin W. Musgrove and Phyllis Musgrove who were killed in the accident hereinafter described and for personal injuries suffered by the survivors. Plaintiffs have appealed from the judgment in favor of defendant following the granting of a motion for a directed verdict.

Marjorie, Wayne and Phyllis were riding in an automobile driven by decedent Edwin at the time of the accident. When they were traveling in a northerly direction about five and one half miles south of Salinas, a truck and semi-trailer owned and driven by respondent crossed the center line of the highway and struck the automobile in which the Musgrove family were riding. Edwin and Phyllis were killed and Wayne and Marjorie received severe injuries.

The accident occurred at about 1:20 o'clock in the morning of September 2, 1945. Respondent was driving at a speed of about 40 miles per hour. The highway consisted of two lanes divided in the center by a white line. It was straight for some distance in both directions from the place of the accident. The weather was clear.

Respondent had started at about 7:30 o'clock a. m., on September 1, 1945, from Sacramento. He drove to Oakland and left that city at 7:30 or 8:00 o'clock in the evening for Los Angeles. His only stop between Oakland and the point of the accident was at San Jose. He had had no sleep after he left Sacramento.

Respondent testified that the first notice he had of anything out of the ordinary about his truck was when he heard a tire blow out and the truck swerved to the left over the line where it collided with the Musgrove car. He had seen the car approaching on the other side of the highway from which he was driving. He had a firm grasp on the steering wheel and tried to hold it but was unable to prevent his truck from turning to the left and striking the Musgrove car.

Respondent further testified that after the accident he inspected his truck and found that both front tires were flat, the right front tire appearing to have been cut and the one on the left appearing to have been blown out. The tire on the left front wheel was a recapped or retreaded tire that he had purchased before leaving Los Angeles with a load which he delivered in Sacramento. Before purchasing the tire he and the salesman who sold it to him inspected it by putting it on a spreader and determined that it was in good condition. It had no sections, scars or breaks, the inside being perfectly smooth. He also stated that he inspected the tire throughout the entire trip, his last inspection having been at San Jose where he stopped for fuel, and that the tire appeared at all times to be in good condition.

Respondent also testified that he had never previously used a retreaded tire on the front wheel of the truck which was involved in the accident, and it was not his policy to use retreads on the front wheels; that a retreaded tire is not as safe as a new one and for that reason he kept them off the front wheels as a rule; that "if anything happened" the front wheels are the ones most likely to go flat and that "if this had happened" on the rear wheels he would still have been able to control his truck.

A chemical engineer specializing in the rubber industry, who had worked with the Goodyear Tire and Rubber Company for 19 years, was called as a witness for respondent and testified that the blowout of the left front tire of respondent's truck was due to striking a sharp object. This was the only testimony offered concerning the cause of the blowout.

The rules of law governing the power of the court to direct a verdict are set forth in Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 181 P.2d 935, 940, and in United Air Services, Ltd., v. Sampson, 30 Cal.App.2d 135, 139, 86 P.2d 366.

[1] The instant case is not one in which the court may direct the jury's verdict according to the rules announced in the cases cited. The tire expert, respondent's witness, testified that the blowout was due to the striking of a sharp object. There is no evidence that any such object was on the highway. Respondent testified that the front end of his truck struck the front end or side of the Musgrove car. Since there was no evidence of a sharp object on the highway the jury had a right to infer that the sharp object which cut the tire was on the Musgrove car and that the blowout came with the collision and not before; or it might have inferred that the tire was cut at some time previously and blew out when the collision took place.

Respondent had been driving from 7:30 o'clock in the morning when he left Sacramento, had driven to Oakland, loaded his truck and had continued to the point of the accident with only one stop at San Jose. Since respondent had been driving, loading his truck, and again driving for a period of 18 hours without sleep the jury had a right to infer that the truck went to the wrong side of the highway because it was out of control, and that it was out of control because of respondent's weariness, fatigue and exhaustion, and therefore that the blowout occurred when the tire struck a sharp object on the Musgrove car.

[2] Driving on the wrong side of the highway is prima facie evidence of negligence and calls for an explanation on the driver's part (Jolley v. Clemens, 28 Cal.App.2d 55, 68, 82 P.2d 51) and the burden is upon the driver to excuse or justify his position upon the highway. (Parker v. Auschwitz, 7 Cal.App.2d 693, 696, 47 P.2d 341.) Respondent attempted such justification by his evidence concerning the blowout but the jury was not obliged to believe his testimony or to accept his version of the cause of the accident. It had a right to consider the evidence of the tire expert concerning the cause of the blowout, together with the inferences to which we have referred.

The facts presented in the instant case, the evidence as to the possible cause of the blowout, and the inferences mentioned present a situation entirely different from those found in the cases cited by respondent. In each case the evidence was clear that the accident was caused by latent mechanical defects and no contrary inferences were present. In Doggett v. Lacey, 121 Cal.App. 395, 9 P.2d 257, the steering gear stuck so that it could not possibly be turned. In Phillips v. Pickwick Stages, 85 Cal.App. 571, 259 P. 968, the foot break pedal broke rendering it useless, but there were other elements in the case because of which the court held the defendant liable for the damage. In Johnson v. Reliance Automobile Co., 23 Cal.App. 222, 137 P. 603, the steering knuckle broke and the driver lost control of the car; for this reason and for the reason that the car was entered in a race without authority of the defendant corporation, a judgment in favor of the plaintiff was reversed. In James v. White Truck and Transfer Co., 1 Cal.App.2d 37, 36 P.2d 401, the accident was only indirectly caused by a mechanical difficulty. Because the driving chain was not connecting the motor with the truck the driver stopped and left the truck while he went for aid and a car crashed into the rear end of the trailer. Manifestly these cases have no bearing on the case at bar.

Since the jury might have drawn inferences from the evidence that would have supported a verdict in favor of appellants the judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

83 Cal.App.2d 42

OWEN v. RHEEM MFG. CO.

Civ. 3443.

District Court of Appeal, Fourth District, California.

Dec. 22, 1947.

Rehearing Denied Jan. 20, 1948.

Hearing Denied Feb. 19, 1948.

1. Negligence 🔑5

In determining negligence, the standard is due care, and such standard is not fixed by custom, although failure to observe custom may be evidence of negligence, and custom, while it may assist in determination of what constitutes due care, is never a substitute for due care.

2. Negligence 🔑5

Mere custom or usage cannot make due care out of conduct that is in fact negligent.

3. Trial 🔑139(1), 142

The facts and weight of evidence and inferences to be drawn therefrom are for the jury.

4. Railroads 🔑282(9)

Evidence whether shipper, sued by consignee's employee for injuries sustained when drum fell out of boxcar which employee was unloading, was negligent in respect to manner of loading drums, was for jury.

5. Negligence 🔑105

A person does not assume the risks of danger which he has no reason to anticipate.

6. Railroads 🔑282(9)

Evidence was insufficient to show as matter of law that consignee's employee, suing shipper for injuries sustained when drum fell out of boxcar which employee was unloading, was contributorily negligent in respect to being aware of conditions which caused the drum to fall.

7. Negligence 🔑136(14)

Ordinarily what is due care or what would be the conduct of the everyday reasonably prudent man for his own protection under a like situation is question of fact which must be left to jury.

8. Negligence 🔑125

In negligence action, refusal to permit defendant's witness to state whether witness had ever heard of similar accident was not error.

9. Negligence 🔑125

A plaintiff may prove previous accidents for limited purposes, but defendants cannot in the first instance prove absence of previous accidents.

10. Workmen's compensation 🔑2158

The United States Employees Compensation Act permitted injured employee of the United States subject to act to bring common-law damage action against third person allegedly responsible for accident and to reimburse United States employees compensation commission out of damages recovered in the amount paid to employee by commission under the act. Employees Compensation Act, §§ 9–26, 5 U.S.C.A. §§ 759–776.

◆

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Personal injury action by Charles L. Owen against Rheem Manufacturing Company, a corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Forrest A. Betts, of Los Angeles (Currer & Steck and William J. Currer, Jr., all of Los Angeles, of counsel), for appellant.

Davidson & Bartlett, of Ontario, and Fred A. Wilson, of San Bernardino, for respondent.

GRIFFIN, Justice.

Action for damages. Plaintiff was employed by the United States Government as a laborer in Ontario, at a branch warehouse of the San Bernardino Air Depot. On May 10, 1943, he was engaged, with others, in stacking steel drums in the warehouse yard. They were being removed from railroad box cars. After unloading three carloads, plaintiff's foreman directed plaintiff and a fellow workman to open the door of a fourth box car which was loaded with drums. These steel drums were manufactured by defendant company under a government contract and were loaded by the company's agents, at its plant at South Gate, California. These steel drums were cylindrical in form, 22½ inches in diameter and 35 inches in length. Each drum was protected by a rim or chime extending one inch beyond each end of the drum. Each drum weighed about 73 pounds.

The evidence shows that defendant endeavored to "get every drum in we can" and to accomplish this it stacked them "right up to the edge of the door," and "as close to the door as is permissible to get the door open and closed." These cars vary in size. The standard size is 50 feet long by 10 feet wide. The one that was opened by plaintiff was one of the smaller sizes, 40½ feet in length and about 9½ feet in width. Witnesses testified that sometimes defendant company loaded box cars with the drums lying on their sides and with the ends pointed towards the door. At other times, and in smaller cars, it loaded them with the drums standing end on end at the entrance to the door. A defense witness testified that when the defendant company loaded box cars it loaded the drums "either all on the side or all on end" and never at any time used both methods in any one car.

Plaintiff testified that the car being opened by him and his fellow worker was so loaded that all the drums were lying on their sides except 3 or 4 tiers immediately in front of the door which was being opened and at that door they were standing end on end, three drums high. Plaintiff's foreman testified that they could not open the opposite door "because it was latched from inside." It is undisputed that the drums were stacked without any braces, shoring or other device to prevent them from falling out when the door was opened. On the day in question, as the plaintiff endeavored to open the door, he found that it was stuck and as a result plaintiff endeavored to push it open while his fellow workman used a pinch bar with which to pry it. Under the combined pressure the door partially opened and a steel drum fell out from the top tier, struck plaintiff, and injured him quite seriously. Immediately after the accident the remaining drums on the upright top tiers were leaning against the door. They were subsequently pushed back and the car door was then fully opened.

Plaintiff instituted this action to recover damages against defendant company alleging that it had negligently loaded the drums in the car and failed to place or maintain any proper guards to prevent them from falling when the door was opened.

Defendant denied negligence and affirmatively pleaded that plaintiff assumed the risk incident to his work and also charged him with contributory negligence. A verdict for $7,000 was rendered by the jury for the plaintiff and this appeal followed.

Defendant argues first that the evidence shows that it followed the custom and usage of the industry in loading the barrels into the railroad car and since plaintiff made no attempt to prove that such custom was not followed it was not guilty of negligence; that there was no evidence that defendant should have anticipated that the method of loading the steel barrels into the car here involved might cause bodily harm to anyone, and particularly to those to whom it was supplying the car; that they were presumed to know the custom and usage of the industry in unloading them, citing such cases as Eason v. Kelly Pipe Co., 16 Cal.App.2d 88, 60 P.2d 488; Dahms v. General Elevator Company, 214 Cal. 733, 7 P.2d 1013; Jackson v. Missouri Pac. Ry. Co., 104 Mo. 448, 16 S.W. 413; Hassan v. Northern Pacific R. Co., 60 Mont. 105, 198 P. 446; Toledo & Ohio C. R. Co. v. Beard, 1898, 20 Ohio Cir.Ct.R. 681, 11 O.C.D. 406; Hyland v. Seaver, 1942 (Mass. Supreme Judicial Court), 312 Mass. 535, 45 N.E.2d 835; Restatement of the Law of Torts, secs. 395, 396.

In reference to the custom and practice of loading and shipping drums, one of defendant's witnesses testified, over objection, that in loading and shipping drums for defendant company, for over two years, it was the custom that "the loading of drums, to my knowledge are either by laying down or standing up on end" and that "we do not bulkhead our cars" and to the best of his knowledge, "generally, in the industry, they were not bulkheaded."

[1] Failure to observe custom may be evidence of negligence, but the standard is not fixed by custom. The standard is always due care. The presence or absence of

custom does not alter that standard. Custom may assist in the determination of what constitutes due care. What others do is some evidence of what should be done, but custom is never a substitute for due care. These principles were applied in Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931, 936, where it was said:

"Conformity by defendant to general custom of power companies with relation to the manner of maintaining power lines and rights of way does not excuse defendant unless the practice is consistent with due care." (Citing cases.) See, also, Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Robinet v. Hawks, 200 Cal. 265, 252 P. 1045.

[2] If it may be considered that the evidence produced did in fact establish the custom of the industry in loading these particular kind of barrels in box cars, the cases firmly establish the rule that mere custom or usage cannot make due care out of conduct that is in fact negligent. As said in Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 315, 156 P. 449, 450, it is said:

"We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care."

Under defendant's theory of the case it argues that it followed the custom of the industry in loading the barrels; that there were safety devices on the car doors, as illustrated in photographs in evidence; that the doors could have been opened by means of these devices, if properly handled by persons having knowledge of the correct way of opening such cars and of unloading them, and that even if opened by a "pinch bar" it was the custom to open the door only far enough so that the workmen could see whether or not there was any danger of the contents falling from the car; and that under these circumstances there was no necessity of *shoring* the barrels at the door entrance.

It is also argued that the defendant was not a true *supplier of chattels* under the rule set forth in secs. 395 and 396 of the Restatement of the Law of Torts, etc.; that the United States Government was in reality such supplier since it ordered the barrels, received, inspected and accepted them on the loading dock of defendant, and from that time forward had exclusive control of the loaded railroad car and its contents.

The evidence on this last point shows that the United States Government contracted with defendant company to furnish 200,000 such barrels "to be shipped only as released * * * f. o. b. cars and/or freight station at site of contractor's plant." Under the bill of lading furnished by the government and made out by defendant, defendant was the consignor. It contained the phrase "f. o. b. consignor's plant." Freight was paid by the U. S. Government. The consignee was the "Depot Supervising Officer" at the San Bernardino Airport. The car was finally routed to the branch warehouse at Ontario. After the cars were loaded by defendant, the Government inspector, with defendant's foreman, would "check the cars and seal them with the government seal." When the car arrived at its destination the seal was broken by an authorized officer at the depot.

In upholding a verdict for plaintiff, this principle was announced in Wintersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 197 N.E. 578, 579, that "every person owes duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act," for which wrong the law furnishes a redress; that this duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship between the parties. There, as here, an employee of the consignee brought suit against the shipper. As the employee was opening a box car door one of the barrels fell out and injured him. The shipper had used defective lumber for *shoring* or "the dunnaging of the car." In respect to negligence, the court there said:

"If a reasonably prudent person might, and ordinarily would, foresee that the omission to do a certain act or the commission of an act in a certain way would likely result in injury to another, and injury to another does follow as a result thereof, such act of omission or commission is negligence, and the proximate cause of the injury. 1 Thompson on Negligence, § 50. There was positive evidence of the defective condition of one of the strips used in the dunnaging of the car. * * * The facts and weight of the evidence were for the jury, and we would not be warranted in disturbing the verdict of the jury unless it be against the manifest weight of the evidence."

While our search has not disclosed a case where the courts of this state have applied the above mentioned rule where, by the act of a shipper, injury resulted to a consignee or his employee, the *principle* has been employed in Dahms v. General Elevator Co., supra, where the elevator operator in a business building was injured by the negligence of the defendant which had entered into a contract with the owner of the building (plaintiff's employer) to inspect and repair the elevator. It was there said, 214 Cal. at page 738, 7 P.2d at page 1015:

"We are of the opinion that it falls properly within another well-settled exception. There are numerous cases from nearly every jurisdiction which hold that an action sounding in negligence may be maintained by a stranger to a contract for the execution of a specific piece of work or the sale of a manufactured article, if the product of the stipulated work or the article sold was abnormally dangerous or noxious."

See, also, Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, in which case it is remarked that things classified as inherently dangerous have been steadily extended to include those articles which are reasonably certain to place life and limb in peril, when negligently made, prepared or constructed, as it then becomes a thing of danger, with a corresponding extension of the application of the remedy. It began with articles such as the sale of poison and such things now include a dangerous and defective scaffolding (Devlin v. Smith, 89 N.Y. 470, 42 Am.Rep. 311); defective rungs in ladders, and defective spokes in automobiles (MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440); etc. See, also Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; and Johnston v. Long, 56 Cal.App.2d 834, 133 P.2d 409.

In the Kalash case it was also stated that the common law rule threw a strong arm of protection around the manufacturer which was for the purpose of warding off claims of third persons who were not direct purchasers from the manufacturer. In the instant case the direct purchaser was the United States Government. Plaintiff was the agent of the Government. He was injured in unloading the drums for the purchaser. The relationship of the parties, therefore, was similar to that set forth in the Kalash case.

[3, 4] There was evidence that the freight car here involved was at least 9 feet 6 inches in width; that in cars of such width the barrels could have been placed horizontally throughout the car and that it would not have been necessary to stack them in a perpendicular position at the door. It was argued to the jury that stacking them horizontally, and on end at the door, was *imminently dangerous* to third persons called upon to open the door and that such loading, with the jolting to which it must be inevitably subjected in transit, rendered the unsecured position of the drums *highly dangerous* and that such stacking, under the circumstances, constituted and created a hidden danger; that since this dangerous method was employed by defendant due care demanded something to overcome the hazard either by installing shoring or safeguards or stacking the drums perpendicularly in the center and horizontally on the outside tiers; that otherwise there was a duty imposed upon defendant to warn of such dangerous condition. The evidence was capable of such construction and interpretation. The facts and weight of evidence and inferences to be drawn therefrom were for the jury to determine. We do not feel warranted in disturbing its verdict in this respect.

The next argument involves a consideration of the evidence as to what knowledge plaintiff may have had of such condition or hidden danger, and of his freedom from negligence contributing proximately to his injury.

In this connection defendant asserts that "the plaintiff knew the method by which the barrels were loaded" by defendant, and consequently, having knowledge of the danger or condition creating the hazard, if any, plaintiff was not permitted to expose himself to it without being charged with negligence on his part. On this point plaintiff, Owen, testified that on May 10, 1943, he, Owen, was engaged with seven others, in "unloading—stacking barrels"; that he, himself, had not previously been engaged in "opening any of the cars"; that he was told by the foreman to open this particular car and get it ready to be unloaded; that he had previously helped "unload cars" and had "worked around freight cars" and had opened car doors and unloaded smudge pots on previous occasions; that he didn't see how the barrels were loaded in the freight cars previously unloaded on that day; that he did not have anything to do with taking those barrels "out of the car"; that he had not been unlocking or opening any of the doors on the cars; that he did not pay any attention to the men who were doing it; that he rolled some of the barrels down the incline and stacked them in the field; that he was told there were barrels in the car here involved before he tried to open the door.

[5-7] Plaintiff's foreman testified that Owen had worked under him for about six months but very seldom worked in box cars. Defendant's witnesses pointed out what they called "safety devices" on the car door, and demonstrated how, by first taking hold of one handle and then by use of another handle on that particular car door, the body of the person opening it would not be exposed to danger from falling of the contents of the box car when opening the door. We do not believe the evidence produced on this question clearly shows, without contradiction, that plaintiff was so experienced in opening box cars containing barrels or that he was or should have been aware of the danger or condition which caused the barrel to fall and injure him. One does not assume the risks of danger which he has no reason to anticipate. DeGraf v. Anglo California National Bank, 14 Cal.2d 87, 100, 92 P.2d 899. From the evidence produced, as to the manner in which plaintiff conducted himself, under the circumstances, it cannot be said, as a matter of law, that he was guilty of contributory negligence proximately contributing to his injury. No hard and fast rule can be laid down as to what a person should do for his own safety in the great variety and diversity of situations of danger which now constantly arise, but ordinarily what is due care or what would be the conduct of the every day reasonably prudent man for his own protection under a like situation is a question of fact which must be left to the determination of the jury. Williams v. Field Transportation Co., 28 Cal.2d 696, 171 P.2d 722; Neel v. Mannings, Inc., supra, 19 Cal.2d at page 655, 122 P.2d 576; Anthony v. Hobbie, 25 Cal. 2d 814, 818, 155 P.2d 826; Wintersteen v. National Cooperage & Woodenware Co., supra.

[8, 9] On examination of one of defendant's witnesses counsel for defendant asked the witness if he had ever heard of a similar accident. Objection to this question was sustained. Exception is now made to the ruling, arguing that by the admission of such evidence it would show that defendant had not expected any similar accident and would have no reason to believe that any harm would come from the loading of the barrels in the manner in which they were loaded, citing Hyland v. Seaver, supra. The ruling was not error. While a *plaintiff* may prove previous accidents, for certain limited purposes, a *defendant* may not, at least in the first instance, prove absence of previous accidents. (Thompson v. B. F. Goodrich Co., 48 Cal.App.2d 723, 729, 120 P.2d 693.)

The last contention raised by demurrer to the complaint is that the United States Employees Compensation Act, 5 U.S.C.A. §§ 759-776, is a bar to the maintenance of this action since the plaintiff was, at the time of the accident, subject to the act and entitled to recover thereunder; that he was required to elect which of two remedies he would pursue, i. e., either his remedy under the compensation act or at common law; that since the complaint alleges no such election, and the United States Employees

Compensation Commission did not authorize him to bring the action in question he had no standing before this court, citing Dahn v. Davis, 258 U.S. 421, 42 S.Ct. 320, 66 L.Ed. 696; Hunt v. Bank Line, Ltd., 4 Cir., 35 F.2d 136; and Lavino Shipping Co. v. Speck (The Nako Maru), 3 Cir., 101 F.2d. 716.

Plaintiff claimed damages for loss of wages and cost of medical service. There was evidence that $477.50 medical expense and $550.86 employee's compensation had been paid by the Commission and the jury was instructed that under the Federal statutes the plaintiff would be required to reimburse the Commission to that extent out of any money recovered by him.

The decision in Cary v. Burris, 169 Or. 24, 127 P.2d 126, 128, and cases hereinafter cited, appear to answer this contention. In the Oregon case it was held that: "The act, by providing that the injured employee, from the moneys recovered from a third party as a result of a suit brought by him, must reimburse the United States for compensation previously received, necessarily by implication, sanctions the bringing of such action by the injured employee, and a recovery by the employee bars an action by the United States." (Citing Oklahoma City v. Caple, 187 Okl. 600, 105 P.2d 209.) See, also, United States v. Klein et al., 8 Cir., 153 F.2d 55; Hines v. Dahn, 8 Cir., 267 F. 105; Wagner v. City of Duluth, 211 Minn. 252, 300 N.W. 820; Roeper v. Albany Port District, 266 App.Div. 936, 43 N.Y.S.2d 848; Wood v. Ford Garage Co., 162 Misc. 87, 293 N.Y.S. 999, affirmed in 252 App.Div. 921, 300 N.Y.S. 1358; and United States v. Bettis, D.C., 39 F.Supp. 160.

In Dahn v. Davis, supra, relied upon by defendant, the action was against the United States government, rather than a third party. The government had paid the compensation claim. It was held that the act did not contemplate or provide for suits against the government.

[10] Hunt v. Bank Line, Ltd., supra, arose out of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. Tit. 33, § 933. That act, as there construed, provides that if the employee elects to receive compensation, he is to have no further interest in or control over the suit. No such provision is contained in the act here under discussion. Lavino Shipping Co. v. Speck (The Nako Maru), supra, also involved the Longshoremen's and Harbor Workers' Compensation Act. We see no merit to the point stressed by defendant in its demurrer.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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82 Cal.App.2d 844

SCANNELL et al. v. MURPHY, Sheriff.

Civ. 13442.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1947.

Rehearing Denied Jan. 10, 1948.
Hearing Denied Feb. 9, 1948.

1. Sheriffs and constables 🔑74

Evidence supported finding that sheriff required jail employees to work eight-hour night shifts, without half-hour off for eating, so as to entitle them to overtime compensation on basis of 48 hours per week on night shifts under salary ordinance.

2. Sheriffs and constables 🔑60

A sheriff's regulation, requiring three 8-hour watches to police jail at all times of day and night, constituted express order that jail employees work more than 7½-hour night shifts, fixed by salary ordinance as normal work day on such shifts, if such order was required by provision of ordinance for overtime compensation of employees required by department heads to work more than 7½ hours on such shifts.

3. Mandamus 🔑174

Conflicting evidence as to custom for jail employees to work only 7½ hours on both day and night shifts, with half-hour off for meals, was for trial court, as trier of facts, in mandamus proceeding to compel sheriff to certify to county civil service commission number of 8-hour night shifts worked by some of such employees for purpose of computing their overtime compensation under salary ordinance.

4. **Mandamus** ⚷15

Mandamus proceeding being equitable action, clean hands doctrine applies generally thereto.

5. **Mandamus** ⚷15

The "clean hands" doctrine did not bar jail employees from seeking mandamus, commanding sheriff to certify to county civil service commission number of 8-hour night shifts worked by petitioners for overtime compensation purposes, on theory that they were overpaid on basis of 8-hour day shifts on which they worked only 7½ hours, where there was evidence that they worked 8 hours on all shifts, sheriff's regulations drew no distinction between night and day shifts, and sheriff certified to commission that all such employees worked 8-hour watches.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

6. **Appeal and error** ⚷173(2)

The unclean hands doctrine must be raised in trial court to be available as defense and cannot be raised for first time on appeal.

7. **Mandamus** ⚷187(4)

An issue, not raised in or passed on by trial court, may not be litigated on appeal from judgment granting peremptory writ of mandate.

8. **Mandamus** ⚷82

Mandamus is proper proceeding to compel sheriff to certify and transmit to county civil service commission pay rolls showing periods during which jail employees worked on 8-hour night shifts as condition precedent to their qualification for overtime pay; such proceeding not being for recovery of money only.

9. **Mandamus** ⚷187(10)

Evidence justified modification of judgment granting writ of mandate to provide for certification to county civil service commission of payrolls of jail employees showing when they worked on night shifts and number of hours and days worked thereon.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by Daniel Scannell and others for a writ of mandate directing Daniel C. Murphy, Sheriff of the City and County of San Francisco, to prepare, approve, sign, and transmit to the county Civil Service Commission monthly pay rolls showing that petitioners worked as jailer, captain of the watch, jail matron and operating engineer on eight-hour night shifts during parts of a certain fiscal year. From a judgment granting a peremptory writ, respondent appeals.

Modified, and affirmed as modified.

Raymond D. Williamson, John J. O'Toole, City Atty., and Geo A. Helmer, Deputy City Atty., all of San Francisco, for appellant.

Charles P. Scully, of San Francisco, for respondent.

PETERS, Presiding Justice.

The respondents on this appeal are within the civil service classifications of jailer, captain of the watch, jail matron and operating engineer, and all worked during the fiscal year 1944–1945 in the department of the appellant, the sheriff of San Francisco, in the city and county jails on a rotating three shifts basis, 8 a.m. to 4 p.m.; 4 p.m. to midnight; and midnight to 8 a.m. It is admitted that during the fiscal year in question all of the petitioners worked some time on the two night shifts and some time on the day shift. The respondents claim, and the trial court found that, although the sheriff has certified that these respondents worked on eight-hour shifts, for six days a week, he has refused to certify that part of this period was worked on the night shifts. This becomes important because under the salary ordinance then in effect employees on a monthly salary were entitled to overtime for over forty hours work on a day shift and for over thirty-seven and one-half hours work on a night shift. Admittedly the sheriff has certified that these employees were on eight-hour shifts for six days a week, and the employees have accordingly been paid overtime at the day rate overtime basis for forty-eight hours work, which is twenty per cent in excess of regular salary. The excess overtime pay fixed by the ordinance for night shift overtime pay for a forty-eight hour work week is twenty-seven and one-half per cent of normal salary. Respondents contend that during the period they worked night shifts they were entitled to this excess of seven and one-half per cent. The trial court, by peremptory writ of mandate, has directed the sheriff to "prepare, approve, sign and transmit to the Civil Service Commission of the City and County of San Francisco, State of California, timerolls or payrolls for each month included in the fiscal year commencing July 1, 1944, and ending June 30, 1945, * * * showing that said work of each said petitioner was for 8 hours per day for 6 days per week on night shifts." From this judgment the sheriff appeals.

It should be mentioned that the Civil Service Commission, the City, and the Controller were originally made parties to this proceeding, but their demurrers were sustained, apparently on the theory that they were under no duty to act until the head of the department certified the payrolls.

The pertinent statutory provisions are as follows: Section 2.2(c) of the 1944–1945 salary ordinance provided: "Night Shifts: Seven and one-half hours per day and five days per week shall constitute the normal work day and week for calculating the compensations for employees whose compensations are fixed herein on a monthly basis and who work on night shifts. A night shift is any full time shift which commences after 2 p.m. and prior to 6 a.m."

Section 2.3(b) provided: "Pursuant to the provisions of Section 4, Subdivision (f) of the Salary Standardization ordinance department heads may require occupants of the following specified positions, the salaries for which are based on a monthly basis, to work in excess of the five days and 40 hours for day shifts and five days of 7½ hours for night shifts for the number of hours hereinafter specified. Employees required to work in excess of the normal work week as above specified shall be compensated as follows: * * *

"Night Shifts. . .

"48 hours, 27½% above the compensation fixed herein for their respective classifications. . .

"Sheriff. . .

"D 52 Jail Matron. . .

"D 60 Jailer

"D 64 Captain of Watch. . .

"0168.1 Operating Engineer."

At all pertinent times § 150 of the City Charter provided as follows:

"All personal services shall be paid by warrants on the basis of a claim, bill, timeroll or payroll approved by the head of the department or office employing such service. The claims, bills or payrolls hereinafter designated as payrolls, for salaries, wages or compensation for personal services of all officers, assistants and employees of every class or description, without regard to the name or title by which they are known, for each department or office of the city and county shall be transmitted to the civil service commission before presentation to the controller.

"The secretary of the commission shall examine and approve such payroll for all persons legally appointed to or employed in positions legally established under this charter. The payrolls thus approved, with notation of any item thereof disapproved, shall be then certified by the secretary to the commission and transmitted by him to the controller. The controller shall not approve and the treasurer shall not pay any claim for personal services, or pay check or warrant for salary, wages or compensation unless the same shall have been approved by the said secretary."

It was the position of appellant in the lower court, and it is his position here, that while respondents were working on the two night shifts, they only worked for seven and one-half hours and that the other half hour spent in the jail on the various eight-hour shifts was free time devoted to the eating of a meal. In this connection appellant calls particular attention to the language of § 2.3 (b) of the salary ordinance permitting department heads to "require" employees to work overtime, and contends that there is no evidence that he ever "required" or "directed" his employees to work in excess of the seven and one-half hours per day. It is his thought that this section demands that before overtime is allowed the head of the department must expressly order his employees to work overtime and that an implied order is not sufficient.

There is no doubt that the appellant, and his undersheriff William Hollingbery, Jr., testified that all of the jail employees on all shifts put in but seven and one-half hours of work, and were permitted one-half hour on each shift free time to eat a meal. The sheriff testified that this had been the custom in the jails for many years prior to 1944–1945, and that he did not vary the custom in that fiscal year. He denied that he had "directed" or "required" any one of the respondents to work longer than seven and one-half hours on any shift.

As opposed to this evidence several of the respondents testified that on the two night shifts they were on duty for a full eight hours, and, while admitting that some of them ate a meal during the eight hours, they contended that they were bound to their posts during the meal period, and subject to call. In this connection respondents introduced into evidence a set of rules and regulations governing their conduct in the performance of their duties for the year in question. These regulations had been drafted by a prior sheriff, and appellant admitted that they were in effect when he assumed office. He testified that he permitted these regulations to remain in effect and that each new employee was required to read them. He also admitted that he issued no repealing or amending order respecting these regulations until after the end of the fiscal year here in question. It is admitted that there is nothing in the regulations which authorized any jail employee to take a half hour off during any eight-hour shift for the purpose of eating. The regulations, in fact, indicate that the employees must work a full eight-hour shift. Thus, in reference to hours of duty, it is provided that: "The jail shall be policed at all times of the day and night, there being three (3) watches providing for this purpose. * * * Eight (8) hours shall be worked by each watch, unless otherwise ordered by the Superintendent." No contrary order was ever made by the Superintendent. The regulations further require the jailers "to be watchful and on the alert at all times"; prohibit them from performing any "act that may divert their attention from the efficient performance of their duties"; require that two jailers be on duty "in front of the felony wing at all times," and that one jailer must be "on the bridge at all times"; and each employee must remain on duty "until relieved."

Respondent Scannell testified that employees on the night shifts were given no time off for meals; that he and the others would eat while on watch at their respective stations; that they were on duty during the periods they were eating; that they were required to remain in uniform during the entire eight-hour shift and were prohibited from leaving the jail premises during the eight hours. The evidence also shows that under the law a matron must be on duty in the women's jails at all times, that on night watches there is but one matron on duty at each jail, and that no provision is made to relieve the matrons so that they can take a half hour for meals.

[1-3] Further reference to the evidence is unnecessary. It is quite obvious from the above summary that the finding of the trial court that respondents, while working on the night shifts, were "required" by appellant to work eight hours a shift as that term is used in § 2.3(b) of the salary ordinance is amply supported. If an express order is required under the section the regulations admittedly applicable constitute such an order. The existence of the so-called "custom" to the contrary testified to by appellant was denied by respondents. This conflict was for the trier of the fact.

[4, 5] The next contention of appellant is that respondents have not come into court with "clean hands" and for that reason are barred from relief. There is no doubt, of course, mandate being an equitable action (Potomac Oil Co. v. Dye, 10 Cal.App. 534, 102 P. 677), that the so-called "clean hands" doctrine is applicable generally to such a proceeding. The theory of appellant is that

these respondents worked not only on the two night shifts, but also on the day shift, and, it is urged, that the uncontradicted evidence shows that whatever the rule may have been on the night shifts, on the day shift the employees worked but seven and one-half hours. Admittedly the employees were paid for eight hours work on the day shift. It is therefore contended that the record shows that the respondents, even though underpaid on the night shifts, were overpaid on the day shifts, and therefore do not have "clean hands."

The difficulty with this argument is that its basic premise is unsound. The uncontradicted evidence does not show that the respondents worked but seven and one-half hours on the day shift. While there is some evidence to that effect, the evidence of respondents is reasonably capable of the interpretation that on all shifts they worked eight hours. Certainly the regulations draw no such distinction between the night and day shifts, and appellant has certified to the Civil Service Commission that all respondents worked eight-hour watches.

[6, 7] Moreover, this issue was not presented to the trial court, was not involved at the trial, and no finding was made on it. It was held in Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478, that the "unclean hands" doctrine must be raised in the trial court to be available as a defense, and cannot, as here, be raised for the first time on appeal. If it be a fact that respondents were overpaid while working on the day shifts, that fact not having been here in issue and not having been passed upon, it may be litigated in a proper proceeding, subject to whatever defenses respondents may have to the point. It may not be litigated on this appeal.

[8] It is next urged that by this proceeding respondents are seeking to recover overtime pay improperly withheld, that is, they are seeking to recover money only, and it is contended mandamus may not be used for such a purpose where the legal remedy is adequate. Johnston v. State Compensation Ins. Fund, 41 Cal.App.2d 516, 107 P.2d 102; Northrup v. Haynes, 15 Cal.App.2d 665, 59 P.2d 1056; Coombs v. Smith, 17 Cal.App.2d 454, 62 P.2d 380. There is no doubt that these cases, and particularly the last two, stand for the proposition that mandamus may not be used to recover money in a specific sum from a governmental agency for past services where that is the sole issue presented. But that is not the present case. Here the purpose of the proceeding is to compel the head of a department of a governmental agency to certify and transmit payrolls to the other city departments showing the periods these respondents worked on the night shifts during the year in question. Appellant has certified these payrolls showing that on the days in question these respondents worked on eight-hour shifts without designating whether these were day or night shifts. Under the charter (§ 150) the Civil Service Commission will not examine, the Controller will not approve and the Treasurer will not pay the claimed overtime without the certification of the head of the department in charge of the work records of the employees. What is sought is the certification and transmittal of the work records to the proper authorities—not the payment of money. In the cases relied upon by appellant the petitioners there involved were seeking the payment of back wages in specific sums, where the governmental agency refused to pay. Here the city has not refused to pay, in fact, it clearly appears it will pay upon proper certification and transmittal. This is not trying a case piecemeal as contended by appellant. The pleadings and evidence show that appellant is the only one in the governmental setup that has refused to act. This proceeding was brought to start the chain of municipal action required under the charter as a condition precedent to qualify the respondents for overtime pay. Certification and transmittal by appellant are conditions precedent to a determination of respondents' rights. Mandamus is the proper proceeding for such a purpose.

[9] Appellant next complains of the form of the judgment. The judgment directs the issuance of a writ commanding appellant to certify and transmit to the commission payrolls for the year in question "showing the classification in which each said petitioner worked, and further showing that said work of each said petitioner was

for 8 hours per day for 6 days per week on night shifts." Appellant contends that this judgment compels him to certify that respondents were employed exclusively on night shifts during the year in question, which is contrary to the admitted fact. There is no doubt at all that the evidence shows, without conflict, that during the year in question the respondents all rotated be between the day and night shifts. The judgment is undoubtedly ineptly drawn, and capable of the interpretation placed upon it by appellant. But that is not the only way to interpret the language. What the trial court undoubtedly meant was that, whenever respondents had in fact worked on night shifts during the year involved, they worked for eight hours, six days a week. Out of an abundance of caution, however, and in order to fully protect appellant, that judgment is modified to provide that the writ shall direct the sheriff to certify and transmit the payrolls of respondents so as to show when respondents worked on night shifts during the year in question, and to show that when they did work on such night shifts they worked eight hours a day for six days a week.

The judgment is modified as above indicated, and as so modified is affirmed; respondents to recover costs on appeal.

BRAY, J., and FINLEY, Justice pro tem., concur.

83 Cal.App.2d 52

PEOPLE v. WILLIFORD.

Cr. No. 653.

District Court of Appeal, Fourth District, California.

Dec. 22, 1947.

1. Burglary 🔑38, 46(7)

Where state's theory was that burglary of gunshop was committed by defendant and another, the court properly admitted evidence of association of the two men before and after the burglary, of finding of stolen guns in automobiles or cabins used by both or one of them, of inquiry by defendant about ammunition for special gun, of finding fired shells for such kind of gun at place of burglary, of finding the special gun in one of the cabins, and of the use of guns by the two men, to show possession of the guns, or some of them, and such evidence was sufficient to warrant the court in giving the usual instruction with reference to the possession of stolen property.

2. Criminal law 🔑1170½(1)

Where neither prejudice nor intentional misconduct appeared, cross-examination of alibi witness with respect to prior convictions of felonies was not reversible error where there was a similarity of names and defendant denied that he had been convicted and testified that he was in the army at the time in question and had received an honorable discharge.

3. Criminal law 🔑1036(2), 1129(1)

Objection could not be made for the first time on appeal particularly in absence of assignment of error, concerning cross-examination of alibi witness as to whether he had ever gone under an assumed name.

4. Criminal law 🔑1169(5)

Where voluntary statement by witness was not finished because objection was made and sustained, and jury were instructed to disregard it, use by the witness of defendant's name followed by the word "alias" did not show prejudicial error.

5. Criminal law 🔑1137(2)

Any error in cross-examination of character witness was invited by the defendant where questions were agreed to and could not be complained of on appeal, particularly where no prejudice appeared.

6. Criminal law 🔑1171(1)

Unnecessary argument made by district attorney in reply to criticism of county officials which had previously been made by one of defense counsel, was not prejudicial.

7. Criminal law 🔑1037(1)

Argument that the guilt of the defendant was disclosed by the evidence to a greater degree than in any other case that district attorney had ever tried could not be objected to for the first time on appeal.

8. Criminal law ⚷1171(3)

Incorrect statement by district attorney in argument that a special pistol was found in the possession of the defendant was not prejudicial in view of all the evidence.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Edward Brooks Williford was convicted of burglary, and of assault with a deadly weapon, and from such conviction and from an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Russell Behrens and James E. Walker, both of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crimes of burglary and assault with a deadly weapon, and was found guilty by a jury. He appeals from the judgment and from an order denying his motion for a new trial.

About 3 a. m. on April 16, 1947, two men, one of them "Whitey" Anderson, broke into a gunshop in Seal Beach and were removing some 25 guns, rifles and pistols, with a quantity of ammunition. Two police officers, hearing the noise, came to investigate. As they approached from the alley, the lights in the gun shop were on and a black Pontiac automobile was standing near the rear door of the gun shop with its engine running. Some of the guns were in this car and some were on the ground. As the officers approached they saw a man standing in the lighted doorway, and another man who was standing in the shadows so they could not identify him. The officers ordered the men to put up their hands and instead of complying the two men immediately began shooting at the officers, who also began shooting. The two men then ran through the shop, out into the street and escaped.

Both of the officers positively identified the defendant as the man who was standing in the rear doorway of the shop and who first began shooting. They testified that he was standing in the doorway of this well-lighted shop, that they could see distinctly, that they had a good look at him, and that they could not be mistaken. In the glove compartment of the abandoned car there was found a camera with exposed films. These films were developed and produced pictures of Anderson and his wife, and of the defendant and the woman with whom he was living. In the car was also found a nearly full whiskey bottle, on which were the defendant's finger prints. Several shells for a P-38 automatic pistol were found around the spot where the man in the doorway had been standing. All of the guns taken from the shop were found in and around the car, with the exception of three pistols which were later recovered.

Many surrounding circumstances are shown by the evidence. One of the owners of the gun shop testified that ammunition for this P-38 gun was hard to obtain and that on a Sunday shortly before April 15 the defendant, with a man who was one of his alibi witnesses here, came into the shop seeking such ammunition. The abandoned car was one which had been used by Anderson, and the defendant had spent a large part of his time with Anderson for about a month. So far as the record shows, neither had had any gainful occupation other than gambling. During the forenoon of April 16, Anderson was heard telling his wife that he had abandoned the car, and complaining because she had left the camera and films in it. For the ostensible reason that they expected soon to take a trip to Lake Tahoe the Andersons, and the defendant and his companion, moved that day from "Willowbrook" to a motel in Huntington Park, where they were registered under assumed names. A few days later, they went to Lake Tahoe in a Buick car and there the two couples occupied adjoining cabins in a place that contained only three cabins. The next day, Anderson and the defendant returned to Los Angeles County in the Buick car, leaving the women at the cabins. On April 22, an officer recognized the defendant riding with another man in this Buick car near Wilmington. He gave chase, running 85 miles an hour, but lost the other car in the traffic. About 15 minutes later, that car was parked in a vacant stall behind an apartment house in Wilmington. A lady, who lived in the apartment house, testified that when the car came in there were two men in it, one of whom she thought was the defendant. This car stayed there the rest of that day and all the next day. The next night the police broke open the car and found in the glove compartment one of the stolen pistols, Exhibit 6. The defendant admitted on the stand that he saw this pistol while he and Anderson were returning from Lake Tahoe in the Buick, that "It worked out from under the seat, under my seat."

Anderson and the defendant returned to Lake Tahoe, apparently in another Buick. On April 25, highway patrol officers questioned Anderson about the ownership of the Buick. Anderson said he would show the papers, and took them into the defendant's cabin. Anderson then drew a pistol, and one of the officers shot and killed him. In the defendant's cabin, in a coat belonging to the woman who occupied that cabin with him, was found another of the stolen pistols, Exhibit 7. This woman testified that she did not know how the pistol got there, and the defendant admitted that he had seen it that morning lying on their bed. In Anderson's adjoining cabin the third stolen pistol, Exhibit 8, was found under the pillow of the bed, and a P-38 pistol was also found in that cabin.

The defendant attempted to establish an alibi. He testified that on the preceding evening of April 15, he and Anderson left his home and went to a certain house in Compton to attend a poker party; that they arrived there about 11 or 11:30 p. m.; that Anderson only stayed a few minutes and he did not see him again until morning; that he, himself, remained at the poker party until after 4 a. m.; and that he arrived home about 5:30 or 6 a. m. When asked whether he remained at the poker party continuously until 4 a. m. he replied that he did "to the best of my knowledge." The defendant's brother and several of his friends testified that the defendant arrived at this poker party shortly before midnight and remained there until the party broke up toward morning. However, the defendant told two officers when he was first arrested, that he got home about 11:30 p. m. on the night of the 15th; that he and Anderson then went to Long Beach in the Pontiac car, getting there about 12:30; and that he left Long Beach about 2:30. He refused to tell them what he then did, saying that he was "not going to tell you where I went." He also told an officer that he arrived home about 6 a. m. and that Anderson was then there, but refused to tell whether Anderson had come with him. This alibi evidence was not only contrary to some of the defendant's admissions, as well as to reasonable inferences from the statements he made to the officers, but in several respects the alibi witnesses contradicted each other. Moreover, the entire alibi evidence contained inherent weaknesses which must naturally have greatly affected its weight with the jury.

The defendant contends that because the evidence, with respect to his guilt, was extremely close the errors claimed were especially prejudicial, and that the failure of the jury to believe his alibi witnesses can be explained only by the fact that the jury was prejudiced through certain misconduct on the part of the district attorney and one of his witnesses.

[1] It is first contended that the court erred in admitting evidence that the defendant and Anderson were associated together for some two weeks before the burglary; that the defendant had inquired at the gun shop shortly before the burglary about shells to fit a P-38 gun; that fired shells to fit such a gun were found at the scene of the burglary; that the defendant was seen riding, on April 22, in a Buick in which was later found one of the stolen guns; that the defendant made two trips to Lake Tahoe with Anderson and that one of the guns was found in the car in which they had ridden; that at the time Anderson was killed a P-38 gun and one of the stolen guns were found in his cabin; that the other stolen gun was found in a coat belonging to the woman who shared the defendant's cabin; and that the defendant had admitted to an officer that he had used "some guns" in target practice on the trips to Lake Tahoe with Anderson. It was, and has been, the defendant's contention throughout that this burglary was

committed by Anderson and some other man, and it is here contended that while the evidence just described was admissible for other purposes its admission was here sought for the purpose of showing possession of the guns by the defendant and that it was, therefore, inadmissible. Without doubt, this evidence was admissible for other purposes and we cannot agree that it was inadmissible for the purpose of attempting to show possession of the guns, or some of them, in the defendant. It was the prosecution's theory that Anderson and the defendant had worked together in committing this burglary, they had a right to introduce evidence in support of that theory, and most, if not all, of this evidence was material to that end. Nor can it be said that the attempt to show possession of the guns in the defendant was entirely unsuccessful. One of the stolen guns was found in the pocket of a coat belonging to the woman who occupied the cabin with the defendant. She disclaimed all knowledge of how it got there and the defendant admitted that it was lying on their bed that morning. Another of the stolen guns was found in a car in which the defendant had been riding, he admitted having seen it there on the trip down from Tahoe, and his attempted explanation of the circumstances under which he saw it is not too convincing. He also admitted that he had seen the other stolen gun in Anderson's possession. The question was one of fact for the jury and this evidence was not only admissible, but was sufficient to warrant the court in giving the usual instruction with reference to the possession of stolen property, of which the defendant also complains.

[2] It is next contended that the district attorney committed prejudicial misconduct in cross-examining one of the alibi witnesses with respect to his conviction of a felony. On cross-examination, this witness was asked whether he had ever been convicted of a felony. He replied: "I have been convicted, but I don't know of a felony or not." The matter was then dropped but on redirect examination defendant's counsel explained to the witness what a felony was, and then asked him whether or not he had been convicted of a felony. He replied "No", and was excused. The following day the witness was recalled for further cross-examination. When asked if his full name was Frank Ralph McDonald, he replied it was Frank Leon McDonald. The witness was then asked whether he had ever been convicted and had served sentences in penitentiaries in Pennsylvania, Ohio and New York, and in each instance replied in the negative. Defendant's counsel stated that the district attorney had the wrong man in mind, assigned the asking of the question as prejudicial misconduct, and asked that the jury be instructed to disregard the question. The jury was sent out and an argument had before the court, which does not appear in the record. Thereafter, the court overruled the objection and the witness was again asked similar questions and denied that he had served any such terms. Upon redirect examination by defendant's counsel the witness then testified that during the times in question he was in the Army and that he had been honorably discharged. Apparently the district attorney had before him the record of one Frank Ralph McDonald and was attempting to show that this witness was the same person. While he was unsuccessful in so doing there is nothing to indicate that he was acting in bad faith and he had enough to convince the court, in the absence of the jury, that the matter should be gone into. The questions were confined to permissible matters and the doubt as to the identity of the person involved justified going into the matter the second time. The results obtained were more favorable to the defendant than to the prosecution, and neither prejudice nor intentional misconduct appears.

[3] During cross-examination, this same witness was also asked if he had gone under the assumed name of Frank Waack, and he replied that he had not. It is argued that the name of the witness was not in issue and that prejudicial misconduct appears. This occurred while the district attorney was trying to ascertain the real identity of the witness, and no objection or assignment of error was made.

[4] It is next contended that a prosecution witness committed prejudicial misconduct in referring to the defendant as "Edward Brooks Williford, alias". The

witness, a deputy sheriff, was being questioned with respect to a record in the sheriff's office. When asked if a certain card had been prepared under his supervision he replied that it had, and then proceeded with the voluntary statement "the front side bears the name, Edward Brooks Williford, alias—". At that point, an objection was made and sustained. No request was made to have the jury disregard it. No prejudicial error appears in this connection. People v. Muchupoff, 79 Cal. App. 306, 249 P. 240; People v. Willmurth, 77 Cal.App.2d 605, 176 P.2d 102.

[5] It is next contended that the district attorney committed prejudicial misconduct in cross-examining a character witness. This witness had largely destroyed the effect of his own evidence by admitting that he knew nothing about defendant's reputation, and that all he knew about him was from seeing him "occasionally around the store." The witness was then asked whether his testimony would be the same if he had heard of several arrests of the defendant for various offenses. An objection was then made for the first time, the jury was excused and the matter was argued before the court in the absence of the jury. Defendant's counsel then conceded that several of the questions were proper, and stated that it would be satisfactory if the judge struck out one question and answer and allowed the others to remain. The jury was called back, the one matter was stricken and the jury instructed to disregard it, and the others were allowed to remain. Any possible error was invited by the defendant and no prejudice appears.

[6-8] The final contention is that the district attorney committed prejudicial misconduct in his argument to the jury in three instances. It is first contended that he went outside the record, while replying to a criticism of county officials which had previously been made by one of defense counsel. The district attorney stated that one of the best officers in the county had died at about the time this criticism was being made, and that he hoped that counsel, by his remarks, had not intended to criticize this fine man, a friend of many of those present. While these remarks were unnecessary, no possible prejudice or prejudicial misconduct appears. In another instance, during his closing argument, the district attorney said, "Personally, I have never tried a defendant that I thought his guilt stood out more than this defendant." It is argued that this statement discloses a personal belief entertained at the beginning of the trial and not one based on evidence produced at the trial. When the statement is read in connection with the rest of the argument then being made, it appears that the district attorney was referring to the evidence produced, and was saying that the guilt of the defendant was disclosed by that evidence to a greater degree than in any other case he had ever tried. The statement was not objected to or assigned as misconduct at the time, and the cases relied upon by the defendant are clearly distinguishable. In the other instance, the district attorney stated several times that the various guns in question were found either in the possession of the defendant or of Anderson. At one time he stated that the P-38 pistol was found at Lake Tahoe in the possession of the defendant. This was not strictly correct as it was found in Anderson's cabin but, in view of all of the evidence, no possible prejudice could have resulted. It could well be argued that the defendant was in constructive possession of this gun since Anderson was his accomplice. No intentional or prejudicial misconduct appears in connection with the argument.

In addition to a rather strong case of circumstantial evidence the direct evidence of eyewitnesses is amply sufficient to sustain the verdict and judgment, and no reversible error appears.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concur.

82 Cal.App.2d 905

FREDERICKSON v. KEPNER.

Civ. 15914.

District Court of Appeal, Second District,
Division 2, California.
Dec. 17, 1947.

1. Appeal and error 🔑927(3), 989

On appeal from judgment of nonsuit, court may not weigh inconsistencies in evidence nor construe it other than as strongly as possible in favor of plaintiff, and all evidence in conflict with evidence favorable to plaintiff must be disregarded and only inferences fairly deducible from the evidence and favorable presumptions arising from the facts established by plaintiff may be considered, and where evidence is susceptible or different inferences or constructions those favoring plaintiff must be accepted.

2. Animals 🔑74(5)

Evidence that plaintiff was attacked on defendant's premises by two dogs at a place where the defendant had directed plaintiff to go, that one dog was tied and was kept as watch dog and was permitted to be at large only in evenings when accompanied by someone, and that one dog was German police dog weighing 75 pounds, established prima facie defendant's common-law liability for keeping vicious dog on premises.

3. Animals 🔑68

When owner of a dog has reason to believe that it is savage, ill tempered, or dangerous to persons and property, he keeps the dog at his risk and is liable for damages resulting from the conduct of the dog which exhibits such known traits or character.

4. Animals 🔑68

The owner of a dog is liable if plaintiff receives injuries as result of dog's vicious or dangerous conduct irrespective of whether plaintiff was bitten.

5. Animals 🔑74(5)

The vicious propensities and dangerous character of a dog and knowledge thereof by its owner may be inferred from evidence that dog was kept tied or as a watch dog or from the dog's size and breed.

6. Appeal and error 🔑241

Whether there was substantial evidence to sustain a finding that the dogs which attacked plaintiff were owned by defendant would not be considered on appeal from judgment of nonsuit where motion for nonsuit did not raise such question.

7. Appeal and error 🔑241

A ground not specified in a motion for nonsuit will be considered by appellate court in support of a judgment of nonsuit only when it is clear that the defect is one which could not have been remedied if it had been called to the attention of trial court.

8. Negligence 🔑136(9, 10)

Contributory negligence is a matter of law only when the court can say that there is not any substantial conflict in the evidence and that from such evidence reasonable men can draw but one inference, which points unerringly to negligence of plaintiff proximately contributing to his own injury.

9. Animals 🔑74(8)

In action for injuries resulting from attack of dogs owned by defendant, whether plaintiff was contributorily negligent was for jury.

10. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit where the evidence would have sustained a verdict for plaintiff on the issue of contributory negligence, the appellate court must assume that jury would have found for the plaintiff on such issue.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by John H. Frederickson against Frank Kepner for injuries resulting when dogs owned by defendant attacked plaintiff. From a judgment of nonsuit, the plaintiff appeals.

Judgment reversed.

Landon Morris and Lawrence F. Edmisten, Jr., both of Los Angeles, for appellant.

Harry E. Sackett, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendant predicated upon the granting of his motion for a nonsuit in a trial before a jury in an action to recover damages resulting from injuries caused by being attacked by two dogs owned by defendant.

[1] It is the rule that in reviewing a judgment predicated upon the granting of a motion for nonsuit an appellate court (1) is not permitted to weigh inconsistencies in the evidence, (2) is not permitted to construe the evidence other than as strongly as possible in favor of plaintiff, (3) must disregard all evidence in conflict with that in plaintiff's favor, (4) must consider every inference fairly deducible from the evidence and every favorable presumption arising therefrom as facts established by plaintiff, and (5) where the evidence is susceptible of two constructions or if several inferences reasonably may be drawn therefrom, it must take the view most favorable to plaintiff. (Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 201, 148 P.2d 405.

Viewing the evidence in the light of the rule just stated the record discloses that on October 18, 1944, defendant's business premises consisted of 26 acres of land on which he maintained a public dump and salvage yard, carrying on the business of selling salvaged materials to the public. A roadway ran into the premises on the west side of which, approximately forty feet from the entrance to the property, was a building built on the side of a hill on two levels. The upper level of the building contained defendant's office and a storeroom surrounded by a porch. This level was reached by a stairway leading from the roadway to the porch. Immediately to the south of and adjacent to this building was a series of graduated terraces cut out of the hill on the premises. The top terrace was on the same level as the upper level of the building and was reached by using the building stairway from the roadway level to the upper level, then walking on the porch past the storeroom and through the passageway onto the top level. Various kinds of salvaged materials were displayed on these terraces and were offered for sale to the public.

Defendant owned and kept three dogs on his premises. One of them was a 75 pound German police dog. This dog was kept as a watch dog to watch and guard the area around the storeroom, and was tied up at all times except occasionally in the evening when he would be let loose for the purpose of exercise, at which time he would be accompanied by someone. He was on the premises twenty-four hours a day.

On October 18, 1944, this dog was tied to a beam in the back of the storeroom by a rope long enough to permit the dog to go into the storeroom and also out onto the top terrace where materials were offered for sale. The other dogs kept by defendant were not tied but were let run loose on the property.

On the date above mentioned plaintiff went to defendant's premises to purchase material. After making one purchase he asked defendant if he had any masonite or marble, and defendant directed his attention to some marble on the top terrace, and told plaintiff to go up and look at it.

In order to reach the terrace where the marble was located plaintiff went up the stairway and through the building, and in so doing passed the storeroom where the German police dog was tied. He did not see the dog nor, in fact, had he ever seen any dogs on the premises although he had been there before.

Plaintiff went out onto the top terrace and examined the marble. As he started back toward the building two dogs jumped on his back with their teeth bared and threw him over the bank of the terrace. He observed that one dog had a rope on him and the other did not. Plaintiff was not bitten but received severe personal injuries as a result of being thrown over the bank of the top terrace.

There are three questions presented for our determination:

First: *Do the foregoing facts constitute a prima facie case in favor of plaintiff sufficient to establish defendant's liability for keeping a vicious dog on his premises* *in accordance with the rules of the common law?*

[2, 3] This question must be answered in the affirmative, and is governed by these pertinent rules of law:

(1) When the owner of a dog has reason to believe it is savage, ill-tempered, or dangerous to persons and property, he keeps the dog at his risk and is liable for damages resulting from the conduct of the animal which exhibits such known traits or character. (Hicks v. Sullivan, 122 Cal. App. 635, 638, 10 P.2d 516.)

[4] (2) In order to establish liability it is not necessary that the dog bite a person. It is sufficient if the plaintiff receive injuries as a result of the dog's vicious or dangerous conduct. (Hicks v. Sullivan, supra, 122 Cal.App. 637, 10 P.2d 516.)

[5] (3) The (a) vicious propensities and dangerous character of a dog and (b) knowledge thereof by his owner may be inferred from evidence that the dog was kept (1) tied (2) as a watch dog and also (3) from his size and breed. (Davis v. Mene, 52 Cal.App. 368, 369, 198 P. 840; Warner v. Chamberlain, 7 Houst., Del., 18, 30 A. 638, 639; Montgomery v. Koester, 35 La.Ann. 1091, 1093, 48 Am.Rep. 253.

Applying the foregoing rules to the facts in the instant case it is apparent that the jury could have inferred from the foregoing evidence that, since defendant kept a German police dog of 75 pounds weight tied on his premises as a watch dog, and permitted the dog to be unfettered only in the evenings and when accompanied by someone, (a) the dog had a dangerous nature, and (b) defendant had knowledge of the dangerous character of the animal.

Hence, since there was direct evidence that the dog caused injury to plaintiff, defendant would be liable to plaintiff for the damage resulting and it was error for the trial court to grant the motion for a nonsuit.

Second: *Was there substantial evidence to sustain a finding that the dogs which attacked plaintiff were owned by defendant?*

[6, 7] This question will not be considered by us for the reason that the rule is now settled in California that a ground not specified in a motion for nonsuit will be considered by an appellate court in support of a judgment predicated upon the granting of such motion only in the event that it is clear that the defect is one which could not have been remedied had it been called to the attention of opposing counsel and the trial court in the motion for a nonsuit. (Lawless v. Calaway, 24 Cal.2d 81, 92, 147 P.2d 604.)

In the present case the motion for nonsuit did not include as one of the grounds therefor the point that there was no evidence to sustain a finding that defendant owned the dogs which were the cause of the injury to plaintiff. It is clear that had such fact been called to the attention of opposing counsel in the trial court evidence could have been introduced to overcome the alleged deficiencies in the evidence. Hence defendant may not urge the lack of such evidence as a ground for sustaining the order of the trial court.

Third: *Did plaintiff's contributory negligence bar him from recovering in the present action?*

[8] For the purpose of this appeal this question must be answered in the negative. Contributory negligence is a matter of law only when the court can say that there is not any substantial conflict in the evidence, and that from such evidence reasonable men can draw but one inference which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury. (Wilmot v. Golden Gate Investment Co., 41 Cal.App.2d 664, 668, 107 P.2d 263.)

[9, 10] Assuming without deciding that there was evidence in the instant case which would have supported a finding that plaintiff was contributorily negligent, there was evidence which would have supported a finding that he was not. Therefore under the rule above stated it was a question of fact for the determination of the trier of fact (in this case the jury), and in considering the ruling on the motion for nonsuit we must assume that the jury would have found that plaintiff was not contributorily negligent. (Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 194, 99 P.2d

650; Uribe v. McCorkle, 63 Cal.App.2d 61, 64, 146 P.2d 22.)

In view of our conclusions it is unnecessary to consider other arguments presented by counsel.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

83 Cal.App.2d 84

LELAND et al. v. CRADDOCK et al.

Civ. 15872.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1947.

Rehearing Denied Jan. 14, 1948.

Hearing Denied Feb. 19, 1948.

1. Contracts 🔑271

A mere notice purporting to rescind an agreement cannot have that effect unless the party giving such notice is entitled to rescind.

2. Escrows 🔑8(2)

Where contract for conveyance of realty required acceptance of all parties to cancel escrow prior to specified date, an attempt to cancel escrow prior to the specified date was ineffective under the statute without consent of all parties. Civ.Code, § 1689(5).

3. Escrows 🔑8(2)

Where contract for conveyance of realty was contained in and constituted escrow instructions and provided that after specified date any party to escrow could cancel escrow by written demand for return of money or escrow instructions and all parties had signed instructions, one party after specified date could cancel by written demand for return of money in escrow, under statute permitting rescission of contract by one party where all other parties consent. Civ.Code, § 1689(5).

4. Contracts 🔑272

A party to contract having the right to cancel was not required to obtain a judicial declaration of his right, but could effect cancellation by his own action in accordance with statute enumerating cases when a party may rescind a contract. Civ. Code, § 1689.

5. Specific performance 🔑117

Where court had held contract to have been canceled by plaintiffs, defendant's evidence in support of cross-complaint for specific performance of same contract was not germane.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. J. Leland and others against Catherine L. Craddock and Escrow & Loan Service Company, a California corporation, to have a contract declared terminated, wherein defendant Catherine L. Craddock filed a cross-complaint for specific performance of the same contract. From a judgment in favor of plaintiffs, defendant Craddock appeals.

Judgment affirmed.

John C. Miles, of Los Angeles, for appellants.

William E. Fox, of Pasadena, for respondents.

BARTLETT, Justice pro tem.

Plaintiffs brought an action to have a contract declared terminated and no longer of any force and effect. The defendant Catherine L. Craddock filed a cross-complaint seeking specific performance of the same agreement. From a judgment in favor of plaintiffs, the defendant Craddock appeals.

The plaintiffs were owners in common of real estate in Pasadena. On May 8, 1945, they agreed to convey the property to the defendant Catherine L. Craddock. This agreement was contained in and constituted, among other things, the escrow instructions given to the defendant Escrow and Loan Service Company.

The purchase price of the property was $15,000. The purchaser was to assume an unpaid balance on the property of $7,352.10, and to pay before the close of escrow $7,649.90. The escrow agreement contained the following instructions to the defendant, Escrow and Loan Service Company:

"If you are unable to comply with these instructions on or prior to June 8, 1945, you will comply as soon thereafter as possible unless written demand for the return of the money or instruments by a party to this escrow is received by you *subsequent* to such date and prior to the recording of any instruments provided for herein."

On May 8, 1945, the defendant Mrs. Craddock deposited in the escrow $1,000 with the instruction to pay $500 of this sum to the plaintiff John S. Crowl, and deduct the amount from his settlement check.

On May 28, 1945, the defendant Mrs. Craddock delivered to the defendant Escrow and Loan Service Company the following instructions: "You are hereby authorized and instructed to cancel the above escrow returning any instruments submitted to the escrow and return the balance of the money in escrow to the Leland Realty Co., after deducting your escrow charges and the cancellation charges made by the Title Insurance & Trust Company."

Two of the plaintiffs, Mr. and Mrs. Leland, signed these instructions, but the plaintiffs Mr. and Mrs. Crowl did not.

On September 12, 1945, Mrs. Craddock, by her attorney, Roland Maxwell, wrote the following letter:

"September 12, 1945

Escrow Loan & Service Company
110 South Lake Avenue
Pasadena 5, California
Re: Escrow No. 2–0107

Gentlemen:

I represent Mrs. Catherine L. Craddock who some months ago deposited the sum of $1,000.00 in the above escrow. This letter is written for the purpose of demanding the immediate return of this deposit.

The facts related to me indicate that the signing of this escrow agreement was induced by misrepresentation, and that the rescission of the escrow agreement of which you are hereby notified, is therefore justified.

Unless this demand is complied with within one week of the above date, appropriate legal action will be taken without further notice to you.

Very truly yours,

Roland Maxwell.

CC—Messrs: John S. Crowl
H. J. Leland."

Thereafter, on October 8, 1945, the defendant Mrs. Craddock, notified the escrow company to hold in escrow the balance of the funds that were previously directed to be paid to the Leland Realty Company, and on November 9, 1945, filed an amended instruction as follows: "You are authorized to nullify all previous instructions with regard to the cancellation of the above escrow. It is now intended that it will be completed as originally set out."

Nothing in the record shows any acceptance by any plaintiffs of the defendant's attempt to reinstate the escrow.

Plaintiffs' original complaint was upon the theory that the defendant Craddock's attempted cancellation of the escrow on May 28, 1945, in fact did cancel the escrow. The trial court held adversely to this contention for the reason that two of the plaintiffs, Mr. and Mrs. Crowl, did not consent. The correctness of this decision is not questioned here. The plaintiff was then given leave to amend his complaint to set up the instructions of the defendant given by her attorney Roland Maxwell in his letter of September 12, 1945.

Only two witnesses testified: the defendant Mrs. Craddock called by the plaintiff under the provisions of section 2055 of the Code of Civil Procedure, and her attorney Roland Maxwell. At the conclusion of their testimony, the court held that the contract was cancelled by the Maxwell letter of September 12, 1945, and from and after that date it was of no force and effect.

[1] The only question before this court on appeal is this: Was the trial court correct in its ruling that the defendant, by her letter of September 12, 1945, cancelled the contract evidenced by the escrow agreement, and consequently that after that date it was of no further force and effect? The appellant claims that this ruling was erroneous and contends that the letter of

September 12, 1945, could not constitute anything more than an offer to cancel and if not accepted within a reasonable time could be withdrawn and that it follows that the respondents having failed to accept the offer prior to the time she attempted to withdraw it on November 9, 1945, cannot now avail themselves of it. The only authority for this proposition which they cite is the following quotation from Brown v. Roberts, 121 Cal.App. 654, from page 659, 9 P.2d 517, 519: "Two further contentions are made by appellants. It is argued that as they had rescinded before this action was filed 'there was no contract in existence which could be the foundation or basis of this action for specific performance.' It is sufficient answer to state that the trial court found against appellants on the facts upon which they claimed the right to rescind and further found that the attempted rescission was made in bad faith. *Of course, a mere notice purporting to rescind an agreement cannot have that effect unless the party giving such notice is entitled to rescind.*" (Italics are appellant's.)

That is a correct statement of the law. Here there can be no question as to whether or not the attempted rescission was made in bad faith as the appellant herself is the one who rescinded. Therefore we see the only question left is, Was the appellant entitled to rescind? If she was, the court's ruling was correct.

[2, 3] Only one conclusion can be drawn from the contract of the parties and that is that on September 12, 1945, appellant was a person entitled to rescind and cancel the escrow. The contract required the acceptance on the part of all parties to cancel this escrow prior to June 8, 1945. Appellant tried to cancel the escrow prior to that date, but, as two of the parties had failed to accept, the court held correctly that there had not been a compliance with the provisions of Civil Code section 1689, subdivision 5, and that the escrow continued to be in force. The contract provided that after June 8, 1945, any party to the escrow could cancel it by written demand for return of the money or instructions. As all the parties signed the original instructions, all had agreed to a cancellation in the manner adopted by the appellant, and the provisions of section 1689, subdivision 5 were then fully satisfied.

[4] Appellant makes the assertion that rescission by one party can not constitute an abandonment of a contract unless it is ultimately established by a judicial decree that the party rescinding had a right to do so. Such is not the law in California. The true rule is stated in Philpott v. Superior Court, 1 Cal.2d 512, at page 524, 36 P.2d 635, at page 641, 95 A.L.R. 990:

> "The rule that it is not necessary to ask the aid of a court of equity to effect the rescission where the rescinding party has followed the statutory procedure finds abundant support in California decisions.
>
> "In this connection we approve the opinion of Judge Bishop in the case of Jensen v. Harry H. Culver & Co., 127 Cal.App. Supp. 783, 785, 786, 15 P.2d 907, 908, where many of the authorities are cited as follows: 'There can be no doubt that one having a right to rescind need not turn to the courts to have the rescission accomplished; he may effect it by his own action. Prewitt v. Sunnymead Orchard Co., 1922, 189 Cal. 723, 209 P. 995; McNeese v. McNeese, 1923, 190 Cal. 402, 213 P. 36; Maxwell v. Jimeno, 1928, 89 Cal.App. 612, 265 P. 885, and Ito v. Watanabe, 1931, 213 Cal. 487, 2 P.2d 799."

To the same effect are Fairbairn v. Eaton, 6 Cal.App.2d 264, 267, 43 P.2d 1113; McCall v. Superior Court, 1 Cal.2d 527, 536, 36 P.2d 642, 95 A.L.R. 1019; Bennett v. Superior Court, 218 Cal. 153, 162, 21 P.2d 946.

[5] Appellant complains that she was not permitted to introduce any evidence to support the allegations of her answer or cross-complaint. At the trial of the action no such testimony was offered. As to why it was not offered is apparent. The cross-complaint was one for specific performance of the very contract which the court had held was cancelled by appellant on September 12, 1945. The trial court correctly took the attitude that, in view of his ruling as to the cancellation of the con-

tract, nothing else pleaded was germane to the case.

The judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al. and three other cases.*

Civ. 3460–3463.

District Court of Appeal, Fourth District, California.

Dec. 17, 1947.

Hearing Granted Feb. 9, 1948.

1. Depositaries 🔑8

Where metropolitan water district in connection with condemnation of land for a reservoir site deposited moneys in court as security for payment of awards, such funds, which were deposited by clerk with county treasurer, who then deposited them in his several bank accounts, were moneys in "custody of county" wtihin Depositary Act requiring moneys in custody of county to be deposited in banks. Gen.Laws, Act 2834a, § 1; Code Civ.Proc. §§ 188, 573; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody of County".

2. Depositaries 🔑8

Moneys deposited in court and in turn deposited with county treasurer, as required by statute, to be held subject to court's order must be considered as being in the county treasury in view of provision of Depositary Act that money deposited by treasurer in bank is deemed to be in county treasury. Code Civ.Proc. §§ 188, 573; Gen. Laws, Act 2834a, § 1.

3. Depositaries 🔑8

The "custody" referred to in provision of Depositary Act requiring moneys in custody of county or city to be deposited in bank is the actual custody, with the duty of handling the money, and not merely the legal or technical custody thereof. Gen. Laws, Act 2834a, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody".

4. Waters and water courses 🔑183½

Where metropolitan water district in connection with condemnation of land deposited money in court for payment of future awards to landowners, and clerk deposited such funds with country treasurer who deposited them in banks, treasurer in making deposits represented county rather than water district so that water district was not entitled to interest on deposits under provision of depositary act providing for payment of interest to public body represented by officer making deposit. Gen. Laws, act 2834a, §§ 1, 2; Code Civ.Proc. §§ 188, 573.

5. Waters and water courses 🔑183½

The statutes relating to deposits in court and deposits of public funds governed right to interest on moneys deposited in court by water district in connection with condemnation proceedings, and eventually deposited in banks by county treasurer who received moneys from clerk of court, so that water district was not entitled to interest on deposits on theory that moneys constituted trust funds. Gen.Laws, act 2834a, §§ 1, 2; Code Civ.Proc. §§ 188, 573.

◆

Appeals from Superior Court, Riverside County; Elmer W. Heald, Judge.

Four actions by the Metropolitan Water District of Southern California, the first against E. Bennett Adams and others, the second against Lawrence Holmes and others, the third against W. F. Clay and others, and the fourth against Ashley A. Ash and others involving the condemnation of lands, wherein the plaintiff filed applications for orders for the return to it of interest earned on funds deposited in court in connection with the condemnation proceedings, and where in G. A. Pequegnat, as county clerk of the county of Riverside and ex officio clerk of the Superior Court of the State of California, in and for the county of Riverside, S. H. Whitnah, as county treasurer of the county, and Ray T. Hicks, as county auditor, were ordered to show cause why orders should not be made directing return to the plaintiff of such amounts as might be found to constitute the interest. From an order in each action denying the application for an order for the return of any moneys to the plaintiff and discharging the order to show cause, the plaintiff appeals in each case.

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* Subsequent opinion 197 P.2d 543.

Orders appealed from affirmed.

James H. Howard and Charles C. Cooper, Jr., both of Los Angeles, and H. L. Thompson, of Riverside, for appellant.

W. Earl Redwine, County Counsel for the County of Riverside, of Riverside, for respondents.

BARNARD, Presiding Justice.

These appeals are from orders made after judgment, the matters having been heard together in the trial court and being here presented on one set of briefs.

In these actions, originally, the appellant sought to condemn certain lands in Riverside County for its use as a reservoir site. For the purpose of obtaining immediate possession of the property large sums of money were deposited in court by the appellant as security for the payment of such awards as might be made to the landowners. All of these funds were deposited with the clerk and by him deposited with the county treasurer, who then deposited them in his several bank accounts and commingled them with the rest of his bank funds. The principal sums so deposited in court were all paid to the landowners, or returned to the appellant pursuant to orders of the court in the several actions. Such orders for return were made in response to appellant's applications and were in the exact amounts represented by it, and found by the court, to be the remaining balance to which it was entitled.

Over the years in question the treasurer had received certain interest from the banks upon his bank funds which, at various times, included all or portions of the funds thus deposited in court by the appellant. Some years after the original judgments had become final and had been satisfied, and long after the remaining balances had thus been returned to it, the appellant filed in these actions further applications for orders for the return to it of any interest earned on the funds thus deposited in court and later deposited by the county treasurer in his bank accounts, alleging that the appellant was the legal or equitable owner of these funds; that a proportionate share of the interest earned by the treasurer's bank accounts inured to the benefit of the appellant; that such share of this interest constituted and remained accretions to the appellant's funds as deposited in court; and that these interest accretions constitute deposits in court for which the clerk, the county treasurer and the county auditor, upon order of the court, must account to the appellant. The applications further set forth, in each instance, the amount claimed to be due to the appellant, on a proportionate basis.

The clerk of the court, the county treasurer and the county auditor were ordered to show cause why orders should not be made directing the return to the appellant of such amounts as might be found by the court to constitute the amounts of interest earned on, and accruing to, the funds which it had deposited in court.

The clerk, treasurer and auditor appeared and filed returns or answers and a hearing was had, at which evidence was presented by both sides. It appears that all of the deposits thus made in court by the appellant were turned over to the county treasurer and by him deposited in various banks in both active and inactive bank accounts maintained by him; that these deposits were commingled with other funds in that bank account; that during the period in question he deposited funds in his control in 18 different banks; that he took out various amounts at various times and from time to time transferred funds from inactive accounts to active accounts, and vice versa; that varying rates of interest were received at different times and from different banks; and that it was impossible to identify or trace the particular funds deposited in court by the appellant or to determine the exact amounts of interest received by the county treasurer for the use of these specific funds for the various periods. Evidence was received, however, showing the total amounts which the treasurer had on deposit in various banks in various periods; the amounts received as interest thereon by the treasurer; and the amounts coming from these courts deposits which were in the hands of the treasurer at various periods. From this evidence the appellant contends that the amounts due it can be determined, on a proportionate basis, with reasonable accuracy.

The trial judge filed a memorandum decision in which he stated that the clerk, the county treasurer and the county auditor had complied with all orders of the court, that any remaining balances on the original deposits in court had been returned to the appellant, that the judgments had become final, and that no monies remain which belong to the appellant as a part of said deposit monies. The opinion was then expressed that if, as claimed, there now remains in the county treasury any interest on these funds to which the appellant is entitled, it must secure recovery thereof in a separate action brought against the proper parties. An order was then made in each action denying the application for an order for the return of any such monies to the appellant and discharging the order to show cause. From these orders, respectively, these appeals were taken.

Appellant's general theory is that the interest earned on these court deposits constitutes profits from the use of trust funds which were owned by the appellant, that these profits are "incremental accretions" to those trust funds which were held by the treasurer solely as an officer of, and as custodian for, the court, and that the accretions, as a part of the court deposits, should be returned to the appellant. It is argued that the interest in question was earned by funds owned by the appellant and became part of that fund; that these funds were never in the custody of the county but were held by the treasurer as custodian for the court; that in depositing these funds in the bank the county treasurer did not represent the county; that under the Depositary Act, Gen. Laws, Act 2834a, he had no authority to deposit these funds in banks unless they are to be considered monies belonging to the appellant as a public or municipal corporation; that unless he represented the appellant as a public corporation he was not, in making the deposits, representing any entity specified in section 2 of the Depositary Act as entitled to interest; that, actually, the treasurer was not representing either the county or the appellant but was representing the court; that in any event the common law rule, that the interest follows the trust funds, applies; and that this is recognized by section 2 of the Depositary Act which states that the interest shall go to certain public bodies "except where the law otherwise directs." It is, therefore, argued that if the county treasurer was authorized by the depositary law to deposit these funds in banks the interest remains a part of the funds and goes to the appellant under the terms of that act, and that if the placing of the funds in the banks was not authorized by the Depositary Act they were unlawfully deposited and, being trust funds owned by the appellant, the interest belongs to it. It is further argued that the court had jurisdiction to afford relief to the appellant here since this interest became a part of the deposits made in court, which could only be disposed of on orders of the court; that the court has continuing jurisdiction to dispose of the fund as long as any part remains; that this can be done through special orders after final judgment; and that under the method used the evidence discloses the amounts due to the appellant with sufficient accuracy to justify a reversal with directions to enter orders directing a return of those amounts to the appellant.

If the interest in question became and remains a part of the funds deposited in court, as an accretion thereto, it would seem to follow that the court has a continuing jurisdiction to dispose of the entire fund, and that the trial court erred if it believed that separate actions would then be necessary to dispose of the questions presented. Regardless of the reason given by the court for its orders, we are here concerned with the orders as made, and with whether or not the orders denying this relief to the appellant are in accordance with the law and the facts.

If the funds thus deposited in court were purely trust funds, of which the appellant was the owner, and if there is no statute to the contrary, it might well be assumed that the resulting interest would follow the principal in the matter of ownership. Factually, the situation here is somewhat different and these funds were not merely trust funds in the ordinary sense and as subject to usual trust rules. They were deposited in court in order to obtain an immediate and valuable benefit to the appellant, and it not only parted with possession of the funds but to a large extent changed the character of its ownership thereof. While, in a way, it remained the owner that ownership became qualified and conditional and, in a practical sense, some rights and interests passed to the landowners. The control of the funds was temporarily in the hands of the court and, during a large part of the time while interest was being thus earned, no one knew who was or would be the real owner of parts or all of the fund. It was never contemplated by the parties that all of the fund would be returned to the appellant, although theoretically this was possible, and actually very little of it was so returned.

The appellant relies on the case of Southern Oregon Co. v. Gage, 100 Or. 424, 197 P. 276, where the question arose as to who was entitled to interest on funds deposited in court and thereafter, pursuant to statute, deposited in banks. The litigation was over the payment of certain taxes, and it was held that the taxes had been illegally assessed and the plaintiff had secured a return of the money deposited. The situation there was quite different from that of the instant case since the statute under which the money was deposited provided only that interest be paid on money belonging to the county and since, as the court pointed out, the plaintiff not only owned the money but had been illegally deprived of its use and ought, in justice, to receive the interest which had been actually paid for its use while he was deprived of its possession.

Irrespective of what rules would otherwise apply a different situation existed here because of a compliance with certain statutes which affect the funds which were thus deposited in court by the appellant for a specific purpose, beneficial to it, as permitted by section 14 of Article I of the Constitution. Section 573 of the Code of Civil Procedure provides that money so deposited in court must be delivered to the clerk who must "deposit such money with the county treasurer, to be held by him subject to the order of the court. The treasurer must keep each fund distinct, and open an account for each. For the safekeeping of the money deposited with him the treasurer is liable on his official bond."

Section 188 of that code provides, with respect to any such deposit in court, that the money shall be deposited with the county treasurer who shall give a duplicate receipt to the county auditor, and that any order of court directing the payment or withdrawal thereof "shall require the auditor to draw his warrant therefor and the treasurer to pay the same."

The Depositary Act (Deering's Gen. Laws, Act 2834a) provides, in section 1, that all monies belonging to or "in the custody" of any county, city or other public or municipal corporation shall, so far as possible, be deposited in banks; that any sum so deposited shall be deemed to be in the treasury of such county, city or other public or municipal corporation; and that the banks in which such funds are deposited shall pay certain interest thereon. Section 2 of that act provides that the interest paid by any such bank shall be on the average daily balances of the monies kept on deposit therewith, that the treasurer shall give a statement to the banks and to the county auditor, or the corresponding officer of any other public or municipal corporation, showing the amount of accrued interest for each bank for each quarter, and that "interest on all moneys deposited as herein provided for shall belong to and shall be paid quarterly into the general fund of the county, city and county, city, town, municipality or other public or municipal corporation represented by the officer making such deposit, except where the law otherwise directs."

[1] While the problem here presented is novel, insofar as any previous decisions

are concerned, the solution depends upon the meaning and effect of these statutes. The law requires any money thus deposited in court to be deposited with the county treasurer and the Depositary Act requires any money which is in the custody of the county to be deposited in banks. The ownership of the interest thus produced in this instance is the matter here in controversy. As we view the matter, two of the questions presented are controlling. The first of these is as to whether these funds, thus deposited in court and turned over to the county treasurer in accordance with law, should properly be considered as being monies "in the custody of" the county of Riverside, within the meaning of Section 1 of the Depositary Act.

[2, 3] While money thus deposited in court remains in the legal custody of the court and subject to its orders, the actual custody is placed elsewhere under the provisions of statutes designed to furnish a method for safely keeping the money, for which the court obviously has no facilities. Section 573 of the Code Civ.Proc. provides that it must be deposited with the county treasurer, "to be held by him" although subject to the court's order, that the treasurer must open and keep an account therefor, and that he is liable on his official bond. Section 188 of that code also provides that the treasurer shall give a receipt to the county auditor, and that any withdrawal from the deposit shall be made on the warrant of the county auditor. There is no question that such deposits with the county treasurer are made with him in his official capacity and not personally, and these statutes call for a number of official acts on the part of both the county treasurer and the county auditor. It seems clear that the purpose of these acts is to make available all of the facilities and safeguards of the county treasury, including the legal control surrounding the official acts of the county treasurer and county auditor, for the protection and safekeeping of such funds while under the control of, and awaiting disposition by, the court. While the money is at all times subject to the order of the court it is in the actual custody of the county treasurer in his official capacity, and he and the auditor are acting, with respect to it, as county officers in accordance with the duties imposed upon them by law. While it is in this actual custody it can only be considered as being in the county treasury, although these precise words are not used in the statute. This is recognized by the Depositary Act, which provides that after any money in the hands of the treasurer is deposited by him in banks it shall still be deemed to be in the county treasury. The treasurer is in charge of what is usually regarded as the county treasury and was here acting in his official capacity and, in a very real sense, was acting as a county officer and for the county. It would require an unnecessarily narrow and strained construction of the statutes to hold that funds thus deposited with the county treasurer, as such, were not in the custody of the county, within the meaning and intent of section 1 of the Depositary Act, merely because the treasurer while acting in his official capacity was also performing a duty for the court, as required by law, and because the court retained control over the ultimate disposition of the funds. The custody referred to in section 1 of the act is the actual custody, with the duty of handling the money, and not merely the legal or technical custody thereof.

[4] These funds being in the custody of the county and lawfully deposited in banks the Depositary Act provides that any interest earned shall go into the general fund of the public body represented by the officer who made the deposit. This presents a second question as to what public body was represented by the treasurer, in making these deposits. That is, whether he was representing the county, or was representing the appellant as a public or municipal corporation, within the meaning of the act.

In a way the treasurer was representing both the court, which had control of the disposition of the money, and the county which had custody of it and was charged with the duty of safeguarding it. In another and more indirect way he represented the ultimate owners of the funds, including the landowners as well as the appellant. Under the circumstances, the ultimate ownership of the funds cannot be the controlling element.

The situation here is different from that involved in Pomona City School Dist. v. Payne, 9 Cal.App.2d 510, 50 P.2d 822. In that case, involving interest on school funds deposited in the county treasury, it was argued that since the deposits were made in the banks by the county treasurer the county was the public body which he was representing in making the deposits. It was held that this was too narrow a construction of the language used in the statute and that, in making the deposits, the county treasurer represented the school district. This was held not merely on the basis of the ultimate ownership of the funds, but because of the situation existing at the time the funds were deposited and which continued to exist while the funds remained in the custody of the county. In that case the money was collected and placed in the custody of the county as school money belonging to the district, it was at all times subject to removal and use by the school district, and the treasurer was acting throughout as the agent and ex officio treasurer of the district. It was accordingly held that, in making the deposits, the treasurer represented the district within the meaning of the act.

In the instant case, this was not money coming into the custody of the county merely as a sort of treasury for the appellant district. The appellant had its own treasurer and treasury, and these funds had been removed from that treasury and used for a purpose beneficial to the district. Having been so used, they subsequently came into the custody of the county through statutory requirement, and while in such custody the money was not presently subject to removal or control by the appellant. In depositing the money the treasurer was not acting as ex officio treasurer of the appellant district and in no direct sense was he acting as its agent. Any indirect agency that existed was as much, or more, for the landowners as for the appellant.

In such a case as this, the treasurer represents both the landowners and the condemnor in a general and indirect way, but not in the sense referred to in the Depositary Act. Even in such an indirect sense, the treasurer here represented the appellant as a litigant who had deposited money in court and not as a public or municipal corporation. While the treasurer also represents the court and is subject to its orders, that is not the kind of representation contemplated by section 2 of the Depositary Act. In depositing such money in banks the treasurer is acting in his official capacity, in handling funds which the court has placed in the custody of the county and in its treasury, and in so doing he is acting directly as county treasurer and is representing the county and its treasury.

[5] It would reasonably seem to follow that under these circumstances the county is the only public body which is "represented by the officer making such deposit", as intended by section 2 of the Depositary Act. In any event, it must be held that the appellant district was not the public body so represented, within the meaning of that act. The common law rules relating to trust funds are not applicable in the face of these statutes, and under the terms of the Depositary Act the appellant is not entitled to any interest collected by the county treasurer. We conclude, therefore, that the court correctly denied this relief to the appellant.

The order appealed from, as to each of the actions, is affirmed.

MARKS and GRIFFIN, JJ., concur.

NOBLE v. NOBLE. *

Civ. 15718.

District Court of Appeal, Second District, Division 3, California.

Dec. 24, 1947.

Subsequent Opinion Feb. 20, 1948.

1. Divorce 🔑331

Superior court of county in which realty was located and in which property settlement agreement pursuant to which husband conveyed the realty to wife was executed had jurisdiction of actions by husband to set aside property settlement agreement on ground of fraud and quiet title to the realty in husband's name, notwithstanding divorce judgment obtained by husband in Nevada which approved and ordered agreement made a part of judgment by reference.

2. Divorce 🔑255

Property settlement agreement in order to become so much a part of divorce judgment as to estop the parties from otherwise enforcing it must be incorporated into judgment or its terms must be so specifically referred to therein as to derive independent effect from judgment itself and judgment must be in such form as to justify the construction that it orders the performance of provisions of agreement and could furnish the basis for execution or contempt proceedings

3. Divorce 🔑255

Divorce judgment was not res judicata of husband's right to have property settlement agreement set aside on ground of fraud, where judgment merely approved and ordered agreement made a part of the judgment by reference.

4. Divorce 🔑331

Nevada divorce judgment, though validly approving property settlement agreement so as to estop parties from otherwise enforcing it, would not oust California court of jurisdiction to pass upon validity of the agreement in action by husband to set it aside on ground of fraud.

5. Judgment 🔑958(1)

The defense of res judicata, while constituting a bar to later action if properly pleaded and proved, does not oust court of jurisdiction to ascertain its scope and validity.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Consolidated actions by Robert P. Noble against Hazel E. Noble to quiet title to realty, annul the marriage of the parties and set aside a property settlement agreement. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Nathan Asimow, of Los Angeles, for appellant.

Francis R. McKenna, of Montrose, for respondent.

KINCAID, Justice pro tem.

The plaintiff, Robert P. Noble, and defendant, Hazel E. Noble, were married in the State of California on May 19, 1938. On September 28, 1945, they entered into a property settlement agreement which was executed in contemplation of divorce proceedings between them.

Plaintiff went to Las Vegas, Nevada, and obtained a judgment of divorce from defendant on October 17, 1945, such judgment, with reference to the agreement, providing as follows: "It is further ordered, adjudged and decreed that the property settlement agreement heretofore entered into by and between the parties hereto on the 28th day of September, 1945, be and the same is hereby confirmed, ratified, approved and by reference herein hereby made a part hereof." Plaintiff thereupon, in accordance with the terms of the property settlement agreement, executed a grant deed to the defendant conveying to her such interest as he then had in certain real property improved with a dwelling situate in Los Angeles County, California.

On November 27, 1945, in Los Angeles County, plaintiff filed action No. GL-C207, in which he seeks to quiet title to the said real property in his name. At the same time and place he filed a second action, being No. G1-D 1310, against defendant, containing two causes of action, the first being for an annulment of the marriage of the parties, and the second being for the purpose of obtaining a judgment setting aside the property settlement agreement theretofore entered into by the parties on the ground of fraud. The two actions were ordered consolidated for the purposes of trial and judgment.

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* Subsequent opinion 189 P.2d 502.

Following trial of the consolidated actions the court made and entered its findings to the effect that it is true, as contended by plaintiff, that defendant was married to another living man at the time of her marriage to plaintiff and that such former marriage had not been dissolved by judicial decree and was in full force and effect; that it is untrue that prior to her marriage to plaintiff defendant represented to him that she was divorced and free to marry him and that plaintiff believed and relied on such statement by defendant when he married her; that it is true that defendant was not free to marry plaintiff but it is untrue that defendant concealed that fact from him prior to and at the time of the marriage of the parties hereto but in truth and in fact at the time of such marriage plaintiff knew defendant was a married woman and that her previous marriage had not been dissolved by judicial decree or otherwise; that it is true that plaintiff obtained a divorce from defendant on October 17, 1945, in the County of Clark, Nevada, dissolving their marriage, and that the property settlement agreement of the parties was confirmed, ratified, approved and by reference made a part of the said decree of divorce; that it is true that plaintiff by grant deed transferred all of his interest in and to the involved real property pursuant to the conditions of the property settlement agreement and that defendant is now the owner and holder thereof and that plaintiff has no right, title or interest therein. By way of conclusions of law and judgment the court held that no fraud was practiced upon plaintiff by defendant which affected the said property settlement agreement, but that it is an agreement which is valid and binding on both parties thereto; that the court has no jurisdiction to pass upon the validity of the marriage; that defendant is the owner in fee simple absolute and is entitled to possession of such real property and is given judgment quieting her title thereto against plaintiff. Plaintiff appeals from the judgment in such consolidated cases.

[1] The sole question presented by this appeal is, Did the trial court have jurisdiction, under all the circumstances here existing, to pass upon the validity of the property settlement agreement? In answering this query in the affirmative it will be noted that the real property involved herein is located in Los Angeles County, and that the agreement was executed by the parties at the same place. Plaintiff has invoked the aid of the superior court of such county in regaining both title and possession of the property, and by seeking a judgment vacating and nullifying the agreement on the ground of the fraud of defendant. The question of the validity of the agreement was therefore directly in issue before the court and required a finding thereon unless the aforementioned judgment of divorce of the Nevada court has made it res judicata, thus constituting an estoppel between the parties.

[2,3] In order for the provisions of the property settlement agreement to have become so much a part of the Nevada judgment as to estop the parties from otherwise enforcing it, the judgment, by its terms, must be in such form as to justify the construction that it orders the performance of such provisions and could furnish the basis for execution or for contempt proceedings. The agreement must be incorporated into the judgment or its terms must be so specifically referred to as to derive independent effect from the judgment itself. Where, as here, the agreement was merely approved and ordered made a part of the judgment by reference, it falls short of this stature and cannot be made the basis of a plea of res judicata. Tieso v. Tieso, 67 Cal.App.2d 872, 874, 155 P.2d 659; Queen v. Queen, 44 Cal.App.2d 475, 479, 112 P.2d 755; Plummer v. Superior Court, 20 Cal.2d 158, 164, 124 P.2d 5; Lazar v. Superior Court, 16 Cal.2d 617, 620, 107 P.2d 249.

[4,5] In any event, the California court would not have been divested of jurisdiction to pass upon the validity of the agreement even though the Nevada judgment

had validly approved it. The defense of res judicata, while constituting a bar to the later action if properly pleaded and proved, does not oust the court of jurisdiction to scrutinize its scope and validity. Lincoln v. Superior Court, 22 Cal.2d 304, 308, 139 P.2d 13.

The judgment is affirmed.

WOOD, J., concurs.

SHINN, Acting Presiding Justice.

I concur in the judgment of affirmance. Plaintiff-appellant contends that when the court declined to decide, on the merits, his claim that the marriage was void, it should not have rendered any decision on his separate cause of action which attacked the validity of the agreement. He merely makes the assertion and, for reasons which I think are obvious, cites no rule of law to support it. He makes no other attack upon the judgment. I would join in an opinion holding that the sole ground of his appeal is without merit.

But I must state my disagreement with the expression of the views of my associates in the main opinion for the reason that they relate to questions of law which were not presented to or decided by the lower court and are not presented on the appeal.

I find no question of jurisdiction in the case. Plaintiff has never questioned the power of the court to exercise the jurisdiction of which he invoked by the institution of his action. Defendant does not question the jurisdiction of the court to render judgment in her favor.

The main opinion holds, in effect, that approval by the court of a property settlement agreement is of no effect whatever unless the agreement is copied into the judgment or carried into it by words of command. This is a novel holding and one of considerable importance. It is entirely outside of any issue tried or determined in the court below. Defendant, to be sure, pleaded the Nevada judgment as res judicata as to the validity of the agreement, but she offered no proof in support of her plea. Before passing upon the validity of the plea of res judicata the court would have required evidence as to whether the validity of the agreement was made an issue in the Nevada case, and also proof as to the terms of the decree. No part of the record was placed in evidence. The parties stipulated that a divorce had been granted, but nothing more as to what had been determined by the judgment, and the judgment was not placed in evidence. Under these circumstances the court properly tried the issue of the validity of the agreement. Since no evidence was offered in support of the plea of res judicata the court properly ignored it in its decision of the case. How, then, can this court, with nothing in the record to act upon, determine what was or was not adjudicated by the Nevada court as to the validity of the agreement?

But in addition to this it is clear that the question could not be before us on the present appeal. Plaintiff, who takes the appeal, has never contended that the Nevada decree bars his present action to set aside the agreement. The question could be before us only if the judgment appealed from had declared the Nevada judgment to be a bar to plaintiff's present attack upon the agreement, in which case plaintiff would no doubt have questioned that holding on appeal, or, if the defense had been rested upon the Nevada decree and the decision had been adverse to defendant, in which case she would have had an opportunity on appeal to procure a reversal of that holding. But the decision was solely on the merits.

I express no opinion as to the manner in which a property settlement agreement must be approved by the court, in order that it will operate as a bar to a subsequent action seeking annulment of the agreement for fraud. Anything said on that point would be pure dictum.

83 Cal.App.2d 96

MACBETH v. WEST COAST PACKING CORPORATION et al.

Civ. 16036.

District Court of Appeal, Second District,
Division 2, California.
Dec. 23, 1947.

1. Appeal and error 🔑110

An order denying a motion for a new trial is not appealable.

2. Money received 🔑17(1)

The essential element of action for money had and received is allegation that defendant had and received money to and for use and benefit of plaintiff.

3. Money received 🔑17(1)

In an action for money had and received, it must appear from complaint that money held by defendant is property of plaintiff and that defendant is obliged in equity and good conscience to restore it to plaintiff.

4. Sales 🔑220

Where pleading established beyond dispute existence of seller's bill of sale to buyer and assignment to creditor of a portion of purchase price, by failure of seller's administrator to deny due execution and delivery of such documents which were pleaded in answer, money paid by buyer to creditor pursuant to such assignment became property of creditor and formed no basis for an action by seller's administrator against creditor for money had and received. Code Civ.Proc. § 448.

5. Pleading 🔑345(1), 350(3)

In action by seller's administrator against buyer for balance of price for fish nets, where it was established beyond dispute by pleadings that seller had assigned a portion of price to creditor and that buyer had paid creditor, buyer was entitled to a judgment on the pleadings at least to the extent of reducing amount due by amount of payment to creditor. Code Civ.Proc. § 448.

6. Pleading 🔑350(1)

The statute requiring a 10-day notice of intention to move for summary judgment on the ground that there is no defense to action or that action has no merit is not pertinent to a motion for judgment on the pleadings. Code Civ.Proc. § 437c.

7. Pleading 🔑349

Where a plaintiff has admitted genuineness and due execution of documents relied upon by defendants by failure to deny execution thereof and thereby confesses verity of facts which constitute basis of defense to action, defendant may ask for a judgment on pleadings without relying on statute providing for a summary judgment, upon 10 days' notice and sufficient affidavits, on ground that action has no merit. Code Civ.Proc. §§ 437c, 448.

8. Trial 🔑165

When a litigant appears and announces himself ready for trial, he then stands upon his pleadings as well as upon his available witnesses, and, if either fails to meet requirements of the law, a judgment may be taken against him unless his predicament is such as to justify extension of indulgence.

9. Appeal and error 🔑960(1)

Where plaintiff instituted action, brought it to trial, and confessed existence and due execution of documents which established a defense, and plaintiff would have stated his cause more strongly if he could have done so, denial of plaintiff's motion for leave to amend complaint, made after defendant's motion for judgment on the pleadings, was not an abuse of discretion. Code Civ.Proc. § 448.

10. Appeal and error 🔑1152

Where defendant, by its answer, tendered amount it considered to be balance due on purchase price and last utterance of defendant's counsel, before decision on motion for judgment on the pleadings was announced, was that defendant stood ready to pay such sum, right of plaintiff to recover such sum was clearly established, so that judgment on the pleadings denying any recovery was modified by allowing a recovery for such sum as defendant had tendered.

◆

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge Pro Tempore.

Action by Hugh E. Macbeth, administrator of the estate of Kiyoshi Nakagawa, against West Coast Packing Corporation, Franco-Italian Packing Company, and Marijon Katnich, to recover the balance of purchase price for certain fishing nets, wherein defendant Franco-Italian Packing Company counterclaimed and cross-complained. From a judgment on the pleadings which denied recovery of any sum and from an order denying plaintiff's motion for a new trial, plaintiff appeals.

Judgment affirmed as modified, and appeal from order denying motion for new trial dismissed.

Eva M. Mack and Hugh E. Macbeth, Jr., both of Los Angeles for appellant.

Arthur C. Webb, of Los Angeles, for Franco-Italian Packing Co., respondent.

Gordon P. Shallenberger and Arch E. Ekdale, both of San Pedro, for West Coast Packing Corporation and Marijon Katnick, respondents.

MOORE, Presiding Justice.

[1] The administrator of the estate of Kiyoshi Nakagawa appeals from a judgment on the pleadings which denied recovery of any sum; also from the nonappealable order denying his motion for a new trial. He contends (1) that upon a motion for judgment on the pleadings nothing can be considered but the complaint, as in the case of sustaining a general demurrer, citing Elmore v. Tingley, 78 Cal. App. 460, 464, 248 P. 706; (2) that if a complaint states a valid cause of action, to avoid a trial on the facts the contents of the answer must be such as to warrant a judgment under section 437c, Code of Civil Procedure, citing Gibson v. De La Sale Institute, 66 Cal.App.2d 609, 618, 152 P.2d 774. Also, he contends (3) that even though he concede that a valid cause was not stated, it was an abuse of discretion for the court to deny his motion for leave to amend his complaint.

He alleges that on March 27, 1942, appellant's decedent sold certain fishing nets with accessories to defendants Katnich and West Coast Packing Corporation, herein designated as West Coast, for the sum of $4,500; that decedent thereupon immediately delivered the nets and accessories to the purchasers who then paid the vendor $500; that the balance of $4000 with interest is unpaid; that the agreement of sale was in writing. In a subsequent paragraph of the complaint it is alleged that corporate defendant Franco-Italian Packing Company, herein referred to as Franco, "has in its possession more than Two thousand six hundred fifty ($2650) dollars of the total purchase price of said nets and refuses to deliver said amount of more than $2650 to the plaintiff though repeatedly requested by the plaintiff so to do. Said $2650 * * * was received by the defendant Franco * * * from the West Coast * * *."

Respondent Katnich by answer admitted decedent's sale of the nets to West Coast for $4500. West Coast alleged the execution by Nakagawa of the bill of sale on March 27, 1942, and attached a copy thereof to its answer; that it paid $500 to Nakagawa and sent to him two checks of $2000 each; that thereafter it was notified by Franco that decedent owed it $2650 on account of said nets; that it stopped payment upon those checks and so notified decedent; that thereupon, on April 14, 1942, Nakagawa assigned to Franco $2650 out of the $4000 due decedent. A copy of such assignment was attached to the answer and made a part thereof. West Coast alleged also that on April 22, 1942, it issued its check in the amount of $1350 as the balance due decedent, and sent it to the Bank of America with instructions that the bank pay the $1350 to Nakagawa upon his surrender of the two checks of $2000 each; that decedent did not call for the $1350 or surrender the two checks; that in 1944, not knowing the whereabout of Nakagawa, it cancelled the $1350 check and "still holds that amount of money on its books as owing to * * * Nakagawa, and alleges that it is ready, willing and able to pay the said sum of $1350 to the said Kiyoshi Nakagawa or his legally authorized representatives upon due proof of authorization."

Franco denied holding $2650, property of decedent's estate, claiming "a settlement of all claims between the parties," and in a "counterclaim and crosscomplaint" alleged that "plaintiff is indebted to the defendant in a sum not yet determined on an open book account."

[2-4] As to Franco no cause of action is alleged. The essential element of an action for money had and received is the allegation that the defendant had and received the money to and for the use and benefit of plaintiff. From the complaint it must appear that the money held by defendant is the property of plaintiff and that defendant is obliged in equity and good conscience to restore it to him. Smith v. Benston, 127 Cal.App.Supp. 789, 793, 15 P. 2d 910; Bouey v. Porterfield, 96 Cal.App. 674, 679, 274 P. 766. How could Franco be said to hold money for decedent when it was not a party to the sale of the nets? The money paid Franco by West Coast was not so marked as to indicate that decedent had reserved an interest therein. Its ownership immediately passed to Franco upon its payment by West Coast pursuant to decedent's order.

Neither the assignment by decedent of $2650 nor his bill of sale was denied. After their genuineness and due execution were established (Code Civ.Proc., sec. 448) by plaintiff's failure to deny the execution it was no longer open to dispute that decedent conveyed his nets to West Coast, and Nakagawa assigned $2650 of the balance due him from West Coast. After payment of that sum to Franco the latter held only its own money in which plaintiff had no interest whatever and of course could not force a payment thereof to appellant by an action for money had and received.

[5] As to the West Coast, after it had paid Franco the $2650 pursuant to decedent's assignment it could not possibly have been indebted to appellant in the sum of $4000. All that it held then for appellant was the balance of $1350 which it tendered by its answer and which it offered at the trial to pay appellant.

[6-9] Appellant contends that the court erred in granting a summary judgment without ten days notice of intention to make the motion, as provided in section 437c of the Code of Civil Procedure. That section is not pertinent to a motion for judgment on the pleadings. Motions under section 437c are based upon claim that there is "no defense to the action or that the action has no merit," customarily shown by affidavits. When a plaintiff chooses to confess the verity of the facts which constitute the basis of the defense to his action it is not essential for the defendant to invoke section 437c. The provision of section 448, supra, is sure and swift, and the service of affidavits is unnecessary. When a litigant appears at the bar and announces himself ready for trial he then stands upon his pleadings as well as upon his available witnesses. If either fails to meet the requirements of the law he must suffer the "pangs of outrageous fortune" unless perchance his predicament is such as to justify the extension of indulgence. Nothing in the record before us indicates that the trial court abused its discretion in denying leave to amend the complaint. Appellant instituted the action, brought it to trial and confessed the legal transfer of decedent's funds to Franco. If he could have stated his cause more strongly he would have done so (Vilardo v. County of Sacramento, 54 Cal.App.2d 413, 416, 129 P.2d 165), as indicated by the fact that he went to trial with the purpose of proving decedent's incompetency to make the assignment to Franco. But if Nakagawa had been incompetent on April 14 he must have been the same when he sold the nets for the proceeds of which sale appellant seeks recovery.

[10] But in one respect the judgment must be modified. West Coast tendered by its answer the remaining $1350 of decedent's money. At the inception of the trial counsel for all defendants stated that about such sum "there is no dispute"; and in his last utterance prior to the announcement of the decision the same counsel stated: "We have offered to pay the $1350 into court and stand ready at this time to pay." Under these circumstances the right of plaintiff to the $1350 was established as clearly as was the defeat of his claim for the $2650.

It is therefore ordered that the judgment be amended by striking the last paragraph and substituting in lieu thereof the following: "It is ordered, adjudged and decreed that plaintiff take nothing by this action against defendants Marijon Katnich and Franco Italian Packing Company, a corporation; that plaintiff have and recover from the West Coast Packing Corporation, a corporation, the sum of Thirteen Hundred and Fifty dollars; that all defendants recover their costs, which are hereby taxed at $——."

The order denying the motion for a new trial is dismissed. As modified the judgment is affirmed, West Coast to pay its costs on appeal.

McCOMB and WILSON, JJ., concur.

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83 Cal.App.2d 140

McCLAIN v. TUFTS.

Civ. 15862.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1947.

Hearing Denied Feb. 26, 1948

1. Husband and wife 🔑**265**

The interests of husband and wife in community property may be segregated only in the instances and in the manner provided by statute. Civ.Code, §§ 136, 137, 141.

2. Husband and wife 🔑**268(9)**

Community property is not liable for the wife's torts, since such liability would impose an unwarranted interference with and infringement upon the husband's right to management and control and make of his property a nonexistent liability. Civ.Code, §§ 161a, 172, 172a.

3. Husband and wife 🔑**268(9)**

Community property as well as separate property of a husband is exempt under the statute providing that damages for civil injuries committed by a married woman may be recovered from her alone. Civ. Code, § 171a.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Jean McClain against Barbara Tufts, also, known as Barbara Dare, in tort. From an order refusing to compel the sheriff to levy upon certain community property, plaintiff appeals.

Affirmed.

Bachrack & Brand, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for appellant.

Lester Wm. Roth, of Los Angeles (Leonard G. Ratner, of Los Angeles, of counsel), for respondent.

SHINN, Acting Presiding Justice.

This as an appeal from the denial of an order directing the Los Angeles County sheriff to levy execution upon and sell certain real property situated in the county. The case arose in the following manner. In March, 1946, appellant obtained in New York a judgment in tort against respondent for approximately $30,000. In July, 1946, she secured a California judgment based upon her New York judgment. In August, 1946, her attorneys, having had execution issued, delivered to the sheriff written instructions to levy upon and sell the aforementioned real property. This property, although recorded in the name of respondent's husband, admittedly was community property of respondent and her husband. The sheriff refused to comply with the instructions except on court order. An order was thereupon issued directing the sheriff to show cause why he should not proceed. After a full hearing of the matter, the court below declined to order execution of the writ and discharged the order to show cause.

The sole question presented is whether community property is liable for the wife's torts. The learned trial judge in a well-considered opinion answered this question in the negative. His conclusion was based upon the nonliability of the husband for his wife's torts and upon the nature of the respective interests of the husband and wife in the community property. Section 171a, Civil Code, added in 1913, reads as follows: "For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." This enactment did away with our previous adherence to the common law rule that a husband, by virtue of the marital relationship alone, is liable for his wife's torts. Henley v. Wilson, 137 Cal. 273, 70 P. 21, 58 L.R.A. 941, 92 Am.St. Rep. 160.

Appellant relies upon section 161a, Civil Code, which declares that the respective interests of the husband and wife in the community property are present, existing and equal, subject to the management and control of the husband as provided in sections 172 and 172a, Civil Code. The burden of her argument is that because community property is liable for the husband's torts, Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641, it is likewise liable for the torts of the wife.

[1-3] While the precise question has not been decided by a reviewing court the decisions do not support appellant's contention that the community property should be resorted to for the wife's torts because it is held liable for the torts of the husband. It was held in Smedberg v. Bevilockway, 7 Cal.App.2d 578, 46 P.2d 820, that the wife's interest in community real property could not be subjected to a lien under a judgment against her for tort, for which her husband was not also liable. The ground of the decision was that the respective interests of husband and wife in community property may be segregated only in the instances and in the manner provided by statute, namely by agreement between husband and wife, by decree of divorce, or by a separate action based upon a decree of divorce. Page 581 of 7 Cal.App.2d, page 820 of 46 P.2d. Division of the community property may also result from either an unsuccessful divorce action or an action for separate maintenance. Civ.Code, §§ 136, 137, 141. Appellant concedes that by reason of this decision she cannot force a sale of respondent's interest alone, but maintains that she may escape this holding by selling the interest of the husband, as well as that of the wife. Grolemund v. Cafferata, supra, does not sustain this position. The basis for the Supreme Court's conclusion in that decision that the community property is liable for the husband's torts is shown in the following quotation from it, page 684 of 17 Cal. 2d page 644 of 111 P.2d: "To hold that the husband could not subject community property to liability for his tort would be to hold that he could not manage and control the same." No such basis exists for holding such property to be liable for the wife's torts. In fact to hold the community property liable would be not only an unwarranted interference with, and infringement upon, the husband's right to management and control, but it would also permit his property to be taken for what is, as to him, a nonexistent liability. The exemption granted the husband by section 171a is an exemption of all of his property, including his community property as well as his separate property.

The order is affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

83 Cal.App.2d 80

PEOPLE v. DOUGLAS.

Cr. 2488.

District Court of Appeal, First District, Division 2, California.

Dec. 23, 1947.

Rehearing Denied Jan. 7, 1948.

Hearing Denied Jan. 22, 1948.

1. Criminal law 🔑706, 722(2), 1171(1, 6)

In prosecution of Negro, living in apartment house with Negress not his wife, for manslaughter in fatally shooting a white man knocking at back door after midnight, district attorney's question to defendant and statement to jury constituted reversible error as designed to degrade defendant before jury by intimating that he was living in house of prostitution and impress jury that white man was not an intruder in seeking to enter Negro house of prostitution.

2. Criminal law 🔑730(3), 1171(1)

Ordinarily, prompt sustaining of objections to improper questions asked witness by district attorney and instructions to jury to disregard such questions will cure error in asking them; but, where offense is repeated in various forms, evidence is evenly balanced, and district attorney, after being warned by court, continues his course, such misconduct is so prejudicial as to entitle defendant to new trial.

3. Criminal law ⚿1166½(4)

Where defendant voluntarily left courtroom during recess in manslaughter trial and was absent when trial was resumed, but proceedings were stopped after several questions were asked witness, same questions were again asked and same answers given after defendant returned, and no objection to proceeding on ground of denial of defendant's constitutional right to be present at all stages of trial was made in trial court, defendant was not prejudiced by proceedings during his absence.

◆

Appeal from Superior Court, City and County of San Francisco; Wm. F. Traverso, Judge.

Johnny Douglas was convicted of manslaughter, and he appeals.

Reversed and remanded.

John T. McCarthy and Jerome Sapiro, both of San Francisco, for appellant.

Fred N. Howser, Atty Gen., and David K. Lener, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant was tried to a jury and convicted of manslaughter. He appeals from the judgment on the verdict and from the order denying a new trial.

Defendant was living in an apartment house with one Eugenia West. At 1 A.M. of the night of Nov. 16, 1946, they heard a loud noise of someone knocking at the back door. This door was reached by passing through an alley from the street to the rear of the house and ascending a stairway to a platform facing the kitchen door and a pantry window. Defendant testified that the knocking at that hour frightened him and that he took a loaded revolver, went to the pantry and shot through the window to scare the intruder; that the platform was dark and he saw no one before the shot was fired. He then heard the sound of a body falling to the platform and immediately called the police. They found the victim dead—he was a white man in the uniform of the United States navy. The defendant and Eugenia West were both colored.

[1] Appellant's defense throughout the trial was an admission of the shooting as above described and a plea of justification because of his fear that the intruder was intending to break into his home. In the course of his cross-examination the district attorney asked the appellant. "Has there ever been any prostitution in this house?" An objection was made and sustained and misconduct assigned. Before the court could rule, the district attorney emphasized the error by stating to the jury: "This is just the circumstances of the physical house itself, as to what may have been the reason for this particular person to go there." Another assignment of error was made and the jury was instructed to disregard the question and the remarks of the district attorney. But the court denied appellant's motion for a mistrial.

The conduct is plainly reversible error. The question and the remarks of the district attorney were designed for these two purposes—to degrade the appellant before the jury by intimating that he was living in a house of prostitution, and, second, to impress the jury that the deceased, a white man and a member of the navy, could not have been thought an "intruder" in seeking to enter a "negro" house of prostitution.

[2] People v. Glass, 158 Cal. 650, 654, 112 P. 281; People v. Anthony, 185 Cal. 152, 158, 159, 196 P. 47; and a host of cases which it is not necessary to cite demand a reversal of the judgment. See generally 8 Cal.Jur. 626. The legal principle and the reason why such conduct is reversible error are stated in the Anthony case, 185 Cal. at pages 158, 159, 196 P. at page 49: "In view of the fact that jurors instantly perceive the probative value of such improper testimony and are also unfortunate-

ly inclined to attach weight to the insinuations or suggestions of counsel as to the proof in his possession, which is excluded by the rules of law enforced by the court, it is clear that, however good the intentions of the jury, or however sincere they may be in endeavoring to follow the instructions of the court to disregard such suggestions, it is well-nigh inevitable that they should give weight to such suggestions. * * * It would be as impossible for the jury to believe as it is for us to conceive that the district attorney would ask questions of this character without any information whatever upon which to predicate the question. If he had no such information and sought by a question of that type to instill in the minds of the jury the idea that there was some information in his possession which justified the question, the misconduct would have been immeasureably greater than if the facts were that he had information which justified the question. A district attorney is charged with the public duty of seeing that the defendant has a fair trial. The jury is aware of this fact and must have assumed that he had information which justified the question. * * * The real question is: Has the defendant had a fair trial? * * *

“Ordinarily, the prompt sustaining of objections to improper questions, coupled with instructions to the jury to disregard the question, will cure an error of this kind. But where the offense has been repeated in various forms and where the evidence is so evenly balanced and the district attorney after being warned by the court continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial.”

The case was a very close one on its facts, and we cannot say that this incident did not tip the scales in the minds of the jurors.

[3] The defendant complains that he was denied his constitutional right of being present at all stages of the trial. The facts are that, during a recess in the trial, defendant voluntarily left the court room and was not present when the trial was resumed. After three or four questions were asked a witness, defendant's absence was noted and the proceedings were stopped. When defendant returned the same questions were asked again and the same answers were given. No objection was made to the proceeding in the trial court. In discussing the same question our Supreme Court said in People v. Isby, 30 Cal.2d 879, 186 P.2d 405, 414: “The determinative question is whether or not the accused suffered any damage by reason of absence at a particular stage of the proceedings. State v. Terrall, 79 W.Va. 358, 92 S.E. 127, 129; Strong v. People, 80 Colo. 284, 250 P. 857, 859.”

Here the appellant does not suggest any possible damage or prejudice because of the proceeding during his absence and we can find none.

The judgment and order are reversed and the cause remanded for a new trial.

GOODELL and DOOLING, JJ., concur.

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83 Cal.App.2d 35

NATIONAL DISTILLERS PRODUCTS CORPORATION v. BOARD OF EQUALIZATION et al.

Civ. 7326.

District Court of Appeal, Third District, California.

Dec. 22, 1947.

Rehearing Denied Jan. 14, 1948.

1. Taxation 🔑6

Sale of whiskey to the United States Government through medical department procurement district was subject to distilled spirits excise tax under state statute though tax might be passed on to government in purchase price. Gen.Laws, Act 3796, §§ 24, 34i.

2. Intoxicating liquors 🔑90(1)

Exemption from distilled spirits tax of sales for use in the trades, professions or industries, is limited to sales by authorized licensees in packages of more than one gallon. Gen.Laws, Act 3796, §§ 2(i 3), 6(i, q), 67.1.

3. Intoxicating liquors ⚷90(1)

Sale of whiskey to the United States government through medical department procurement district in quart size bottles was not exempt from distilled spirits excise tax because sale was for medicinal and non-beverage use. Gen.Laws, Act 3796, §§ 2(i 3), 6(i, q), 67.1.

4. Intoxicating liquors ⚷90(1)

Sale of whiskey to the United States government through medical department procurement district was not exempt from distilled spirits excise tax on ground that there was no sale of spirits within the state, in view that delivery was made by shipment via common carrier at Ohio to medical depot, Los Angeles, and in view of contract provision requiring delivery at destination "f. o. b. Los Angeles Medical Depot". Gen.Laws, Act 3796, §§ 24,34i.

5. Intoxicating liquors ⚷90(1)

Delivery of whiskey in California pursuant to contract between corporation and United States was a "sale" within tax provisions of Alcoholic Beverage Control Act even if the United States was not a "person" as defined by the Act. Gen.Laws, Act 3796, § 2(f, *l*).

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the National Distillers Products Corporation against the Board of Equalization of the State of California and others, for refund of distilled spirits excise taxes paid under protest. Judgment for plaintiff and defendants appeal.

Reversed.

Fred N. Howser, Atty. Gen. and Jas. E. Sabine, Deputy Atty. Gen., for appellants.

Anthony J. Kennedy, of Sacramento, for respondent.

PEEK, Justice.

This is an appeal from a judgment in favor of plaintiff in an action for refund of distilled spirits excise taxes paid under protest and levied under section 24 of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796.

The agreed statement of facts and the stipulation upon which the case was submitted to the trial court show that plaintiff entered into a contract with the United States Government through the Medical Department Procurement District at St. Louis, Missouri, to furnish the United States Army with 41,000 quart size bottles of bottled in bond whiskey. Under the terms of the contract plaintiff was ordered to and did ship a portion of the whiskey, 209 cases of 12 bottles each, to the Commanding Officer, Los Angeles Medical Depot, Los Angeles, California. The order for the whiskey was neither solicited, received nor accepted in California. All of such negotiations were carried on at plaintiff's office in New York City, as was the payment made to respondent upon invoice rendered to the Procurement Office at St. Louis. The whiskey was withdrawn from a government bonded warehouse at Cleveland, Ohio. Delivery thereof was made on October 26, 1942 by shipment via common carrier at that point by plaintiff as the consignor to the Medical Depot at Los Angeles as consignee. The stipulation previously mentioned was that the whiskey was procured for medicinal and non-beverage use.

The plaintiff's petition for a re-determination of the tax was denied by the defendant Board. Plaintiff thereupon, under protest, paid the taxes so levied, and after its claim for review was likewise denied the present action was instituted under provisions of section 34i of said act. At the conclusion of the hearing the trial court found that the whiskey was not subject to taxation by this state as it had been procured for medicinal and not beverage purposes.

[1] Authority is not lacking in support of respondent's contention that the imposition of the tax in this case would violate the Federal Constitution in that the tax directly affects the United States in the performance of its governmental functions. Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857, 56 A.L.R. 583; Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236. However, appellant asserts that these cases have been

overruled not only with respect to their reasoning and rationale but also upon the actual decisions rendered.

The case chiefly relied upon by appellant as affecting this change in the application of the immunity doctrine is that of Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L.Ed. 3, wherein it was held that a sales tax when applied to sales made to a contractor for use in construction work for the United States under a cost-plus contract did not violate the implied immunity of the Federal government from state taxation under the Constitution. In discarding the economic burden test adhered to by a sharply divided court in the Panhandle case, supra, the court stated: (314 U.S. at pages 8, 9, 62 S.Ct. at page 45, 86 L.Ed. 3) "The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added cost, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi, supra; Graves v. Texas Co., supra, we think it no longer tenable."

The principle enunciated therein that the incidence of the tax and not the economic burden is the test to determine the validity thereof, has been followed by the Supreme Court of this state in Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731, 117 A. L.R. 838, and in United States v. Lee, 153 Fla. 94, 13 So.2d 919. In Western Lithograph Co. v. State Board of Equalization, supra, the court sustained a sales tax which was imposed upon a sale to an instrumentality of the Federal government, a national bank, rather than to the government directly. In deciding the case, however, the court proceeded upon the theory that the difference was immaterial, stating: 11 Cal.2d at page 158, 78 P.2d at page 733, 117 A.L.R. 838. "It is further assumed that the bank, as a national bank, is an instrumentality of the United States, as contemplated by McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, and cases following it [citing cases], and as such is not subject to tax by the state except with the consent of and in the manner prescribed by congress."

The respondent also relies upon two cases decided by the United States Supreme Court subsequent to the Alabama v. King & Boozer case, supra, which, it is said, limit the application of that case to a situation where a private contractor stands between the seller and the government. We believe, however, that these two cases are clearly distinguishable from the King & Boozer case and from the present situation. In the first of these, Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504, 147 A.L.R. 761, the tax which was held to violate the immunity of the Federal government from taxation was laid directly upon the United States. The action was one to enjoin the Commissioner of Agriculture of the State of Florida from enforcing, against the United States, an act requiring the affixing of inspection tax stamps to bags of fertilizer owned by the government prior to distribution thereof as part of a national soil conservation program. It was specifically held that "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government." 319 U.S. at page 447, 63 S.Ct. at page 1140, 87 L.Ed. at page 1508. In the second, United States v. County of Allegheny, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209, the Supreme Court held invalid an ad valorem property tax assessment based upon the included value of machinery owned by the United States and leased to the manufacturer. While difficult to distinguish from the King & Boozer case as to ultimate result reached, the expressed theory of the holding in that case is that the tax was imposed directly upon property owned by the United States and the burden indirectly laid upon the government, although the tax was assessed against the private owner of the real property. The majority of the court took a strict view of the tax as a property tax and did not revert to the formerly repudiated test of burdensomeness as a criterion for determining the validity of the tax.

The additional case of Standard Oil Co. v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611, also cited by respondent, does not appear to be in point. The statute under which the tax was there sought to be imposed specifically exempted therefrom sales to the government of the United States or any department thereof. The decision merely held that post exchanges are "arms of the government deemed by it essential for the performance of governmental functions." The court expressly declined to pass upon the constitutionality of an application of the taxing statute to the sale there involved. But in view of the above cited decisions there is no reason to believe that if the question were before the court the decision would not have favored the tax.

In the light of the decision in the Western Lithograph case and the clear language in the case of Alabama v. King & Boozer, supra, there appears to be no escape for respondent from the conclusion that the excise tax here was validly imposed upon the seller under the provisions of the taxing statute. The fact that such tax may be passed on to the government in the purchase price of the goods in a manner which is non-discriminatory and on an equality with any other purchaser, does not invalidate the tax.

[2, 3] Respondent puts forward the argument adhered to by the trial court in its opinion that the sale being one for medicinal purposes is exempt from the tax under section 67.1 of the act. However, there is no such exemption in the act applicable to a sale of whiskey for medicinal purposes as such. Said section provides that "No tax under this act shall be imposed upon the sale of * * * distilled spirits * * * for use in the trades, professions, or industries, but not for beverages use." Section 6 of the act authorizes and limits the nature of sales which may be made by different classes of licensees. Subdivision (i) thereof authorizes the holder of an industrial alcohol dealer's license to sell undenatured ethyl alcohol *"in packages of more than one gallon for use in the trades, professions or industries and not for beverage consumption."* (Italics added.) Subdivision (q) of the same section authorizes sales by a distilled spirits manufacturer *"in packages larger than one gallon for use in the trades, professions or industries and not for beverage use."* (Italics added.)

An industrial alcohol dealer is defined in Section 2(i 3) of the act as "a person who sells alcohol or distilled spirits *in packages of more than one gallon* for use in the trades, professions or industries, but not for beverage use." (Italics added.)

The Supreme Court of this state in Commercial Solvents Corporation v. Riley, 7 Cal.2d 731, at page 734, 62 P.2d 588, at page 589, defined "Tax-free alcohol" or "industrial alcohol" under the act as it then existed to mean " 'undenatured ethyl alcohol or other distilled spirits in *packages of more than one gallon for use in the trades, professions or industries,'* as described in section 6, subdivision (i)."

It follows that the exemption from the tax provided for in section 67.1 applies to sales of distilled spirits for use in the trades, professions or industries which in turn must necessarily be taken to mean only those made by licensees authorized to make such sales and defined by limitation to include only sales in packages of more than one gallon.

The reason for such restriction is obviously that of preventing circumvention of the statute if such sales of whiskey were made in small containers.

[4] The further argument of plaintiff that there was no sale of the distilled spirits within this state because delivery was made in Ohio is nugatory in light of the agreed statement of facts and the provisions of the contract of purchase. In said statement it is agreed that "Delivery of the whiskey under the contract was made under date of October 26, 1942, by shipment via common carrier at Cleveland, Ohio, by

National Distillers Products Corporation, consignor, from Cleveland to the Medical Depot, United States Army, Los Angeles, California, the United States Government being the consignee." The terms of the contract were "F.O.B. Los Angeles Medical Depot, Los Angeles, California, Delivery at destination 12 days." The parties have thus foreclosed any contention other than that delivery was made to the Government in California.

[5] The tax is further protested on the grounds that the purchase of distilled spirits by the War Department is not a sale within the meaning of the act for the reason that the United States is not a "person" as defined in section 2, subdivision (f) which reads: "'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

Section 2(*l*) then defines a sale as follows: "'Sell' or 'sale' and the phrase 'to sell' means and includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and means and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and shall include soliciting or receiving an order for such beverages, but shall not include the return of alcoholic beverages by a licensee to the licensee from whom such alcoholic beverages were purchased."

The argument is that for a sale to take place within the meaning of section 2(*l*) there must be a transfer of title from one "person" to another as the word "person" is defined in section 2(f).

Conceding that the Federal Government is not a person within the meaning of the act for the reason that the section thereof defining the word "person" does not include the United States, it does not follow that the transaction here involved does not come within the definition of a sale for the purpose of imposing a tax upon the National Distillers Products Corporation.

A reading of section 2(*l*) will clearly show that the proposition contended for by respondent takes into consideration but one of several definitions of "sale" included within the last mentioned section. In the alternative a sale "means and includes (a transfer of title from one person to another) *and* means and includes the *delivery* of alcoholic beverages * * *." (Italics added.)

As above stated there was clearly a delivery of the distilled spirits within the State of California pursuant to the contract between the respondent and the United States and therefore a "sale" within the definition of the act.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

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82 Cal.App.2d 879

PEOPLE v. WILDE.

Cr. 2020.

District Court of Appeal, Third District, California.

Dec. 15, 1947.

1. Criminal law 🔑563

The corpus delicti may be proven by circumstantial evidence and reasonable inferences drawn therefrom, and need not be proved by direct and positive evidence.

2. Criminal law 🔑517(4)

The corpus delicti may be proved by only slight evidence to lay the foundation for the introduction of evidence of a confession.

3. Criminal law 🔑517(4)

In prosecution for possessing a pistol in violation of statute making possession of a deadly weapon by an ex-convict a crime, evidence sufficiently proved the corpus delicti for admission in evidence of defendant's confession that he had had possession of the gun and had concealed it at the spot where it was found by police officers. Gen.Laws, Act 1970, § 2.

4. Criminal law ⚷781(3)

Where defendant in prosecution for possessing a pistol in violation of statute making possession of a deadly weapon by an ex-convict a crime had confessed, jury was not required to be instructed that they could not convict defendant unless they were satisfied beyond a reasonable doubt by evidence other than defendant's confession that defendant was in possession of the gun, since the corpus delicti is not required to be established to a moral certainty and beyond a reasonable doubt before confessions may be admitted in evidence; prima facie proof of corpus delicti being sufficient. Gen.Laws, Act 1970, § 2.

5. Criminal law ⚷824(1, 4)

Court in criminal cases must give, of its own motion, instructions on general principles of law pertinent to such cases when they are not proposed or presented in writing by parties themselves, but court need not give instructions upon specific points developed through evidence introduced at the trial, unless such instructions are requested by party desiring them and when court fully and fairly charges jury upon law appertaining to facts, its failure to instruct on any particular matter deemed essential is not error in absence of request for such an instruction.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Robert Wilde was convicted under statute making possession of a deadly weapon by an ex-convict a crime, and he appeals.

Judgment and order denying a new trial affirmed.

Robert A. Zarick, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

But two contentions are raised on this appeal which has been taken from a judgment of conviction of a violation of Chapter 339, sec. 2, Stats. of 1923, Deerings Gen. Laws, Act 1970, p. 864, which makes it a crime for an ex-convict to have possession of a deadly weapon. The first ground of reversal urged is that, aside from the admissions of defendant, there is no evidence that he was ever in possession of a deadly weapon; and second, that the trial court committed reversible error in failing to instruct the jury that they must be satisfied by independent evidence of such possession before they could convict the defendant.

The evidence shows, without contradiction, that defendant is an ex-convict; that on the evening of December 28, 1946, he was in an automobile parked in front of the C. & B. Liquor Store, at 21st and Broadway in Sacramento, about 10 o'clock, p. m.; that two police officers, who had gone to this place in response to a call, saw defendant in said automobile, at which time he wore a black snow cap and a jacket; that when the police officers approached defendant's car, defendant hastily left at a fast rate of speed; that the officers followed but lost the car in the traffic a few blocks away, but 10 or 15 minutes later found it parked in the vicinity of 20th Street, between Yale and X Streets; that defendant was then standing behind the car, the lights of which were out, changing his upper garments; that as soon as the officers appeared he jumped into his car and again left at high speed; and that though the officers pursued him and used their siren frequently, defendant failed to stop until one of them fired a shot over his head. It further shows that after defendant was apprehended and taken to the police station the two officers returned to the vicinity of 20th, Yale and X Streets, which they described as "a rather deserted spot" without other cars or people there, and after a search of the vicinity found a 45 caliber automatic pistol ready for firing and with a shell in the chamber and with a clip attached containing ammunition. The gun was under a paper box about three feet from the sidewalk on the side of the street where defendant had been changing his clothes, and from 35 to 40 feet from the spot where defendant's car had been parked.

[1] Was this evidence, then, sufficient proof of the corpus delicti to furnish a foundation for the introduction of defendant's confession? That the corpus delicti may be proven by circumstantial evidence and reasonable inferences drawn therefrom is well established. People v. Ives, 17 Cal.2d 459, 463, 110 P.2d 408; People v. Pruitt, 55 Cal.App.2d 272, 274, 130 P.2d 767; People v. Kaye, 43 Cal.App.2d 802, 810, 111 P.2d 679.

In the Pruitt case, supra (hearing in Supreme Court denied), the court said, 55 Cal.App.2d at page 274, 130 P.2d at page 768: "It is not necessary that the corpus delicti be proved by direct and positive evidence. Circumstances may be more convincing. People v. Spencer, 58 Cal.App. 197, 208 P. 380. It is neither the fashion, the custom nor the disposition of violators of penal statutes to choose an audience or the glare of calcium lights as conditions for the commission of their crimes. Of this courts must be ever mindful in considering the crime, the parties involved and the circumstances detailed. People v. Patello, 125 Cal.App. 480, 13 P.2d 1068; People v. Bonilla, 114 Cal.App. 219, 225, 299 P. 784; People v. Baker, 94 Cal.App. 628, 271 P. 765."

[2] In People v. Harshaw, 71 Cal.App.2d 146, 149, 161 P.2d 978, the court said that the corpus delicti need be proved by only slight evidence to lay the foundation for the introduction of evidence of a confession, citing People v. Bollinger, 196 Cal. 191, 200, 237 P. 25; People v. Kaye, supra, 43 Cal.App.2d at page 809, 111 P.2d at page 679, and 8 Cal.Jur. 235. Also see People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745; People v. Smith, 72 Cal.App.2d Supp. 875, 877, 164 P.2d 857; People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741.

[3] We cannot say that the evidence above set forth did not furnish a sufficient foundation for the admission of defendant's confession that he had had possession of the gun and had concealed it at the spot where it was found by the officers.

[4] As for the contention that the trial court should have instructed the jury that "they must be satisfied by independent evidence of such possession before they could convict defendant," if, by this statement, it is meant by appellant that the jury should have been instructed that they could not convict the defendant unless they were satisfied beyond a reasonable doubt by evidence other than his confession, that defendant was in possession of the gun, we cannot agree that such is the law. Appellant cites People v. Bender, 27 Cal.2d 164, 163 P.2d 8, and People v. Holt, 25 Cal.2d 59, 153 P.2d 21, but in neither of those cases was the confession of the defendant involved, nor did the court hold that where a defendant has confessed his commission of a crime his guilt must be established by evidence independent of the confession.

The record before us does not contain the instructions given nor any instructions requested and refused. Attached to the clerk's transcript is a stipulation signed by counsel for appellant, the attorney for respondent, and the trial judge, which sets forth that during the course of the trial the following request was made to the court:

"Robert Wilde

"Request for special instructions

"(1) Oral Declarations

"(2) Oral admissions to corroborate possession of deadly weapons if not satisfied that proof independent or prima facie evidence of possession independent of oral admissions";

and further stating that the only instruction given concerning oral declarations and/or corpus delicti was, "You are instructed that evidence offered by the prosecution of oral declarations, or statements of the defendant ought to be received by you with caution."

[5] It is apparent from the foregoing that what kind of an instruction defendant was requesting under heading (2) is uncertain; and he apparently offered none himself. It was said in the Bender case, supra, that it is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases when they are not proposed or presented in writing by the parties themselves, but it is not its duty to

give instructions upon specific points developed through evidence introduced at the trial, unless such instructions are requested by the party desiring them; and that when the court fully and fairly charges the jury upon the law appertaining to the facts of the case its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction. Appellant cites no authority holding that an instruction that the jury must be satisfied by independent evidence of the possession of the gun by defendant before they could convict him, is essential.

In People v. Selby, 198 Cal. 426, at pages 438, 439, 245 P. 426, 431, the court said:

"It may finally be said that the authorities are unanimous on the proposition that the corpus delicti is not required to be established to a moral certainty and beyond a reasonable doubt before the extrajudicial statements, admissions, or confessions of a defendant may be received in evidence—prima facie proof of the corpus delicti being sufficient for that purpose. And, with the exception of People v. Tapia, supra [131 Cal. 647, 63 P. 1001], and People v. Wagner, supra [29 Cal.App. 363, 155 P. 649], the rule is likewise unanimously declared that it is not necessary that the jury, in resolving the question of the guilt or innocence of a defendant upon all the evidence in the case should, before considering for any purpose the extrajudicial statements, admissions, or confessions of a defendant, be first satisfied to a moral certainty and beyond a reasonable doubt that the corpus delicti has been established by evidence aliunde.

"When the case is submitted for their verdict, the jury may consider *all* the evidence in the case, including the extrajudicial statements, admissions or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt. If this were not the correct rule, proof of the extrajudicial statements, admissions or confessions of the accused would have no utility except to connect him with the crime charged. The general rule is that, unless evidence is admitted for a limited purpose, it will be considered for every purpose. Any expressions in People v. Tapia, supra, and People v. Wagner, supra, to the contrary of what we have declared are at variance with the authorities and are not binding." And an instruction proposed in that case, which is seemingly similar to what is here contended should have been given, was held properly refused. Also see People v. McMonigle, supra, 29 Cal.2d at pages 738-740, 177 P.2d 745; People v. Day, 71 Cal.App.2d 1, 4, 161 P.2d 803; People v. Harshaw, supra, 71 Cal.App.2d at page 149, 161 P.2d 978.

The judgment and order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

83 Cal.App.2d 60

PEOPLE v. WONG.

Cr. 708.

District Court of Appeal, Fourth District, California.

Dec. 22, 1947.

Rehearing Denied Jan. 6, 1948.

Hearing Denied Jan. 21, 1948.

1. Homicide 🔑244(1)

In prosecution for assault with intent to murder, evidence justified verdict finding that defendant did not act in self-defense. Pen.Code, § 217.

2. Homicide 🔑145

Where a specific intent to kill is charged and is a necessary element of the crime, such intent must be proved like any other fact or essential element or be reasonably deducible from the evidence and may not rest on presumption, but rule does not apply to homicide prosecution.

3. Criminal law 🔑1186(4)

Where defendant was convicted by jury of assault with a deadly weapon with intent to commit murder but trial judge on motion for new trial reduced offense to assault with deadly weapon, error in instruction relating to intent to kill was harmless. Pen.Code, §§ 217, 1181, subd. 6; Const. art. 6, § 4½.

4. Criminal law ⟹1186(4)

In prosecution for assault with intent to commit murder, instructions which placed on defendant burden of producing sufficient evidence to raise in jurors' minds belief in soundness of his defense of self-defense, whereas law only requires a reasonable doubt as to the guilt of defendant to be raised, were not prejudicial in view of overwhelming evidence of guilt of defendant and weakness of evidence pointing to self-defense. Pen.Code, §§ 197, 217; Const. art. 6, § 4½.

5. Criminal law ⟹1186(4)

In prosecution for assault with intent to commit murder, where several phases of self-defense were urged by defendant, giving of instructions on such phases substantially correct in themselves, but neither one covering the subject involved in the others, was not prejudicial where proof of defendant's guilt was clear and convincing. Pen.Code, §§ 197, 217; Const. art. 6, § 4½.

6. Homicide ⟹188(5)

In prosecution for assault with intent to commit murder proof of specific acts of violence or of assault on third persons by the victim is not admissible. Pen. Code, § 217.

7. Homicide ⟹188(3)

In prosecution for assault with intent to commit murder with plea of self-defense, where there was no showing that the victim was armed or that he made any motion indicating an intention to draw a weapon, evidence concerning the victim's general reputation for carrying a gun was properly excluded. Pen.Code, §§ 197, 217.

8. Criminal law ⟹379

Generally evidence of general reputation should be confined to those traits which are in issue and should bear some reference and relation to nature of the charge.

9. Criminal law ⟹964

Where information was sufficient to charge either assault with a deadly weapon with intent to commit murder or assault with a deadly weapon, and jury found defendant guilty of the first offense, trial judge was authorized on motion for new trial to reduce offense to assault with a deadly weapon. Pen.Code, §§ 217, 1181, subd. 6.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Stanley Wong was convicted of assault with a deadly weapon, and from judgment and from order denying motion for a new trial, defendant appeals.

Judgment and order affirmed.

Edgar B. Hervey, of San Diego (Henry F. Walker, of Los Angeles, of counsel), for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment sentencing defendant to the penitentiary after he had been found guilty of assault with a deadly weapon and also an appeal from the order denying his motion for new trial.

The information charged defendant with "assault with intent to commit murder, in violation of Section 217 of the Penal Code of the State of California, in that on or about the 25th day of January, 1947, in the County of Imperial, State of California, the said defendant, Stanley Wong, unlawfully assaulted one Angelo Abellera with a deadly weapon, to wit, a 32 caliber automatic pistol with intent to commit murder."

After a protracted trial the jury found the defendant guilty as charged. On motion for new trial the trial judge, under the authority of subdivision 6, section 1181 of the Penal Code, found the evidence insufficient to show defendant guilty of assault with a deadly weapon with intent to commit murder, but found him guilty of the lesser crime of assault with a deadly weapon and pronounced judgment accordingly.

Defendant admitted shooting Abellera twice with a 32 caliber automatic pistol but sought to justify his act by the plea of self-defense of his own person, defense of property and defense of another.

Defendant was employed as assistant dealer in a gambling house in Brawley, in Imperial County. Shortly before nine o'clock p. m. on January 25, 1947, Abellera entered the establishment and started to play a Chinese gambling game called "Hi Que", at what is designated in the record as Table No. 1. Defendant was seated at nearby Table No. 3, where another game was in progress. Abellera claimed to have lost about $40.00 when, during the progress of a "hand" which he believed gave promise of winning, the manager announced that closing time had arrived and that the games were closed. Abellera asked permission to play out the hand, which was refused. He then shook the table, spilling chips, dice and dominoes to the floor and, as defendant maintains and Abellera denied, some money.

From this point on, there is a sharp conflict in the evidence. Generally, the witnesses for the people testified that Tom Yee, aged 64 years, an employee of the establishment, rushed over to Abellera and struck him over the head with a "sap", described as an iron pipe about two feet long which was wrapped in paper; that the two scuffled; that defendant rose from his seat at Table No. 3, took an automatic pistol from his pocket and shot Abellera; that he advanced a few steps and fired a second shot. The first shot struck Abellera in the back in the fleshy portion of his hip. The second shot was fired when Abellera had turned around to see who was shooting and struck him in the stomach. None of these witnesses saw any money on the table or on the floor.

The story of defendant and his witnesses presents a different picture. Defendant testified he went from Table No. 3 into the kitchen to get some crackers as he was hungry; that he heard loud noises in the gambling room of dice, chips and dominoes falling and something that sounded like an exploding bomb; that he took his pistol from a box on a shelf and returned to the gambling room; that he saw Tom Yee and Abellera struggling; that Yee was on his knees with Abellera bending over him with his hands on Yee's shoulders or around his neck; that he cried "halt" and fired one shot "wild" to stop the fracas with no intention of hitting anyone; that Abellera advanced toward him and he fired at Abellera's legs to stop him. This is the shot that hit Abellera in the stomach; that he hit Abellera over the head with the pistol and that it flew out of his hand. It subsequently developed that Abellera was unarmed.

Tom Yee testified that he was sitting in the gambling room reading a paper when the manager announced the games closed; that he heard Abellera ask to finish the "deal" and play one more game; that Abellera tipped over the gaming table spilling the dice, chips, dominoes and money on the floor; that Abellera picked up some of the money and started for the door; that Yee started after him to stop him; that the two struggled but that Yee was an old man without much strength so that Abellera forced him to his knees and choked him so that he became dizzy; that he heard the two shots fired.

Abellera was seriously wounded by the second shot which punctured his intestines in numerous places. There is other conflicting evidence concerning statements made to officers after the affray and also after Abellera was released from the hospital which it is not necessary to detail.

As there was admitted error in instructions, we must further consider the actions of defendant under his claim of shooting Abellera in self-defense.

The circumstances under which the right of self-defense arises are set forth in section 197 of the Penal Code and are summarized in 13 Cal.Juris. p. 626, sec. 34, as follows: "Homicide is also justifiable when committed by any person in either of the following cases: 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or, 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished."

The right of defendant to shoot Abellera in defense of his own person is not established even by the evidence most favorable to defendant. When the first shot was fired, Tom Yee and Abellera were engaged in a scuffle and were several paces from defendant who testified that he fired the first shot "wild" with no intention of hitting Abellera. However this may be, his aim was either so very bad or so very good that he shot Abellera in the back. When one person shoots another in the back when there is no altercation between them, the plea that the shot was fired in self-defense is far from convincing. It is impossible to see how defendant could have believed that his life was endangered or that there was then a design to do him great bodily injury. The same is true of the time the second shot was fired. Abellera was unarmed and, even according to defendant, made no hostile gesture toward him except to take a few steps in his direction. Defendant was the aggressor and fired the first shot. Self-defense is not very apparent where the supposed assailed shoots his supposed assailant in the back.

It also would tax credulity to believe that Abellera was attempting to commit a felony upon or to do great bodily injury to Tom Yee. According to the evidence of the defense the two men were engaged in a scuffle and no weapon was used or in sight. At the most, if we entirely disregard the evidence of several witnesses to the effect that Yee assaulted Abellera with a "sap", Abellera was only guilty of assault and battery, a misdemeanor.

There is evidence, though strongly contradicted, that Abellera picked up some of the house money from the floor and started away with it. There is no suggestion of the amount of money it was claimed he was taking.

[1] The evidence supporting the claim of self-defense is so weak that there can be no wonder that the jury rejected it.

[2] The trial judge instructed the jury in effect that a person is presumed to intend to do that which he voluntarily and wilfully does in fact do, and also is presumed to intend the natural, probable and usual consequences of his acts. It is now well settled that in cases of this kind (except homicide cases) where a specific intent to kill is charged and is a necessary element of the crime, such intent must be proved like any other fact or essential element of the crime or be reasonably deducible from the evidence and may not rest on a presumption. This rule was followed in People v. Snyder, 15 Cal.2d 706, 104 P.2d 639, 641, where numerous cases are cited supporting it. It was also held that the error in giving such an instruction in this kind of a case was "beyond the reach of the saving grace of section 4½ of article VI of the Constitution" and constituted reversible error.

Had defendant finally stood convicted of the crime of assault with a deadly weapon with intent to commit murder we could have done nothing other than reverse the judgment and direct a new trial. However, such is not the case. On motion for new trial the trial court reduced the offense to assault with a deadly weapon where the specific intent to kill need not be charged nor proved as an independent fact.

This brings the case within the procedure followed in People v. Brown, 27 Cal.App.2d 612, 81 P.2d 463, 466, where the defendant was charged with and convicted of the crime of assault with a deadly weapon with intent to commit murder. Instructions similar to those given in the instant case were given and were held to be erroneous and the following order was made:

"The judgment from which this appeal is taken is reversed, and the defendant remanded to the trial court with instructions to modify the judgment of assault with intent to commit murder, to assault with a deadly weapon, and that defendant be sentenced accordingly.

"The order denying a new trial is affirmed."

The Brown case was twice cited with approval on other points in the Snyder case where the Supreme Court said in discussing the instructions: "Nor are we confronted with a case wherein the error is rendered harmless by virtue of the defendant's conviction of an included offense, or of a distinct offense, not requiring proof of a specific intent."

[3] The procedure followed here rendered harmless the error in giving those instructions and permits the application of section 4½ of article VI of the Constitution so that a reversal of the judgment becomes unnecessary as there has been no miscarriage of justice.

Defendant complains of an instruction in which the jury was told in effect that if the jurors believed from the evidence that, without any overt act or physical demonstration on the part of Abellera sufficient to warrant defendant in believing he was in great bodily danger, he shot Abellera, the shooting was not justifiable. There were other instructions in which the jurors were told that if they believed certain things concerning the defense of self-defense the defense could not be sustained.

It is argued that these instructions were erroneous in that they placed on defendant the burden of producing sufficient evidence to raise in the minds of the jurors the belief in the soundness of the defense while the law only requires a reasonable doubt as to the guilt of the defendant to be raised, citing such cases as People v. Vasquez, 93 Cal. App. 448, 269 P. 549; People v. Settles, 29 Cal.App.2d Supp. 781, 78 P.2d 274, and People v. Roe, 189 Cal. 548, 209 P. 560.

[4] It must be admitted that these instructions should not be considered models. In view of the overwhelming evidence of the guilt of defendant and the weakness of the evidence pointing to a shooting in self-defense, we should not reverse the judgment because there has been no miscarriage of justice in this case. However, somewhat similar instructions have been given in cases where judgments were affirmed (People v. Iams, 57 Cal. 115; People v. Washburn, 54 Cal.App. 124, 201 P. 335; People v. Wheeler, 75 Cal.App.2d 360, 171 P.2d 62) and where, as here, there were full and fair instructions on the doctrine of reasonable doubt.

[5] Defendant further complains of the instructions on self-defense and argues that no instruction covered the several phases of this defense as urged by him.

The trial court gave instruction No. 15, as follows:

"In this case the defendant has interposed three separate defenses involving the law of self-defense; First; defense of himself. Second; defense of another person, and Third; defense of property and the commission of a felony in his presence.

"In order to clearly set forth the instructions on these three phases and parts of the law of self-defense, the court will divide the said instructions into groups. Group 1 will contain all of the instructions on the right of self-defense as applied to the defendant personally. Group 2 will contain instructions as to the right of the defendant to avail himself of the law of self-defense relative to another person and property and the commission of a felony in his presence."

There were given several instructions on these phases of self-defense, substantially correct in themselves but neither one covering the subject involved in the others. Where, as here, various defenses are interposed it would be an unnecessarily difficult task to cover all in each instruction. With the warning we have quoted we cannot see how the jury could have been misled by the method adopted here.

Defendant urges error in many other instructions which it is not necessary to consider in detail. The proof of defendant's guilt is so clear and convincing that it is obvious that there has been no miscarriage of justice.

Defendant urges error in sustaining an objection to a question concerning Abellera's general reputation for carrying a gun. We find the following in the testimony of defendant:

"The Court: Well, overruled, You may answer. Did you ever see him carry a weapon at any time? A. A knife, sir.

"Mr. Mouser: That answer is objected to as not being responsive to the question.

"The Court: Overruled.

"Q. What kind of a knife was it you saw him carry? A. A spring knife.

"Q. How long a blade? A. A blade about that long (indicating).

"Q. Now, did you ever know of him carrying any other weapon?

"Mr. Mouser: At this stage I will ask that all the evidence in regard to a knife, which would seem to be an ordinary pocket knife insofar as the blade goes, be stricken from the record and the jury admonished to disregard it.

"The Court: Motion denied. He stated that is all he ever saw him carry, was a knife, is that right? A. That is right.

"Q. Did you ever know him to carry any other kind of a weapon? A. Only what I heard.

"The Court: That may be stricken, what he heard. * * *

"Q. Mr. Wong, do you know the general reputation of Andy Abellera in and around Brawley as to whether he carried a gun?

"Mr. Mouser: Objected to as incompetent, irrelevant and immaterial. General reputation for peace and quietude might be admissible.

"The Court: I think that means whether he was a violent or turbulent person, or his reputation for being a peaceable man or a violent and turbulent character. Do you know that reputation? A. Yes, sir.

"The Court: You may state whether it was good or bad. A. It was bad.

"Q. And do you know his reputation as to whether he carried a gun?

"Mr. Mouser: Objected to as incompetent, irrelevant and immaterial.

"The Court: I don't believe that would be his reputation on that. His reputation is whether a good or bad or violent or turbulent person. Sustained."

Defendant relies on the cases of People v. Singh, 78 Cal.App. 488, 248 P. 986, and People v. Jefferson, 34 Cal.App.2d 278, 93 P.2d 230, as supporting his position.

In the Singh case the defendant was on trial for the murder of one Hager. The court said [78 Cal.App. 488, 248 P. 989]: "As has been hereinbefore mentioned, on the trial of the action defendant offered to prove that Hager was in the habit of carrying a 'gun'; that on several different occasions, and within one month preceding his death, Hager had exhibited his 'gun' to several different persons and had threatened them with it; and that such facts were communicated to defendant prior to the date when Hager was killed. * * * Assuming that the evidence already before the court tended to show that immediately before the shooting occurred Hager had 'jumped at, or toward, or on' defendant, with knowledge in defendant that Hager was probably armed and that theretofore with a 'gun' he had threatened other persons, the serious and legally pertinent question would arise as to whether in such circumstances, as a reasonable man, defendant would be justified in believing that either his life was in danger, or that great bodily harm would result to him by reason of conditions then and there existing. It is clear that so considered the offered evidence was admissible and that defendant was substantially prejudiced by reason of the refusal of the trial court to permit such evidence to be introduced."

People v. Jefferson, supra, presents a somewhat different state of facts. Defendant was on trial for the murder of one Yates who had struck defendant's wife. Defendant interfered and Yates, with a drawn knife, advanced on defendant who retreated until stopped by a wall. He fired one shot in the air and then shot and killed Yates who was still advancing threateningly.

Defendant had become acquainted with Yates while the latter was serving a jail sentence for cutting one Morris with a knife. There was evidence that Yates' reputation for peace and quiet was bad. To the question [34 Cal.App.2d 278, 93 P.2d 232]: "On this evening, had you any knowledge of any act previously done by Mr. Yates which caused you to fear that he might cut you with that knife?" Jefferson was permitted to answer "Yes." An objection was sustained to the question "What was that knowledge?" which was evidently asked with the purpose of bringing out evidence concerning the assault on Morris. It was held error to sustain this objection.

[6] We are not able to harmonize this ruling with the general rule that proof of specific acts of violence or of assaults on third parties are not admissible in evidence. See People v. Casserio, 16 Cal.App.2d 223, 60 P.2d 505; People v. Soules, 41 Cal.App.2d 298, 106 P.2d 639; People v. Keys, 62 Cal.App.2d 903, 145 P.2d 589, 594. In the Keys case it was said: "It is the general rule in California that in a prosecution for murder where the defense of self-defense is interposed, the defendant may introduce evidence that the reputation of the deceased for peace and quiet was bad, and known to him to be bad. Proof of specific acts of violence or proof of a prior conviction for assault are not admissible. People v. Griner, 124 Cal. 19, 56 P. 625; People v. Garcia, 2 Cal.2d 673, 42 P.2d 1013; People v. Soules, 41 Cal.App.2d 298, 106 P.2d 639."

[7, 8] The facts in the instant case easily distinguish it from both cases relied on by defendant. Here there is no intimation that Abellera was armed or that he made any motion indicating an intention to draw a weapon. He had not "jumped at, or toward, or on defendant". We have found nothing in the record indicating that defendant had any reasonable ground to believe that Abellera was about to assault him. Under these circumstances the two cases cannot be controlling and we should follow the more general rule that evidence of general reputation should be confined to those traits which are in issue and should bear some reference and relation to the nature of the charge. People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1114; People v. Jefferson, supra.

[9] Lastly, defendant argues that the verdict of the jury does not support the judgment. It is conceded that the information was sufficient to charge either assault with a deadly weapon with intent to commit murder or assault with a deadly weapon. The jury found the defendant guilty of the first and the trial judge found him guilty of the second offense. This procedure is permitted by sec. 1181 of the Penal Code. See People v. Brown, supra.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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83 Cal.App.2d 22

CYR et al. v. WHITE et al.

Civ. 13565.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1947.

1. Appeal and error ⚷194(6), 884

Claimed failure to comply with court rule requiring memorandum of points and authorities to accompany demurrer was cured by fact that no objection was made in the trial court and that both parties filed briefs in response to trial court's request. Superior Court Rules, rule 19, subd. 1; Code Civ.Proc. § 430.

2. Appeal and error ⚷917(1)

On appeal from judgment sustaining demurrer to complaint, allegations of complaint must be taken as true.

3. Municipal corporations ⚷235

The object of statute requiring municipal contracts to be awarded on basis of competitive bidding is to prevent waste of public money, corruption and favoritism. Gen.Laws, Act 5233, § 874.

4. Newspapers ⚷2

Public policy requires that there be no favoritism in the letting of municipal contracts, and also requires that city's published legal notices should reach as many persons as possible. Gen.Laws, Act 5233, § 874.

5. Municipal corporations ⚷241

In awarding contract for publication of sixth class city's legal notices, city council is not required to award contract to lowest responsible bidder, but has discretion, abuse of which can be controlled by courts, to determine which is the better bid, having in mind both the price and extent of circulation of newspaper. Gen.Laws, Act. 5233, § 874.

6. Municipal corporations ⚷241

The lowest responsible bidder portion of statute providing that sixth class city must let public works contracts to lowest responsible bidder is not applicable to portion of statute relating to letting of contracts for publishing of legal notices. Gen. Laws, Act 5233, § 874.

7. Municipal corporations ⚷241

A sixth class city council awarding contract for publication of legal notices to other than lowest bidder need not specifically find that lowest bidder was not lowest responsible bidder. Gen.Laws, Act 5233, § 874.

8. Newspapers ⚷2

A person attacking sixth class city's contract for publication of legal notices must allege and prove fraud. Gen.Laws, Act 5233, § 874.

9. Newspapers ⚷2

A contract subsequent to beginning of fiscal year for publication of sixth class city's legal notices for balance of fiscal year was not void, notwithstanding that statute required city council to invite bids and to contract before the beginning of the fiscal year for publication of such notices during the ensuing fiscal year. Gen.Laws, Act 5233, § 874.

10. Pleading ⚷225(1)

Sustaining demurrer without leave to amend for failure of complaint to state cause of action was not abuse of discretion, where complaint could not be amended without stating an entire new cause of action.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Raoul H. Cyr and Paul K. Lovegren against Herbert K. White and others, to have adjudged void a contract by the City of Burlingame for the publication of legal notices in a designated newspaper and for other relief. From the judgment, the plaintiffs appeal.

Affirmed.

Edmund J. Holl and Alan H. Critcher, both of San Francisco, for appellants.

I. Karmel, City Atty. of Burlingame, Cosgriff, Carr, McClellan & Ingersoll and Luther M. Carr, all of Burlingame, for respondents.

BRAY, Justice.

The right of the trial court to sustain without leave to amend the demurrer to the complaint, depends primarily upon the question whether, in a sixth class city, the council is legally required to award a contract for advertising legal notices to the lowest responsible bidder, or has discretion in the matter.

So far as material here, the allegations of the complaint are that Burlingame is a city of the sixth class; that plaintiffs are copartners, publishing, in the city of Burlingame, a weekly newspaper of general circulation, established as such by court decree, called "The Editor of Burlingame" (hereinafter for brevity called "The Editor"); that plaintiffs own personal property in Burlingame assessed for, and upon which they pay, taxes; that the only other newspaper of general circulation in Burlingame is the "Burlingame Advance and Burlingame Star" (hereinafter for brevity referred to as "The Star"); that pursuant to the Municipal Corporations Act, the city council invited bids for the publication of all the city's legal notices from December 1, 1946, to July 1, 1947; that in accordance with the advertisement, plaintiffs submitted a bid for publication in "The Editor" of all legal notices, for the price of 80 cents per square for the first publication and 40 cents per square for each subsequent publication; that the publisher of "The Star" submitted a bid of $1 per square for the first publication and 50 cents per square for each subsequent publication; that the unit price bid by the publishers of "The Star" is 25% greater than that bid by plaintiffs; that on December 16, 1946, the city council awarded the contract for the publication of legal notices for the balance of the fiscal year to "The Star"; that such award was illegal and void, because, first, the contract was awarded for less than one year, and, secondly, the contract was not awarded to the lowest bidder, but to the highest bidder. The complaint then alleges that certain advertisements were published by "The Star" for the city pursuant to the contract, and asks that the award and contract be declared null and void, and that the city be enjoined from paying the charges for the advertising done pursuant to the contract.

Defendants demurred generally to this complaint, and the court sustained the demurrer without leave to amend.

[1] Plaintiffs contend that the demurrer should not have been considered, because of the claimed failure of defendants to comply with Rule XIX, subdivision 1, Rules of the Superior Court (213 Cal. LXXXVIII) which requires a memorandum of points and authorities to accompany the demurrer. The only attempted compliance with this rule was the mention at the bottom of the demurrer of section 430 of the Code of Civil Procedure (the section setting forth grounds of demurrer), and McQuillin on Municipal Corporations, without giving volume or page. However, this defect was cured by the fact that no objection was made in the lower court and that the court requested both parties to file briefs, which they did.

Award to Highest Bidder.

[2] For the purposes of this appeal, the allegations of the complaint must be taken as true and we must assume that the council awarded the contract to the highest, and not the lowest, bidder.

The portion of the Municipal Corporations Act which governs the letting of contracts of this nature by a sixth class city is section 874 (Deering's Gen. Laws, 1944 Ed., Act 5233, page 1995). It provides: "Public Works: When to be done by contract: Letting of contracts: Performance by day labor: Emergencies: Contracts for publication of legal notices. In any project for the erection, improvement and repair of public buildings and works; in all work in or about streams, bays, or water fronts, or in or about embankments, or other works for protection against overflow; in all street or sewer work exclusive of maintenance or repair; and in the furnishing of any supplies or materials for any such project inclusive of projects for maintenance or repair of streets or sewers, when the total expenditures required for the same exceed the sum of one thousand dollars ($1,000), the same shall be done by contract and shall be let to the lowest responsible bidder, after notice * * *." It then goes on to provide as to the character and method of notice and other matters, including the right of the council by a four-fifths vote to perform the work by day labor or purchase materials in the open market without further observance of the preceding provisions of the section. There is then a provision concerning awarding contracts in the event of emergency without previous advertising. Then comes a new paragraph which reads: "Contracts for publication of legal notices. In the event that there is more than one newspaper of general circulation printed and published in such city the city council shall, annually, prior to the beginning of each fiscal year, publish a notice inviting bids, and, contract for the publication of all legal notices required to be published in a newspaper of general circulation printed and published in said city. Said contract shall include the printing and publishing of all such legal notices during the ensuing fiscal year." If there is only one newspaper in the city then the council may contract with it without advertising for bids.

Plaintiffs contend that the requirement that the contract be let to the lowest bidder set forth in the public works portion of the section, controls the second paragraph relating to contracts for publication of legal notices.

There has been no interpretation of this latter portion of the section by the courts of this state. Plaintiffs cite a number of cases to the effect that the primary purpose of requiring competitive bidding on municipal contracts is to prevent fraud and collusion and for the protection of public funds. Among others, they cite Attorney General v. Public Lighting Commission, 155 Mich. 207, 118 N.W. 935, Miller v. Incorporated Town of Milford, 244 Iowa 753, 276 N.W. 826, 114 A.L.R. 1423, and Harris v. City of Philadelphia, 299 Pa. 473, 149 A. 722. They then go on to state that under the rule of construction of statutes in pari materia (Estate of Jacobs, 61 Cal.App.2d 152, 142 P.2d 454), as both paragraphs deal with municipal contracts, the two paragraphs must be construed together. They point out that section 777 relating to cities of the fifth class is practically identical with section

874. As to fourth class cities, there is no specific provision concerning contracts for the publication of legal notices, although section 628 provides generally that all contracts for work to be performed, or materials to be used, exceeding $500, shall be let to the lowest bidder. Section 536 relating to cities of the third class requires that bids for doing city printing and advertising shall be let to the lowest bidder. As to cities of the second class, there is no provision at all, while Act 5233, section 106, requires cities of the first class to let their printing and advertising to the "lowest responsible bidder."

An examination of section 874 shows that there is quite a difference between its two parts. The requirement that contracts be let to the lowest responsible bidder appears only in the first paragraph relating to public works, etc., and they only where the "total expenditures required" exceed $1,000.

[3-5] While the object of statutes requiring municipal contracts to be awarded on the basis of competitive bidding is to prevent waste of the public money, corruption and favoritism (as established by the many cases cited by plaintiffs) there is a very sound ground for differentiating between contracts for public works and the publication of legal notices, which differentiation the Legislature apparently had in mind. Generally speaking, contracts for public works are to be completed in a similar manner by whichever contractor gets the job, but the question of the value of legal advertising involves the circulation of the particular newspaper, that is, the number of people who will see the notices. Public policy requires that there be no favoritism in the letting of municipal contracts, but, at the same time, it also requires that notices required by law to be published should reach as many persons as possible. In a given city, there may be two newspapers of general circulation, one a daily with a tremendous circulation, the other a weekly with a very small circulation. While the latter might be able to publish legal notices much cheaper than the former, it would be far more in the interests of the public that the city's legal notices be published in the paper of larger circulation. At least, in awarding a contract, the city council should be permitted to weigh that consideration against the matter of cost, and unless the council abuses its discretion, its determination should stand.

Plaintiffs argue that unless the contract is awarded to the lowest responsible bidder there is no object in calling for competitive bids, that it would be a waste of public funds to advertise for bids and then give the contract to the highest bidder. However, that does not necessarily follow. Advertising is necessary to give publicity to the fact that a contract is to be awarded, and hence the action of the council is kept open to public scrutiny. Secondly, the council cannot arbitrarily award the contract to the highest bidder. While, as here, the council has discretion to determine which is the better bid, having in mind both price and other matters affecting the value to the public, including the question of circulation, it is a wise discretion that must be used, and the courts can control any abuse of that discretion.

[6] Even if, as claimed by plaintiffs, "the lowest responsible bidder" portion of section 874 applies to contracts for publication of legal notices, which it does not, the case of West v. Oakland, 30 Cal.App. 556, 159 P. 202, while not involving section 874 or a municipal contract for advertising, is determinative of the questions here, as it disposes of arguments very similar to those made by plaintiffs in this case. There, the city advertised for bids for the installation of locking devices in its jail. The city charter definitely provided that the contract "shall be" let to the lowest responsible bidder. After extensive investigation the council rejected the bid of the West company, although it was the lowest, and accepted a higher bid, for the reason that the council felt that the West locking device did not measure up to the requirements of the plans. Just as plaintiffs did here, West, as a taxpayer, brought suit against the city to have the award of contract set aside on the sole ground that the charter required the city to give the contract to the lowest responsible bidder. The contention of West was practically the same as the contention of plaintiffs here. Quoting from page 560 of 30

Cal.App., 159 P. 204: "It is the contention of the appellant that * * * the term 'lowest responsible bidder,'" as used in the charter "is to be held to mean only that the lowest responsible bidder shall be the lowest bidder who has not been delinquent or unfaithful in any former contract with the city, and that otherwise, in every case of contracts awarded by competitive bidding, the council must either award the contract to the lowest bidder or must reject all bids.

"We are of the opinion, however, that this is altogether too narrow and binding a construction to place upon these provisions of the Oakland city charter. There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as 'lowest and best bidder,' or as 'lowest responsible bidder,' and the like; and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters, in the absence of other limiting clauses. The term 'lowest responsible bidder' has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work, and that where, by the use of these terms, the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts, in the absence, of direct averments and proof of fraud. 2 Dillon on Municipal Corporations (5th Ed.) § 811, p. 1223, and cases cited. And even when in statutes and charters the term 'lowest bidder' only is employed, the courts have held that, in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered."

Plaintiffs contend that the lowest bidder must be assumed to be the lowest responsible bidder unless the council makes a finding to the contrary, and cites McQuillin on Municipal Corporations (no volume or page), Seysler v. Mowery, 29 Idaho 412, 160 P. 262, Times Publishing Co. v. City of Everett, 9 Wash. 518, 37 P. 695, 43 Am.St. Rep. 865, and other cases from outside jurisdictions. That this is not the rule in California is decided by the West case, supra, where the court says, page 562 of 30 Cal.App., 159 P. 205: "It is also contended by appellant that it was the duty of the city council, upon determining that the M. G. West Company was not the lowest responsible bidder, to make a specific finding to that effect. Whatever the rule upon that subject may be in other jurisdictions, the question has been determined in this state adversely to the appellant's contention in the case of Rice v. Board of Trustees, 107 Cal. 398, 40 P. 551, wherein it was discussed and decided that it was not necessary for a municipal board, in making a record of its action in the rejection of certain bids, to also make an entry of its reason for so doing, but that the real reason for its action might be shown upon the trial of the case involving the validity and integrity of the action of the board."

In Thoits v. Byxbee, 34 Cal.App. 226, page 235, 167 P. 166, 170, the court stated: "The finding of the council, in the absence of fraud and collusion (neither of which was alleged nor claimed in this proceeding) is conclusive. Butler v. Printing Comm'rs. 68 W.Va. 493, 70 S.E. 119, 38 L.R.A.,N.S., 653; 3 McQuillin on Municipal Corporations, § 1228"

In Hodgeman v. City of San Diego, 53 Cal.App.2d 610, 128 P.2d 412, in considering a municipal contract for water meters the court held that price alone did not determine who was the lowest responsible bidder and that the council had a discretion to determine, as well as the price, the type of meter which it deemed best adapted in physical appearance and mechanical operation, to the needs of the city. See also

San Buenaventura v. Ventura Co. Star, 29 Cal.App.2d 41, 83 P.2d 975, where the court construes a provision of the city charter which provides that the contract for city advertising must " 'be awarded to the responsible bidder submitting the lowest bid on the basis of the bona fida subscription list of paying subscribers of said publication within the city limits' " and held, page 42 of 29 Cal.App.2d page 976 of 83 P.2d: "The clear purpose of the provision is tó insure the widest circulation of the public notices at the lowest cost to the city."

[7, 8] It is apparent, therefore, that the rule in this state is that it is not necessary for a city council awarding a bid to other than the lowest bidder to make a specific finding or record to the effect that the lowest bidder was not the lowest responsible bidder, and that to attack the award, the attacker must allege and prove fraud.

Contract for Less Than Year.

[9] There is no merit to the contention that because the contract was let subsequent to the beginning of the fiscal year and for less than a year period, it is void. Section 874 provides that the council "shall, annually, prior to the beginning of each fiscal year" call for bids and that the contract let pursuant to the bids received "shall include the printing and publishing of all such legal notices during the ensuing fiscal year." The fiscal year runs from July 1 to June 30. Here the call for bids was not published until November 1, 1946, nor the contract awarded until December 16. The contract merely covered advertising for the balance of the fiscal year. While it is true that the statute requires the council to invite bids and contract before the beginning of the fiscal year, and unless some good reason existed for the delay, the council probably would be derelict in its duty for failing so to do, there is nothing in the law that says the council cannot do belatedly what it should have done on time. Public policy would require that there be in existence a contract so that legal notices could be published as required by law, and the failure of the council (if there was any failure) to obtain such contract on time would not deprive the council of the right to remedy the situation as soon as possible, whether the direction in the statute is mandatory or merely directory.

Sustaining Demurrer Without Leave to Amend.

[10] The complaint failing to state a cause of action, the court correctly sustained the demurrer. Plaintiffs contend that they should have been given leave to amend. But how could they have amended without stating an entirely new cause of action? The complaint was brought on the sole theory that, as a matter of law, the council must award the contract to plaintiffs as the lowest bidder. On page 26 of appellant's opening brief there appears: "The complaint clearly alleges the illegality of the contract in that it was not let to the lowest responsible bidder. It is set forth that the plaintiffs were the lowest bidder, and, accordingly, they were prima facie entitled to receive the contract." Obviously, to amend, plaintiffs would have to charge fraud, a cause of action quite different from the theory on which they proceeded. Nowhere in the complaint or briefs is there the slightest intimation that there was any fraud committed by the council, or that the plaintiffs claim that there was. In view of these circumstances, it cannot be said that the court abused its discretion in denying leave to amend. In Pagett v. Indemnity Insurance Co., 54 Cal.App.2d 646, 649, 129 P.2d 700, 702, the court stated: "It is well settled that a new and different cause of action may not be set up in an amended complaint and that the trial court should grant a motion to strike an amended complaint which sets up an entirely new and different cause of action. [Citing cases.]" In Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1, 149 A.L.R. 215, the plaintiff complained that the court abused its discretion in refusing to permit him to amend his complaint. In holding that there was no abuse of discretion the court said, page 493 of 20 Cal.2d, page 4 of 127 P.2d: "From plaintiff's complaint the basis of plaintiff's action is clear, that is, negligence in the calculation of the amount of the tax claim against the property involved. Inasmuch as we have determined that no cause of action exists for such alleged negligence, there are no circumstances under which an

amendment would serve any useful purpose." "* * * the allowance or refusal of amendments is a matter so largely within the sound discretion of the trial court that its exercise will not be disturbed in the absence of a showing of gross abuse." Fetterley v. Gibson, 210 Cal. 282, 283, 291 P. 411, 412. So here, as we have determined that no cause of action exists for failing to award the contract to plaintiffs as the lowest bidder, the court did not abuse its discretion in sustaining the demurrer without leave to amend.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

83 Cal.App.2d 71

TOMPKINS v. TOMPKINS.

Civ. 13441.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1947.

1. Divorce 🔑181

Failure of defendant to comply with judgment of divorce is not ground for dismissal of his appeal from that judgment.

2. Divorce 🔑27(3)

Physical abuses by offending party need not be proven to establish "extreme cruelty" as grounds for divorce, as distinguished from "mental cruelty," since either bodily injury or mental suffering, if grievous, can constitute extreme cruelty.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty" and "Mental Cruelty".

3. Divorce 🔑184(6)

In a divorce action, finding of conduct inducing grievous mental suffering sufficient to constitute extreme cruelty will not be disturbed on appeal if based upon a reasonable analysis of facts reflected by evidence. Civ.Code, § 94.

4. Divorce 🔑108

In a divorce action where defendant contested only on property matters in dispute, plaintiff was not relieved of duty to make out her case, since grounds of divorce though admitted must be established by competent evidence under the Code. Civ.Code, § 130.

5. Evidence 🔑14

Court took judicial notice that a husband's staying away nights, asking for divorce, going with another woman, and leaving home permanently after twenty years of marriage, caused mental suffering to the wife under commonly accepted standards.

6. Divorce 🔑130

In a divorce action, evidence that husband stayed away nights, asked for divorce, went with another woman, and left home permanently after twenty years of married life, was sufficient to constitute "extreme cruelty". Civ.Code, § 94.

7. Divorce 🔑130

In a divorce action where a number of charges are made, it is not necessary that all acts of cruelty be corroborated, since corroboration of a single act may be sufficient. Civ.Code, § 94.

8. Divorce 🔑127(4)

In contested divorce actions where evidence is clear that no collusion exists, a decree is justified upon evidence only slightly corroborated if court is otherwise satisfied that prevailing party is entitled to decree. Civ.Code, § 94.

9. Divorce 🔑130

In a contested divorce action on grounds of extreme cruelty, where wife testified that husband stayed away nights, asked for divorce, and left home permanently, testimony of a daughter who saw the husband leave another woman's house with her at 7 A.M. and that the woman waved good bye was sufficient corroboration of wife's claim that husband went with another woman to justify a decree.

10. Divorce ⚷252

In a divorce action where minute entry recited that decree was on ground of desertion, court's formal written findings that husband had been guilty of both desertion and extreme cruelty controlled so as to permit an unequal division of community property in wife's favor under the statute requiring equal division only where desertion alone occurred, since the findings are a legal requirement. Rules on Appeal, rule 2(b) (2); Civ.Code, §§ 131, 146, subds. 2.

11. Divorce ⚷169

On appeal from an interlocutory divorce judgment and conclusions of law specifying no grounds but based on written findings showing extreme cruelty and desertion by the husband, appellate court considered the judgment grounded on extreme cruelty and desertion, since both judgment and conclusions are predicated on required findings. Rules on Appeal, rule 2(b) (2); Civ.Code, § 131.

12. Divorce ⚷252

In a divorce judgment grounded on extreme cruelty, court has right to apportion community property between the parties in such manner as under the circumstances it deems just. Civ.Code, § 146, subd. 1.

13. Divorce ⚷286

On appeal from a divorce judgment grounded on extreme cruelty where record showed no abuse of discretion, award of community property would not be disturbed.

14. Husband and wife ⚷249

If parties so intend, property taken by a husband and wife as joint tenants is community property.

15. Divorce ⚷249(3)

In a divorce judgment grounded on extreme cruelty, where husband admitted that real property held in joint tenancy was community property and evidence showed that a sum left the wife by her father was invested in the property and in a grocery business operated during the marriage, an award of joint tenancy property to the wife as community property was proper.

16. Insurance ⚷123

The insurable interest of a wife in her husband during marriage continues after divorce to the extent of enablling her to protect an expectancy as beneficiary existing at the time of divorce, where the expectancy has been purchased with community funds.

17. Divorce ⚷249(1), 286

Trial court in a divorce action has broad powers and wide discretion in settling the property rights of the parties, and its award will not be disturbed in absence of an abuse of discretion.

18. Divorce ⚷237

In framing a judgment for divorce on grounds of extreme cruelty, where a policy insuring life of husband to wife's benefit has accrued value purchased by premium paid from community funds during marriage, court has authority to permit alimony award within husband's ability to pay specifically for purpose of enabling wife to continue premiums for protection of her community property.

19. Divorce ⚷240(1), 252

Alimony award of $75 a month for support and maintenance, an additional monthly sum to enable wife to make payments of premiums on life insurance purchased with community funds, and community property division assuring $40 a month income to a wife earning $169 a month, was authorized under evidence.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Catherine Tompkins against Elmer E. Tompkins for divorce. From the interlocutory judgment, defendant appeals.

Affirmed.

Jack Flinn, of San Francisco, for appellant.

W. Urie Walsh, of San Francisco, Hugo P. Correll, of Hayward, and Charles J. Barry, of San Francisco, for respondent.

FINLEY, Justice pro tem.

This is an action for divorce wherein plaintiff, the wife, complains in two counts.

In the first cause of action she alleges extreme cruelty; in the second, desertion. In awarding her judgment from the bench the trial court specified that it was on the ground of defendant's desertion. In its written findings the court found that defendant had been guilty of extreme cruelty toward plaintiff and also that he had deserted and abandoned plaintiff, which desertion had continued for more than one year. In the conclusions of law and interlocutory judgment neither ground is mentioned. In the conclusions of law appears the statement that "Plaintiff is entitled to a decree of this Court * * * dissolving the bonds of matrimony between Plaintiff and Defendant," and in the interlocutory decree it is ordered, adjudged and decreed "That Plaintiff is entitled to a divorce from Defendant" without specifying the ground. From this interlocutory judgment, which also awarded plaintiff the major portion of the property owned by the parties, alimony in the sum of $75 per month, plus an amount sufficient to enable her to keep up the premiums on two insurance policies on the life of defendant, defendant appeals.

[1] In his opening brief defendant raises five points in support of reversal. Plaintiff has incorporated into her brief a motion to dismiss on the ground that defendant is in contempt of the trial court's order; has filed no stay bond and for this reason this appeal should not be considered. Failure of an appellant to comply with the judgment appealed from is not a ground for dismissal of the appeal.

No closing brief was filed by defendant. The points upon which he relies will be considered here in the order presented.

[2] The first point is that "there is neither direct evidence nor corroboration sufficient to support the findings that appellant was guilty of extreme cruelty toward respondent; nor was there sufficient evidence or corroboration to support the finding that appellant wrongfully inflicted upon respondent 'grievous physical and mental suffering.'" Defendant argues that nowhere in the testimony of plaintiff is there any evidence of physical abuses and therefore the finding of extreme cruelty must have been based solely on mental cruelty. A review of the testimony demonstrates this contention to be a fact, but the law does not confine the term "extreme cruelty" to acts of physical violence or bodily injury. Civil Code, section 94 defines extreme cruelty as "the wrongful infliction of grievous bodily injury, *or grievous mental suffering,* upon the other by one party to the marriage." (Emphasis added) Since the bodily injury or grievous menal suffering appears in the alternative it is obvious that either, if proven, would constitute extreme cruelty within the meaning of the statute.

[3] Conduct that would induce grievous mental suffering sufficient to constitute extreme cruelty depends upon the circumstances of each particular case, and the finding of a trial court based upon any reasonable analysis of the facts and circumstances as reflected by the evidence will not be disturbed on appeal. La Mar v. La Mar, 30 Cal.2d 898, 186 P.2d 678; Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1; see, also, Hansen v. Hansen, 86 Cal.App. 744, 261 P. 503, and McFall v. McFall, 58 Cal.App.2d 208, 136 P.2d 580.

[4] At the trial of this action defendant gave no testimony pertaining to the grounds of divorce. At the conclusion of plaintiff's case, defendant's counsel stated: "I will call the defendant, but we are not making any contention as to the facts of the divorce. It is only the matter of the property that is in dispute."

This failure did of course not relieve plaintiff of the duty of making out her case, for in a divorce action the grounds for divorce even though admitted must still be established by competent evidence. Civil Code, sec. 130; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L.R.A., N.S., 45; Avery v. Avery, 148 Cal. 239, 82 P. 967; Andrews v. Andrews, supra.

Plaintiff testified that the defendant "had been staying out nights and not coming in"; that, in the month before the separation she "found he was with another woman"; that he (defendant) said he wanted a divorce and would leave her everything if she would let him have a divorce; that she declined; that he continued "staying out"; that she pleaded with him; that one night in April (1943) he stayed out and she remonstrated with him; that the next day "he went to work and never came back after that, except two weeks later he came home to get his clothes." The plaintiff further testified that she had seen defendant with another woman; that two days after defendant left the home, plaintiff went to the other woman's house at about 6:00 a. m. and waited outside, and that at 7:00 a. m. the defendant and the other woman came out of the house and that the latter waved goodbye to the defendant; that the eldest daughter was with her at the time and waited with her. When asked how defendant's conduct affected her, the plaintiff said: "Well, after living with somebody for twenty years, you can imagine." She stated further that she could not sleep or eat and that she lost thirty pounds in weight.

[5-6] This evidence stands unrefuted. There would be little virtue in discussing its adequacy for it can be accepted as a matter of judicial knowledge that any concept of the marriage relationship which would sanction such conduct and attribute to the offended party no mental suffering and anguish, would be callous indeed and quite at variance with commonly accepted standards. We hold this evidence to be substantial and sufficient to constitute extreme cruelty.

[7-9] Furthermore, it is not necessary that all of the acts of cruelty charged by the aggrieved party be corroborated. Where a number of charges have been made corroboration of a single act may be sufficient. McGann v. McGann, 82 Cal. App.2d 382, 186 P.2d 424; Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99; Keener v. Keener, supra. Moreover, the rule requiring corrorboration is not so strictly applied in contested divorce actions as it is in actions where a decree is sought upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. McGann v. McGann, supra; Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804; Ungemach v. Ungemach, supra; Serns v. Serns, 70 Cal. App.2d 527, 161 P.2d 417. In the present case the corroborating witness was plaintiff's daughter. She testified that she was with her mother on the occasion when she saw defendant and the other woman come out of the woman's house together at 7:00 a. m., at which time the latter waved goodbye to defendant. We hold this corroboration to be sufficient.

[10] The second point raised by defendant is that the division of the community property is contrary to law. In the findings of fact the trial court describes certain property as community property and sets the bulk of the same over to plaintiff. Defendant argues that: "Conceding that plaintiff is entitled to an interlocutory decree on the grounds of defendant's desertion, it therefore becomes incumbent upon the Court to equally divide the community property of the parties. (Civil Code, 146, Subd. (2).)" There is no merit to this contention. Regardless of what the court said and of the minute order made at the time of trial, the formal written findings signed by the court supersede the control in those cases where such findings are required. Rules on Appeal, Rule 2(b) (2); Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279; Silva v. Mercier, — Cal.App.2d —, 187 P.2d 60. Findings are required in a divorce action. Civil Code, sec. 131; La Mar v. La Mar, supra.

[11-13] The written findings here set forth that defendant is guilty of both extreme cruelty and desertion. The interlocutory decree itself does not mention or specify either ground but this is unnecessary since the conclusions and the judgment are predicated upon the written findings of fact and it must be considered that the judgment rests upon both extreme cruelty and desertion. Where extreme cruelty is

a ground the trial court has the legal right to apportion the community property between the parties in such manner as under the circumstances it deems just. Civil Code, sec. 146, subd. 1; Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65; Quagelli v. Quagelli, 99 Cal.App. 172, 176, 277 P. 1089; Falk v. Falk, 48 Cal.App.2d 762, 770–772, 120 P.2d 714; Crouch v. Crouch, 63 Cal. App.2d 747, 756, 147 P.2d 678. In the absence of a showing of an abuse of discretion, which we cannot say has been shown here, the trial court's award of the community property will not be disturbed upon appeal. Shapiro v. Shapiro, 127 Cal.App. 20, 27, 14 P.2d 1058.

[14, 15] Defendant's third point is that the trial court exceeded its jurisdiction in awarding joint tenancy property to plaintiff as community property. The fact is, however, that even though the real property awarded by the trial court to plaintiff did stand in the names of the parties as joint tenants, the complaint alleges and the answer admits that it is community property. There is no evidence in the record to the contrary. If the parties so intend, property taken by a husband and wife as joint tenants is community property. La Mar v. La Mar, supra; Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; Andrews v. Andrews, supra. In this connection it is also to be noted that about $2,000 left to plaintiff by her father was invested by the parties in this property and in the grocery business operated by defendant during the marriage and which was sold on April 7, 1946. Since defendant in his answer to the complaint admits the real property to be community property its treatment as such by the trial court was proper.

[16] The fourth point urged by defendant is that the court erred in ordering him to maintain premium payments on two life insurance policies wherein he is named as the insured and plaintiff as beneficiary. The order made was not that defendant should pay these amounts directly to the insurance companies, but that he should deliver them to plaintiff for the purpose of paying the premiums. Defendant cites Gelfand v. Gelfand, 136 Cal.App. 448, 29 P.2d 271, for the proposition that upon the dissolution of the marriage relation the insurable interest of the wife on the life of the former husband "does not exist." This does not mean that her rights are absolutely extinguished for immediately thereafter appears the following language 136 Cal.App. at page 455, 29 P.2d at page 274: "This, however, does not foreclose her right or claim to her interest in any property which may have been used in the payment of premiums, which right we think the court is empowered to determine and may cause a defendant to make compensation out of his separate property for the benefit of the wife to the extent that her community right has been invaded * * *."

The beneficiary under the policy referred to in the Gelfand case was not the wife but a third party. If upon divorce a wife is entitled to restitution in the amount of her community interest in premiums paid by her husband on a policy wherein she is not beneficiary, it is only reasonable that a wife should be entitled to protect or salvage her community interest in a policy on the life of her husband wherein she is named as beneficiary and on which the premiums have been paid from community funds. In the case of Phoenix Mut. Life Ins. Co. v. Birkelund, 29 Cal.2d 352, 175 P.2d 5, the Supreme Court specifically recognizes that the insurable interest of a wife in her husband during the marriage may continue thereafter to the extent at least of enabling her to protect her existing expectancy as beneficiary at the time of divorce where this expectancy had been purchased with community funds.

[17, 18] The trial court in a divorce action has broad powers and wide discretion in settling the property rights of the parties. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751; Scheibe v. Scheibe, 57 Cal. App.2d 336, 134 P.2d 835. This power is sufficiently extensive to permit an award of alimony within the husband's ability to pay, for the specific purpose of permitting a wife to protect her interest in the community property. This would encompass the right to protect her expectancy under a life insurance policy wherein her divorced

husband is the insured and she is beneficiary, particularly where the policy has an accrued value purchased by premiums paid from community funds during the marriage. Phoenix Mut. Life Ins. Co. v. Birkelund, supra.

[19] The final point for consideration concerns the trial court's award of alimony in addition to the insurance premium payments just referred to. This award was in the sum of $75 per month for plaintiff's support and maintenance. Defendant contends that the trial court abused its discretion in making such an award where the evidence discloses that the major portion of the community was awarded to plaintiff; that she will have an income of $40 per month from this property; that she is employed and earns $169.00 per month; and that defendant is not working and has not worked since the sale of his grocery business in April, 1946.

According to his own testimony defendant had only about $500 at the time of trial and had no interest in any property or estate other than that considered by the trial court here. Plaintiff admitted that she was employed and that her salary was $169 a month. The fact that she would receive $40 a month as income from the real property awarded by the court was not disputed. Defendant's position is that in the light of this evidence the order made by the trial court provided alimony payments in excess of plaintiff's needs and defendant's ability to pay.

Plaintiff's reply to this contention is that a guilty party cannot avoid the responsibility for payment of alimony by the simple expedient of avoiding employment, or in other words, refusing to work.

Defendant testified that he was then living in Sonoma and had moved there for his health. He stated that he had bronchial trouble; that San Francisco was "terrible for it"; and that he had been living in Sonoma for about six months. He also stated that he was under a doctor's care until he "moved up the country" but had not been since that time and had only been back to the doctor once. No other showing was made touching upon the state of defendant's health, his inability to secure employment or to transact business. We must therefore hold that an award of general alimony of $75 per month, plus the additional amounts required to pay the insurance premiums, was not an award in excess of defendant's ability to pay were he to make a reasonable effort. See Merritt v. Merritt, 220 Cal. 85, 29 P.2d 190.

There is no testimony in the record directed to plaintiff's need for the alimony award made by the trial court for current living expenses. There was, however, testimony concerning a balance of $5,814 yet remaining due on the family home in San Francisco, awarded by the court to plaintiff. In the case of Bowman v. Bowman, supra, the Supreme Court held that alimony payments ordered to be made for the purpose of paying off a mortgage on a house and lot originally owned by the husband and wife as joint tenants, but which became the separate property of the wife before divorce by quitclaim from her husband, were proper. In view of this holding we cannot say that the testimony here was insufficient to support an inference that plaintiff was properly in need of the $75 per month awarded for her support and maintenance which would include safeguarding the real property awarded to her. Such matters rest in the sound discretion of the trial court. Scheibe v. Scheibe, supra, Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868, and will not be disturbed upon appeal in the absence of a clear showing of an abuse thereof which we hold has not been shown here.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

HENIGSON v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 15771.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1947.

Hearing Granted Feb. 19, 1948.

1. Master and servant 🔑14½

Where owner of moving picture agency transferred to general manager of agency an interest in and to the owner's right to participate in the profits, without notice to the labor commissioner of the arrangement and contract as required by statute, and without commissioner's consent thereto, owner's license to operate the agency immediately became void, and all contracts of the owner, including the contract transferring such interest to general manager, were void and unenforceable. Labor Code, § 1595.

2. Contracts 🔑138(1)

A void contract or one against public policy or against the mandate of a statute cannot be used as the foundation of an action.

3. Master and servant 🔑14½

Statute providing that if any licensee sells, transfers or gives away any interest in or right to participate in profits of employment agency without Labor Commissioner's consent, agency's license shall immediately become void, was not rendered inapplicable to contract transferring an interest in moving picture agency from owner to general manager, because contract provided for payment of half of all "receipts and revenue" rather than profits, since such revenue included profits. Labor Code, § 1595.

4. Master and servant 🔑14½

The legislature's intent in adopting statute providing that if any licensee transfers any interest in or right to participate in profits of employment agency without Labor Commissioner's written consent, license of agency shall immediately become void, was to prevent an agent from evading statutes requiring applicants for a license or for a renewal of a license to state the names of those financially interested in the agency. Labor Code, §§ 1582(e), 1586, 1587, 1595.

5. Contracts 🔑138(1, 4)

Where a contract is void by reason of failure of parties to comply with terms of statute under which it purports to have been made, no claim can be enforced under it, and one of contracting parties is not estopped from denying validity of contract.

6. Master and servant 🔑14½

The alleged fact that general manager of moving picture agency had a license would not validate a contract between him and the owner of the agency, that violated statute providing that if any licensee transfers any interest in or right to participate in profits of employment agency without Labor Commissioner's written consent, license of employment agency shall immediately become void. Labor Code, § 1595.

7. Executors and administrators 🔑202(1)

Where contract between owner of moving picture employment agency and general manager for payment to general manager of half of revenue from agency, was void under statute because made without written consent of Labor Commissioner as required by statute, general manager was not entitled to recover on that contract from owner's estate on ground that the estate would be unjustly enriched. Labor Code, § 1595.

8. Contracts 🔑138(1)

A void contract is unenforceable, and the doctrine of unjust enrichment will not lift the contract above the level on which it has been cast by reason of its illegality.

9. Contracts 🔑105

Where a statute prohibits the doing of an act, the act is void even though the statute does not expressly pronounce it so.

10. Contracts 🔑105

A statute prohibiting the making of contracts of a certain character, except in a prescribed manner, ipso facto makes them void if made in any other way.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action for declaratory relief by Henry Henigson against the Bank of America National Trust & Savings Association, a corporation, and others, to determine plaintiff's rights under a contract between plaintiff and defendants' testator. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Loeb and Loeb and Herman F. Selvin, all of Los Angeles, for appellant.

Roth & Brannen and Frank M. Gunter, all of Los Angeles, for respondents.

WILSON, Justice.

Appellant brought this action for declaratory relief to determine his rights under a contract entered into between him and Myron Selznick about December 8, 1941. The agreement was reduced to writing in May, 1942, but was never signed by the parties. After the commencement of the action Selznick died. Respondents Bank of America National Trust & Savings Association and two individuals were appointed executors of his estate. Appellant filed a claim with the executors setting out his contentions as to his rights under the contract. The claim was rejected. The executors were substituted as defendants and appellant filed a supplemental complaint alleging the matters contained in the original complaint, the appointment of the executors and the filing and rejection of his claim. Judgment was ordered that appellant is not entitled to recover under the contract, from which judgment he has appealed.

In his lifetime Selznick conducted the business of motion picture agent and representative, licensed under the provisions of the Labor Code relating to employment agencies. Secs. 1550 et seq. About December 8, 1941, Henigson was employed by Selznick to render services in the latter's agency business and he thereafter performed duties as vice president and general manager of the business. The agreement was oral at the beginning of their relationship. About May 2, 1942, they arrived at an understanding as to the terms and conditions under which Henigson was to perform his services and the compensation he was to receive. A draft of the agreement was prepared but was not signed, although it appears that the parties operated under it. Appellant contends that it truly represented the terms on which they had agreed and for the purpose of this decision we shall treat it as a binding contract.

By the terms of the agreement Selznick engaged Henigson to render services in an executive capacity and to compensate him as follows: (a) A fixed compensation of $300 per week; (b) as contingent compensation "one half (½) of all sums of money or other consideration, in any form, received directly or indirectly by us, or by Myron Selznick, individually, or by any of our affiliated or associated enterprises or companies, from any deal relating either directly or indirectly to a so-called 'independent set-up'. For convenience Myron Selznick, individually, and/or any of our affiliated and/or associated enterprises or companies are hereinafter jointly and severally referred to as 'Selznick'. By an 'independent set-up' as that term is used herein is meant any deal or arrangement as a result of which there will be produced or financed or distributed a motion picture and from which deal or arrangement there will accrue to ourselves or to Selznick sums of money, proceeds, bonuses, shares of profit, or other consideration, other than the usual commissions normally payable to us as commission by our clients." (c) Selznick guaranteed that Henigson's contingent compensation should amount to not less than $200 per week "as a non-repayable advance against such contingent compensation."

The agreement provided that the contingent compensation should be computed on an annual basis; the aggregate compensation payable was not to exceed $104,000 per annum; in computing the amount of contingent compensation no deduction was to be made for Selznick's ordinary and current expenses connected with the operation of the agency business or for extraordinary legal or other expenses incurred by Selznick in connection with independent setups unless Henigson had been consulted with respect to the incurring of such expenses and had consented thereto; if Henigson were required to render services outside the City of Los Angeles he was to receive his expenses in addition to his fixed and contingent compensation; while rendering services in and around Los Angeles he was to receive an expense allowance of not to exceed $100 per week; the agreement was deemed to have commenced January 1, 1942; it might be terminated by either party at any time; notwithstanding such termination Henigson's right to contingent compensation should extend beyond the date of termination and until Selznick had received all commissions and other considerations in any form from all independent setups.

Henigson performed services under the agreement until December 31, 1942, when he terminated his employment with the consent of Selznick. There was no claim on the part of Selznick during his lifetime nor on the part of the executors that Henigson had failed to perform his duties in a manner satisfactory to Selznick.

In the absence of any evidence on the subject the court found (1) that notice of the employment of Henigson by Selznick or notice of the agreement was never given to the Labor Commissioner, (2) that such employment was never approved by the commissioner, (3) that an application for a license was never filed stating that Henigson had any interest as a profit sharer in the operation of the agency, and (4) that no license was issued to Selznick or to Henigson, or to both of them, to carry on the agency business. The court further found that although Henigson was employed by Selznick in an executive capacity his position was not different from that of any other of Selznick's employees.

As conclusions of law the court declared (1) that from the time of making the employment agreement on May 2, 1942, Selznick had no license from the Labor Commissioner as required by the laws of California to carry on the agency business that he did in fact carry on after that date; (2) that because the business was not being lawfully conducted during the period in which Henigson was its general manager no valid rights, claims or interests were acquired by Henigson during that period to the anticipated fund from which Henigson, if the agreement had been valid, would have been entitled to receive one half as the contingent compensation referred to in the agreement; (3) that the employment agreement between Selznick and Henigson had been terminated and that Henigson had no claim or valid right or cause of action under it against the estate of Selznick or the executors thereof. The judgment rendered was in accord with the conclusions of law.

Appellant contends that the court erred in concluding that there was no valid basis for any fund out of which to pay Henigson's "contingent compensation." (Henigson had received $500 per week for the year 1942, this being the amount of the salary plus the nonrepayable advance against the contingent compensation guaranteed by Selznick, amounting to a total of $26,000.) Two additional points are argued in the briefs but appellant concedes that they are not open to him if the trial court is sustained on the point above mentioned.

The determination of the question rests upon the applicability of certain provisions of the Labor Code to which we shall refer, especially on the construction to be placed on section 1595 and the pertinence of that section to the contract. Section 1595 reads as follows: "If any licensee sells, transfers, or gives away any interest in or the right to participate in the profits of the employment agency without the written consent of the Labor Commissioner the license of the employment agency shall immediately become void and thereupon be surrendered to the Labor Commissioner."

[1, 2] By the contract Selznick transferred to Henigson an interest in and to the right to participate in the profits of the agency. The Labor Commissioner was not notified of this arrangement and did not give his consent thereto and Selznick's license therefore immediately became void. Since the agency license was void it follows that any act of Selznick purporting to have been performed as an agent and any contract entered into by him as a purported agent or concerning the agency business was void, including his contract with Henigson. A void contract or one against public policy or against the mandate of the statute cannot be used as the foundation

of an action. Hooper v. Barranti, 81 Cal. App.2d 570, 184 P.2d 688.

[3] Appellant contends that since the contract between Selznick and Henigson says nothing concerning profits but states that one half of all receipts and revenue received by Selznick from independent setups should be payable to Henigson, the latter provision means gross revenue and receipts rather than profits and consequently is not forbidden by section 1595. This contention overlooks the fact that gross revenue includes all income, profits as well as operating expenses, and that the division of or the right to participate in the gross revenue or receipts of the agency necessarily effected a pro tanto division of or participation in the profits. The greater the withdrawal of gross receipts or revenue the less profits remaining.

Section 1582, subdivision (e), of the Labor Code requires the written application for a license to state the names and addresses of all persons, except bona fide employees on stated salaries, financially interested either as partners, associates or profit sharers in the operation of the agency. Section 1586 provides for the renewal of licenses on March 31 of each year, and section 1587 contains the same provisions relating to applications for renewal as are in section 1582(e) concerning original applications. Henigson was not an employee whose only compensation was a stated salary. He received a stated salary but under the agreement it was to be augmented by the contingent compensation of one half of all considerations received by Selznick from so-called "independent setups."

[4, 5] The palpable intent of the legislature in adopting section 1595 was to prevent an agent from evading sections 1582 (e) and 1587 through obtaining a license for himself and then entering into a contract with another person which he would have been required to disclose if it had been in existence when he obtained an original license or a renewal. Selznick did just what section 1595 was designed to prevent. He had entered into his oral arrangement with Henigson in December, 1941. His license was renewed in March, 1942. The contract was reduced to writing (but not signed) in May, 1942. Never did he reveal to the Labor Commissioner that Henigson had any right whatsoever to a portion of the contingent compensation payable to Selznick in connection with the independent setups. When a contract is void by reason of the failure of the parties to comply with the terms of the statute under which it purports to have been made no claim can be enforced under it (Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 90, at page 91, 109 P.2d 650) and one of the contracting parties is not estopped from denying the validity of the contract.

The case of Warner v. Marchetti, 52 Cal. App.2d 172, 125 P.2d 838, does not sustain appellant's position. In that case a contract between a talent scout and an employment agent was upheld as not being in violation of section 1595 or of subdivision (e) of section 1582 of the Labor Code on the ground that the talent scout was an independent contractor whose work was completed when he introduced a potential artist to the agent; he was not a profit sharer, partner or associate in the business and had no right to participate in the profits.

[6] In the absence of a finding to the contrary it will not be presumed, as contended by appellant, that he was licensed. In fact there is no suggestion or intimation to that effect either in the record or in the briefs. Even though he had had a license his contract would not thereby be validated. Section 1595 requires the consent of the Labor Commissioner to every transfer of an interest in the profits of an agency and no exception is made of a transfer to another licensed agent.

[7-10] Appellant contends that if his claim is rejected and the executors are permitted to avoid the payment of his contingent compensation the estate will be unjustly enriched to the extent of the amount that Selznick agreed to pay him. Appellant must suffer whatever penalties result from the invalidity of his contract. He was acting in an executive capacity in the Selznick organization. In view of the terms of the contract and of the duties to be performed by him it must be assumed that he had had experience in the motion picture industry and in agency business.

He is presumed to have known the law and to have been cognizant of the requirements of the Labor Code to which we have referred. Since he was to receive a large profit from the contract and since he was employed in an executive capacity he should have seen to it that the law was complied with and that the commissioner's approval of the contract was obtained. A void contract is unenforceable. Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 90, 109 P.2d 650. The doctrine of unjust enrichment will not lift it above the level on which it has been cast by reason of its illegality. Where a statute prohibits the doing of an act the act is void even though the statute does not expressly pronounce it so. A statute prohibiting the making of contracts of a certain character except in a prescribed manner ipso facto makes them void if made in any other way. Smith v. Bach, 183 Cal. 259, 262, 191 P. 14.

It is unnecessary to refer to the other points raised in appellant's briefs since he has conceded that they are not open for consideration unless we agree with him on the question hereinbefore discussed.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 950

HALEY et al. v. BAY CITIES TRANSIT CO.

Civ. 15898.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1947.

1. Trial 🔑28(1)

The judge should participate in a view with the jury.

2. Appeal and error 🔑979(2)

The granting of a new trial for insufficiency of the evidence will not be disturbed except for a manifest abuse of discretion.

3. Appeal and error 🔑979(2)
New trial 🔑71

Where there is a substantial conflict in the evidence upon disputed issues which are material to the determination of the question of liability, the trial court may exercise its powers to set aside the verdict of the jury and order new trial, and under such circumstances its order will not be disturbed on appeal.

4. New trial 🔑71

Where there were substantial conflicts in the evidence and the court had photographs of place where pedestrian was allegedly struck by bus and of the vicinity, granting of defendant's motion for new trial for insufficiency of evidence was not an abuse of discretion though trial judge did not participate with the jury in making two views.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Marie Jean Haley against Bay Cities Transit Company for personal injuries sustained when struck by motorbus owned and operated by defendant, and action by James W. Haley, husband of the principal plaintiff, for consequential damages. From an order granting the defendant's motion for a new trial on the ground that the evidence was insufficient to support the verdicts and judgments for plaintiffs, the plaintiffs appeal.

Affirmed.

Birger Tinglof, of Los Angeles, for appellants.

Reginald I. Bauder, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiff Mrs. Haley sought damages for personal injuries sustained by her when she, a pedestrian, was struck by a motorbus owned and operated by the defendant. Plaintiff Mr. Haley, her husband, sought consequential damages. The jury rendered two verdicts—one for the wife and one for the husband, and judgments were entered thereon. Defendant made a motion for a new trial on the ground, among others, that the evidence was insufficient to justify "the verdict and judgment." The court granted the motion upon the ground that the evidence was insufficient to support "the verdict and the judgment."

Plaintiffs appeal from the order granting the motion for a new trial, and contend that the trial court abused its discretion in granting the motion.

Plaintiffs' case was based on the alleged negligence of the bus driver in swerving suddenly into the curb in such a way that a part of the body of the bus extended over the curb and struck Mrs. Haley, who allegedly was standing on the sidewalk near the curb.

The accident occurred in Santa Monica on October 19, 1945, about 8:15 a. m. on Santa Monica Boulevard (which extends in an easterly and westerly direction) about 21 feet east of the southeast corner of the intersection of Santa Monica Boulevard and Fourth Street. There is a marked crosswalk, 21 feet wide, extending across Santa Monica Boulevard at the east entrance of the intersection. The bus was 21 feet in length. The bottom of the floor of the bus and the bottom of the right front step were about 12 inches above the surface of the street, and the right front corner of the bus extended about 10 inches beyond the right side of the right front tire. The south curb of Santa Monica Boulevard extended 6 inches above the surface of the street.

Plaintiff Mrs. Haley testified that on the day of the accident she had alighted from a bus (not the one here involved) at the east side of Fourth Street a few feet south of said intersection; that she then walked on the east sidewalk of Fourth Street to the south curb of Santa Monica Boulevard, and stopped there at a point on the curb approximately even with the east white line of the pedestrian crosswalk which is on the east side of the intersection; that she had intended to cross to the north side of Santa Monica Boulevard to wait for another bus which would take her in a westerly direction; that she was standing on the south curb 2 or 3 inches from the edge of it and no part of her body extended beyond that curb; that she had a bundle, containing a dress and a pocketbook, under her arm; that she looked for traffic on Santa Monica Boulevard; that she saw the bus, which is here involved, to her left in the middle of the intersection traveling about 20 miles an hour in an easterly direction on Santa Monica Boulevard about 7 or 8 feet north of the south curbline; that she watched the bus as it came toward her, and it was traveling faster as it approached her than it was traveling when she first saw it; that when it was 10 or 15 feet from her, it "swung in all of a sudden" toward the curb where she was standing and she "felt a swish," and the front part of the bus struck her on her left shoulder and arm; that the bus carried her into the street and "knocked" her unconscious.

A witness, called by the plaintiffs, testified that prior to the accident she was standing on the south curb of Santa Monica Boulevard at a point about the middle of said pedestrian crosswalk (that is about 11 feet west of the place where Mrs. Haley was standing); that she (witness) had intended to cross to the north side of Santa Monica Boulevard and then walk easterly to her place of business on Fifth Street; that as she stood on the curb she noticed Mrs. Haley who was standing on the curb at a point about 11 feet east of the witness; that the witness looked for traffic on Santa Monica Boulevard and saw the bus, which is here involved, crossing Fourth Street in an easterly direction and about 10 feet north of the south curbline of Santa Monica Boulevard; that when the hood of the bus was passing the witness the bus swerved toward the curb and went faster; that the bus came so close to the witness and at such speed it frightened her; that the front end of the bus came within 6 inches or one foot of the curb at the point where the witness was standing; that she could hear the tires scrape against the curb where Mrs. Haley was standing, and as that happened she saw Mrs. Haley standing on the curb, and then Mrs. Haley seemed to double over and be carried along with the bus; that Mrs. Haley's leg went under the right rear wheel of the bus; and that Mrs. Haley did not step into the street.

The bus driver testified that as he crossed the intersection of Fourth Street and Santa Monica Boulevard he saw pedestrians on the sidewalk at the southeast corner; that, among them, there were two ladies standing toward the edge of the south curb on Santa Monica Boulevard, one of whom was Mrs. Haley who was looking toward the east; that she did not turn her head and look toward the witness at any time; that he could see her plainly, and he watched her practically all of the time from the time he first saw her, and she did not move or make any attempt to go into the street; that the bus was traveling about 20 miles an hour and was 6 to 8 feet north of the curb; that it was an "old pusher type" bus, and not used on "a regular run"; that he did not know whether he angled toward the curb, but he was then in the process of reducing his speed to make a stop near the "bus stop" which was between Fourth and Fifth Streets on Santa Monica Boulevard (the bus stop was about 75 feet east of the place where Mrs. Haley had been standing); that the first time he knew anything had happened was when he heard a thud on the side of the bus, toward the right rear of it; that he already had his foot on the brake and was making the stop, and he then stopped as quickly as he could; that he found the plaintiff on her knees in the street at the right rear corner of the bus with her right hand up on the bumper; and that at no time, from the time he crossed Fourth Street until the bus came to a stop did any part of it touch the curb. He also testified that he started angling toward the curb when he was about 30 feet west of the east entrance to the intersection; and that he stopped the bus instantly after the accident—within approximately 3 feet.

A police officer, called by defendant, testified that he went to the scene of the accident about 8:15 a. m. in response to a call; that he made measurements of the distance between the right rear corner of the bus and the south curb on Santa Monica Boulevard; that the extreme right tip of the rear bumper was 3 feet from the curb and 6 feet east of the east white line of the crosswalk; and he "estimated" that the nearest portion of the right front of the bus was approximately 18 inches from the curb.

A witness, called by defendant, testified that he had made certain tests with the bus to determine the "overhang [over the curb] of the bus" when placed at different angles with relation to the curb, and he stated his computations as to how far parts of the bus extended over the curb when the bus was placed in certain positions; that when the right front and right rear tires were parallel with and against the curb, the body of the bus, at a point 4½ feet above the sidewalk, extended 12 inches over the curb; that when the bus was at the curb at an angle of 5 degrees, the body of the bus, at a point about 2½ feet above the sidewalk, extended about 2 inches over the curb, and when the bus was at an angle of 20 degrees, the body at that point, extended 6 inches over the curb.

The parties stipulated that the jury might visit the scene of the accident, and that the bus, which was involved herein, might be placed at various angles and positions at the scene in the presence of the jury.

After the parties had rested, and before the instructions were given, the court made an order, pursuant to the stipulation, that the jury visit the scene of the accident. Thereupon, the jury, counsel for both parties, reporter, and bailiff, went to the scene of the accident, and there the bus was placed assertedly in various positions which, according to the evidence, it had been in at the time of the accident, and assertedly it was driven along the same route and was stopped at the same place and in the same position as, according to the evidence, it had been driven and stopped at the time of the accident. The judge did not go to the scene of the accident.

The next morning the court granted defendant's request to reopen the case to call another witness. That witness, who was a transcriber for the shorthand reporter in this case, testified that she had seen the accident from an east window in her office (on the 12th floor of a building on the north side of Santa Monica Boulevard and about 1½ blocks west of the place where the accident occurred--which office is on the same floor of the same building where the courtroom is located); that she saw plaintiff's body come in contact with the bus, and at that time plaintiff was standing in the street; that the witness saw the plaintiff put her right foot into the street and transfer her weight onto her right foot; that as the bus passed by, her coat "sort of blew" out and plaintiff "sort of" fell under the back of the bus; that no part of the bus come in contact with the curb; that when Mrs. Haley came into contact with the bus, the right front wheel of the bus was approximately 10 inches from the curb, and the right rear wheel was approximately 3 feet from the curb.

Thereafter the court granted plaintiffs' request that the jury be permitted to view the scene of the accident from the window from which the last witness said she saw the accident. The jury then went to the office of that witness, and the attorney for defendant went to the scene of the accident and stood at the point where plaintiff had testified she was standing when she was struck by the bus. While the attorney stood in that position, the bus here involved was driven and stopped on two occasions at the scene of the accident, assertedly in the same manner in which, according to the testimony of the bus driver, it was driven and stopped at the time of the accident. The jury viewed this demonstration from that window, but the trial judge was not present.

Appellants argue that since the trial judge was not present when the jury viewed the above-mentioned demonstrations, at the scene of the accident and from said office window, that he abused his discretion in granting the motion for a new trial, in that, he granted the motion without any knowledge or consideration of the demonstrative and autoptic facts.

[1] The trial judge should have been at the scene of the accident with the jury and should have viewed with the jury the demonstration that was made there, and he should have been present with the jury in the said office and should have viewed from there the second demonstration that was made at the scene of the accident. The appellants, however, made no objection to the absence of the trial judge when the demonstrations were made. The appellants do not contend that the trial judge's failure to observe the demonstrations with the jury constituted irregularity in the trial, but assert that the result of such failure was that the trial judge did not have the benefit of all the evidence or any of the most important evidence and was not in the same position the jury was in to consider and weigh the evidence, and therefore, that the granting of the motion for a new trial under such circumstances was an abuse of discretion.

The trial judge heard all the testimony and observed the witnesses. He also observed the map and the several photographs received in evidence and used by the witnesses while testifying. The photographs showed the bus, curb, street, crosswalk, bus stop, and the building from which the jury viewed the second demonstration. It thus appears that even though the trial judge did not view the demonstrations, which purported to be in accordance with the testimony of Mrs. Haley and her witness, all the other evidence was before him and he was in a position, aided by the map and photographs, to weigh and consider the possibility and probability of the bus being driven as stated by Mrs. Haley and her witness.

As above stated, the theory of appellants' case was that a part of the bus extended over the curb and struck Mrs. Haley. The trial judge said, as shown by his written opinion, that the uncontradicted evidence as to the place where the bus stopped after the accident "is all important and rather completely determines what actually occurred." That evidence was that when the bus came to rest the right rear of it was 6 feet easterly of and 3 feet northerly of the point on the curb where Mrs. Haley claims she was standing when she was struck, and that the right front end of it was 18 inches from the curb. The judge also said, "I do not think the bus could get into the position where it stopped and enroute project over the curb at all. The physical facts then alone call for a new trial." Even if it be assumed that the demonstration which purported to be in accordance with the testimony of Mrs. Haley and her witness was actually in accordance with such testimony and therefore refuted the judge's opinion that the bus could not have been operated as stated by them, the fact that such a demonstration could be made does not, of course, establish that the bus was in fact so operated at the time of the accident. As to the probability of the bus having been operated as Mrs. Haley and her witness stated, the trial judge said in his opinion that "Whatever the path of the bus may have been, I am convinced that at no time was any portion of the bus body over the curbline." Although the demonstration may have indicated that the judge erred in concluding that the bus could not be operated as stated by Mrs. Haley and her witness, it appears further from his opinion that he also concluded, irrespective of whether it could be demonstrated that the bus could be driven as Mrs. Haley and her witness stated, that no part of the bus did, in fact, extend over the curb when the accident occurred.

[2, 3] "The granting of a new trial on the ground of insufficiency of the evidence will not be disturbed except on a manifest and unmistakable abuse of discretion by the trial court." Imperial-Yuma etc. Credit Ass'n v. Shields, 74 Cal.App.2d 932, 935, 169 P.2d 671, 673. "[W]here there is a substantial conflict in the evidence upon disputed issues which are material to the determination of the question of liability, the trial court may exercise its powers to set aside the verdict of a jury and order a new trial; and that under such circumstances its order will not be disturbed on appeal." Bayley v. Souza, 55 Cal.App.2d 776, 778, 131 P.2d 584, 585. "When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing case.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party. * * * [Citing cases.]" Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010, 1012.

In the present case there were substantial conflicts in the evidence as follows: (1) As to where Mrs. Haley was standing—whether she was on the sidewalk or whether she had stepped into the street; (2) as to the route or path the bus traveled—whether or not the tire scraped the curb or was near it; (3) as to which way Mrs. Haley was looking—whether she was looking toward the bus or away from it; (4) as to whether the speed of the bus was being increased or decreased just before the impact; (5) as to whether Mrs. Haley was struck by the front or rear of the bus; and (6) as to how far the bus traveled after the impact—whether approximately 3 feet or 27 feet (the length of the bus plus 6 feet).

[4] The conflicts in the evidence herein were such that a verdict for the moving party would have been supported by the evidence. The trial court did not abuse its discretion in granting the motion for a new trial.

The order granting the motion for a new trial is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

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82 Cal.App.2d 916

McMANUS v. BENDLAGE.

Civ. 16113.

District Court of Appeal, Second District, Division 3, California.

Dec. 17, 1947.

Hearing Denied Feb. 9, 1948.

1. Judgment 🔑570(12)

Where judgment sustaining demurrer to amended complaint without leave to amend was reversed but action was thereafter dismissed for want of prosecution, judgment of dismissal was not res judicata.

2. Judgment 🔑720

A material question which was in issue in former action and was there judicially determined is conclusively settled by judgment therein, and is res judicata and may not be again litigated in subsequent action between same parties or their privies regardless of form issue may take in subsequent action. Code Civ.Proc. § 1908, subd. 2.

3. Judgment 🔑540

The validity of plea of res judicata depends on whether issue decided in prior litigation was identical with the one presented in action in question, whether there was a final judgment on the merits, and whether party against whom judgment is asserted was a party or in privity with party to prior litigation. Code Civ.Proc. § 1908, subd. 2.

4. Judgment 🔑585(1), 720

A prior judgment operates as a bar against a second action upon the same cause and also operates as an estoppel or conclusive adjudication in a subsequent action upon a different claim as to such issues in second action as were actually litigated and determined in first action. Code Civ.Proc. § 1911.

5. Judgment 🔑585(4)

A determination of issues presented by a cross-complaint is res judicata as fully as a determination in a separate action by defendant against plaintiff. Code Civ.Proc. §§ 1908, subd. 2, 1911.

6. Judgment 🔑622(1)

Plaintiff is estopped by adverse judgment from pleading same matter as set-off or counterclaim in separate action brought against him by former defendant. Code Civ.Proc. §§ 1908, subd. 2, 1911.

7. Judgment 🔑717, 725(1)

A determination in prior action as to relative rights and duties of party to contract in controversy is conclusively fixed by judgment in so far as such rights and duties were within issues raised and were actually or by necessary inference adjudicated. Code Civ.Proc. §§ 1908, subd. 2, 1911.

8. Judgment 🔑603

A successful defense in an action on one or more of a series of installments payable under a contract ordinarily does not bar actions on future installments where defense related merely to particular installments in suit, but where defense successfully set up in former action involves whole merits of underlying transaction, judgment is complete bar to subsequent actions to recover further installments. Code Civ.Proc. §§ 1908, subd. 2, 1911.

9. Judgment 🔑725(6)

A judgment in vendee's action for damages for fraud in inducement of a contract is res judicata, precluding subsequent action by vendor for money which vendee is obligated to pay under the contract. Code Civ.Proc. §§ 1908, subd. 2, 1911.

10. Sales 🔑170

Where provision of sales contract requiring delivery of secret formulæ and processes was condition precedent to performance by buyers, repudiation of provision by seller wiped out contract, discharging buyers from any of conditions to be performed on their part.

11. Judgment 🔑725(6)

Where seller brought action for payments allegedly due under contract for sale of secret formulæ and processes, and buyers cross-complained for damages on ground that consideration had failed and that contract was induced by fraud, judgment in favor of buyers released them from all obligations of contract.

12. Judgment 🔑622(1), 725(6)

Where seller brought action for payments allegedly due under contract for sale of secret formulæ and processes, and buyers cross-complaint for damages on ground of failure of consideration and on ground that contract was induced by fraud, judgment in favor of buyers adjudicated that formulæ were not secret and could not be delivered, and precluded subsequent action by seller for money under contract and estopped him from using same matter as a set-off.

13. Corporations 🔑617(2)

Where claim asserted by cross-complaint was assigned by corporation before franchise was suspended, assignment was not invalid because the franchise was suspended before judgment was obtained.

14. Assignments ⚿=22

Where assignment was of moneys owing by seller arising out of inability of seller to deliver secret formulæ and processes, and was not merely of a naked right to bring action for fraud unconnected with any property or thing which itself had a legal existence and value, assignment was not invalid on ground that claim was not assignable.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Bert F. McManus, doing business as the Mutual Credit Bureau, against Theodore J. Bendlage on a judgment, wherein defendant counterclaimed for moneys allegedly payable under terms of a contract. Judgment for plaintiff and defendant appeals.

Affirmed.

J. Merrill Levy, of Long Beach, for appellant.

Alvin P. Jackson and Robert W. Cooper, both of Los Angeles, for respondent.

VALLÉE, Justice pro tem.

Suit upon a judgment. In April, 1937, Bendlage, appellant-defendant, made a written contract with Kohlsaat and Krieger. Bendlage, in the contract, represented that he was the sole owner of secret formulæ and processes of manufacture of medicinal products known as "Vesodyne." He agreed to sell and deliver to Kohlsaat and Krieger the secret formulæ and processes, patent rights, trademarks, copyrights and trade names, all assets, books and records of his business which had been carried on under the name "Anthony Lily Co.," and its goodwill, together with all interest in and the right to use the name "Anthony Lily Co." and the sole right to manufacture the products. Kohlsaat and Krieger agreed to pay Bendlage therefor $1,500 when the contract became effective and three percent of net gross sales; and after six months from the date of the contract, not less than $30 per month for a period of six months, $50 a month for the next six months, $75 a month for the next six months, and $100 a month thereafter "on account of such royalties." The contract provided that payment of royalties should expire at the end of thirty-five years after the date of the agreement.

On September 7, 1938, Bendlage filed suit in the Superior Court of the County of Los Angeles against Kohlsaat, Krieger and Anthony Lily Co., referred to as the "first action." He alleged the making of the contract, the terms thereof, the delivery on April 20, 1937, to Kohlsaat and Krieger of "the secret formulæ to all of the above mentioned products"; that Anthony Lily Co. had been organized as a corporation and was selling and disposing of the products; and failure of the defendants to make the payments prescribed by the contract. In a second count Bendlage alleged that he was entitled to the immediate possession of the alleged secret formulæ and processes for the preparation of the compound "Vesodyne" and other items alleged to have been delivered to the defendants; that the defendants, without his consent, took possession of the property and retained the same to his damage; that he had demanded possession, which defendants had refused. He sought recovery of the payments and return of the alleged secret formulæ and processes and other items, and in the event possession could not be had, the sum of $5,000, the alleged value thereof. Kohlsaat and the corporation answered, admitting the contract, admitting demand upon Anthony Lily Co. for payments under the contract, and alleging that refusal of that company to comply with the demands was made conditional upon performance by Bendlage of his obligations to that company, denying that they were indebted to Bendlage, denying that they ever took possession of any of the secret formulæ or processes, alleging that refusal to re-deliver any property to Bendlage was made conditional upon the return to Kohlsaat of the consideration paid to Bendlage under the contract.

Kohlsaat and Anthony Lily Co. filed a cross-complaint in which they alleged that prior to the making of the contract Bendlage had represented: that the formulæ and processes for the manufacture of "Vesodyne" were "secret formulæ" known only to Bendlage and manufactured exclusively by him; that no other person knew the formulæ or processes or were manufacturing or selling the same, and other representations; that the representations were false, known by Bendlage to be false, or made as positive assertions of fact without any information with respect thereto; that the representations were a material consideration and inducement to Kohlsaat in entering into the contract; that he relied upon them and would not have made the contract had he known of their falsity; that Kohlsaat had made demand upon Bendlage for delivery of the secret formulæ and processes; that Bendlage had failed to do so; that Kohlsaat had paid Bendlage the $1,500 provided by the contract, had expended moneys in organizing Anthony Lily Co. and in the promotion and sale of the products; that Anthony Lily Co. had expended moneys in the promotion and sale of the products. The cross-complaint prayed for damages to Kohlsaat in the sum of $2,500 and to Anthony Lily Co. in the sum of $5,000.

In this "first action," the court found the making of the contract; that Bendlage had not delivered any secret formulæ as required by the contract; that none of the formulæ was secret; that the defendants had refused to comply with the contract but that the refusal was justified and was made conditional upon performance by Bendlage; that the defendants did not at any time become indebted to Bendlage in any sum, and that they were not indebted to him; that Bendlage was not entitled to any of the property he alleged he had delivered to the defendants; that the retention of what property had been delivered was "within the rights" of the defendants; that Bendlage had made the representations alleged in the cross-complaint; that they were false, known to Bendlage to be false at the time they were made; that they were made with the intent to induce Kohlsaat and Krieger to enter into the contract; that Kohlsaat and Krieger relied upon the representations and were induced thereby to enter into the contract and would not have done so had the representations not been made; that Kohlsaat and Krieger, shortly after the making of the contract, discovered the falsity of the representations and demanded of Bendlage that he deliver to them the secret formulæ and processes; that thereupon Bendlage promised to deliver the secret formulæ and processes but that at the time of the making of the promises "he knew that he could not do so"; that Kohlsaat had suffered damage in the amount of $2,500 and Anthony Lily Co. in the sum of $3,000. Judgment was against Bendlage on the complaint and for the cross-complainants upon their cross-complaint. The judgment was entered April 19, 1939, and became final.

[1] On January 7, 1941, Bendlage filed an action against Kohlsaat, Krieger and Anthony Lily Co., referred to as the "second action," praying for judgment that the contract of April 20, 1937, was in force, for an accounting and for other relief. A demurrer was sustained to an amended complaint without leave to amend. An appeal was taken from the judgment entered upon the sustaining of the demurrer. The judgment was reversed. Bendlage v. Kohlsaat, 54 Cal.App.2d 136, 128 P.2d 691. Thereafter the action was dismissed for want of prosecution. Contrary to the contention of respondent, this "second action" is not germane upon this appeal. A judgment of dismissal for want of prosecution is not res judicata. Lord v. Garland, 27 Cal.2d 840, 850, 168 P.2d 5.

On May 23, 1944, respondent, assignee of Kohlsaat and one Goldman, filed the complaint in the present action on the judgment rendered in the "first action." By amended answer, appellant Bendlage denied any indebtedness and set up a counterclaim for moneys alleged to be payable under the terms of the contract, amounting, so it is alleged, to $5,000. The cause was submitted to the trial court upon an agreed statement of facts. The statement of facts says that the court may take judicial notice of all pleadings and proceedings in the first and second actions; that Bendlage has not received any of the moneys to be paid under the contract except small amounts not material here; that on October 20, 1940, Bendlage made demand upon respondent's assignors for payment of these moneys;

that on October 28, 1940, the sheriff sold on execution all of the rights of Bendlage under the contract, crediting 5 cents on the judgment; that the corporate powers of Anthony Lily Co. were suspended on March 6, 1939, and were revived on September 13, 1946. It was further agreed that certain testimony could be considered as given, subject to objection, to the effect that in January, 1939, all assets of Anthony Lily Co. were assigned to Kohlsaat and Goldman, and that on December 6, 1946, Anthony Lily Co. ratified the assignment to Kohlsaat and Goldman. Plaintiff asserts title to the judgment under this assignment and ratification.

The objections to the evidence set forth in the agreed statement of facts were overruled. The court found that since July, 1937, Bendlage had not received any money pursuant to the contract; that no sums were or are due to Bendlage pursuant to the contract; that Bendlage owned no further rights under the contract; that the same issues involved in the counterclaim of Bendlage were decided on the merits in favor of respondent's assignors in the "first action"; that all of its rights in the judgment had been assigned by Anthony Lily Co. to Kohlsaat and Goldman, and by them to respondent; that the sums prayed for by respondent, less small amounts of no moment here, were due; that respondent is the owner of all rights of the company and Kohlsaat under the judgment. Judgment was for plaintiff-respondent.

Appellant contends that the court erred in its findings that the issues involved in the counterclaim were decided on the merits in the "first action"; that he is entitled to offset the amount which had accrued under the contract against respondent's judgment. He says that respondent's assignors, by not rescinding the contract originally and by suing for damages, elected to stand upon the contract; that consequently, the contract at all times has been in force and the amounts specified have been payable. Respondent says that the invalidity of the counterclaim in the present action was adjudicated in the "first action" adverse to appellant; that such adjudication is a bar to any right of appellant to offset the amount of the counterclaim against the judgment.

[2-9] It is fundamental that a material question which was in issue in a former action and was there judicially determined is conclusively settled by a judgment rendered therein and that such question is res judicata and may not again be litigated in a subsequent action between the same parties or their privies regardless of the form the issue may take in the subsequent action. Code Civ.Proc. sec. 1908, subd. 2; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 509, 258 P. 387; Andrews v. Reidy, 7 Cal.2d 366, 370, 60 P.2d 832. In determining the validity of the plea res judicata three questions are pertinent: Was the issue decided in prior litigation identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the judgment is asserted a party or in privity with the party to the prior litigation? Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892. A prior judgment operates as a bar against a second action upon the same cause and it also operates as an estoppel or conclusive adjudication in a subsequent action upon a different claim as to such issues in the second action as were actually litigated and determined in the first action. Code Civ.Proc. sec. 1911; Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916; Sutphin v. Speik, 15 Cal.2d 195, 201, 99 P.2d 652, 101 P.2d 497; Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 134 P.2d 242; Pomona College v. Dunn, 7 Cal.App.2d 227, 232, 46 P.2d 270. A determination of issues presented by a cross-complaint is res judicata as fully as a determination in a separate action by a defendant against a plaintiff. Lamb v. Wahlenmaier, 144 Cal. 91, 94, 77 P. 765, 103 Am. St. Rep. 66. One bringing a suit on a cause of action is estopped by the judgment therein from pleading the same matter as a setoff or counterclaim in a separate action brought against him by the former defendant. If the former judgment was rendered against him it is conclusive. Case v. Hardenbrook, 238 App.Div. 169, 263 N.Y.S. 825, aff'd 263 N.Y. 630, 189 N.E. 731; Brussell Sewing Machine Co. v. Gould-

Moody Co., Inc., 265 App.Div. 312, 38 N.Y. S.2d 687. A determination in a prior action as to relative rights and duties of a party to a contract in controversy is conclusively fixed by the judgment in so far as such rights and duties were within the issues raised and were actually or by necessary inference adjudicated. Price v. Sixth District Agricultural Ass'n, supra, 201 Cal. 502, 510, 258 P. 387; Wright v. Security-First Nat. Bank, 35 Cal.App.2d 264, 277, 95 P.2d 194. A successful defense in an action on one or more of a series of installments payable under a contract ordinarily does not bar actions on future installments where the defense related merely to the particular installment or installments in suit. Brix v. People's Mut. Life Ins. Co., 2 Cal.2d 446, 455, 41 P.2d 537; Jacoby v. Peck, 23 Cal. App. 363, 365, 138 P. 104. But, where the defense successfully set up in the former action involves the whole merits of the underlying transaction, the judgment is a complete bar to subsequent actions to recover any further installments. Launtz v. Russek Furniture Co., 247 Ill.App. 289; Stamler v. Weinberger, 109 N.J.L. 438, 162 A. 569. A judgment in a vendee's action for damages for fraud in the inducement of a contract is res judicata, precluding a subsequent action by the vendor for the money which the vendee is obligated to pay under the contract. Brunswig Drug Co. v. Springer, 55 Cal.App.2d 444, 449, 130 P.2d 758.

[10-12] The defenses and the allegations of the cross-complaint in the "first action" were failure of consideration and that the contract was induced by fraud. The effect of the judgment in that action was that appellant Bendlage had not delivered and could not deliver the secret formulae and processes. The judgment in that action determined that the formulae were not secret and could not be delivered. It was an adjudication that there had been a total failure of consideration. The judgment determined that Bendlage was not entitled to recover any of the moneys payable to him under the contract. It precluded a subsequent action by Bendlage for any money under the contract. It estopped him from using the same matter as a setoff. It is manifest that patent rights, trademarks, copyrights, trade names, books and records, if any, were of no value without the formulae and processes.

The provision of the contract requiring delivery of the secret formulae and processes was a condition precedent to the performance by respondent's assignors. Its repudiation by appellant effectively wiped out the contract. Alderson v. Houston, 154 Cal. 1, 13, 96 P. 884. The breach of the contract by appellant was a breach of the entire contract and discharged respondent's assignors from any of the conditions to be performed on their part. The contractual relation ceased to exist. Lassen Irrigation Co. v. Long, 157 Cal. 94, 95, 106 P. 409; Gold Min. & Water Co. v. Swinerton, 23 Cal.2d 19, 29, 142 P.2d 22. As it was adjudicated that respondent's assignors had not secured and could not secure the thing they had contracted for and which constituted the consideration for the contract, the judgment released them from all obligations of the contract. Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 178, 230 P. 2d 389; California Credit Etc. Corp. v. Goodin, 76 Cal.App. 785, 246 P. 121.

Whether the formulae were secret and whether they could be delivered could be litigated but once. Those questions were litigated in the "first action." They cannot become the subject of another lawsuit, defense or setoff. Lux v. Columbian Fruit Canning Co., 120 Kan. 115, 242 P. 656. It would be inconsistent in this case to admit evidence and to permit a decision which would have the effect of determining that the formulae were secret and could be delivered, when it was adjudged in the "first action" that they were not secret and could not be delivered. If appellant can offset today he can recover later-accruing installments tomorrow. The result would be that he would receive the fruits of the contract while respondent's assignors and respondent receive nothing. The finding that "the same issues involved in defendant's counterclaim were decided on the merits in plaintiff's favor" in the "first action" is not vulnerable.

[13, 14] Appellant also says that the assignment by Anthony Lily Co., to Kohlsaat

and Goldman was invalid because the company's franchise was suspended before it obtained the judgment. It was shown that the claim asserted by the cross-complaint was assigned before the franchise was suspended. Appellant contends, however, that the claim was not assignable. The assignment was not of a naked right to bring an action for fraud unconnected with any property or thing which itself had a legal existence and value, independent of the right to sue for fraud, as asserted by appellant. It was an assignment of moneys owing by Bendlage to the company arising out of the inability of Bendlage to deliver the secret formulae and processes. McCord v. Martin, 34 Cal.App. 129, 166 P. 1014. The determination that the assignment was valid is supported by the evidence.

Our conclusion that the judgment in the "first action" is res judicata and that the contract as a whole had been destroyed makes unnecessary consideration of other points made by appellant which go to questions of the validity of the execution sale and to the amount to be set off against the judgment.

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

WEST KEY NUMBER SYSTEM

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82 Cal.App.2d 933

OWEN v. CITY OF LOS ANGELES.

Civ. 15626.

District Court of Appeal, Second District,
Division 3, California.
Dec. 18, 1947.

Rehearing Denied Jan. 6, 1948.
Hearing Denied Feb. 11, 1948.

1. Municipal corporations 🔑767, 768(3)

Minor defects in city's sidewalks or streets will not necessarily make the city liable for injuries caused thereby.

2. Municipal corporations 🔑819(1)

In action against city by pedestrian for injuries sustained when pedestrian stepped off curb into hole in pavement, evidence sustained finding that hole which was from 2 to 3⅓ inches deep, about 4 to 6 inches wide, and from 9 to 11 inches in length, was a defective or dangerous condition within meaning of the Public Liability Law. St. 1923, p. 675.

3. Municipal corporations 🔑763(2)

In action against city by pedestrian for injuries sustained by pedestrian when she stepped off curb into hole in pavement while going into street to pet a cat, question was not whether city could reasonably anticipate that a woman would step into the street to pet a cat, but whether it was reasonably to be anticipated that pedestrians would step off curb in course of entering or leaving automobiles, crossing street at places other than crosswalk, or using the street for other purposes. St. 1923, p. 675.

4. Municipal corporations 🔑763(2)

A city's duty to keep streets in a reasonably safe condition for pedestrians is not limited to crosswalks and other areas most commonly used. St. 1923, p. 675.

5. Municipal corporations 🔑755(1)

Courts have the duty to see that liability of a city under the public liability law is not unjustly imposed, but it is not court's duty to lift any part of the just burden from the city and place it on individuals who use city's streets. St. 1923, p. 675.

6. Appeal and error 🔑996

The question, on appeal, whether a condition of a city's streets is defective or dangerous, is a question calling for application of the rule that, where there is room for difference of opinion among reasonable minds, the question is one of fact which is concluded by the implied finding of the verdict.

7. Municipal corporations 🔑819(6)

In action against city by pedestrian for injuries sustained by pedestrian when she stepped off curb into hole in pavement, evidence authorized finding by jury that city had actual knowledge of the condition of the street. St. 1923, p. 675.

8. Municipal corporations 🔑819(6)

Proof of the existence for a long period of time of a dangerous or defective condition of a city's street is sufficient to justify a finding of constructive notice to the city of the condition.

9. Municipal corporations ⚷819(6)

In action against city by pedestrian for injuries sustained when pedestrian stepped off curb into hole in pavement, evidence justified a conclusion that city had constructive notice of the condition of the pavement.

10. Municipal corporations ⚷805(2), 806(1)

Pedestrian's knowledge of the generally poor condition of pavement near her home made it her duty to proceed into the street with more care than would have been demanded if she had been without such knowledge, and it was her duty to look and step down, not casually, but carefully. St. 1923, p. 675.

11. Municipal corporations ⚷819(7)

In action against city by pedestrian for injuries sustained when pedestrian stepped off curb into hole in pavement, evidence warranted implied finding by jury that pedestrian was not negligent in failing to see the hole in the pavement.

12. Municipal corporations ⚷821(23)

In action against city by pedestrian for injuries sustained by pedestrian when she stepped off curb into hole in pavement, it was a question of fact for jury whether pedestrian's knowledge of the generally poor condition of the surroundings was such as to charge pedestrian with assumption of the risk with respect to the particular hole into which she stepped.

13. Municipal corporations ⚷821(23)

Pedestrian was not guilty of contributory negligence as a matter of law because, at time of injury resulting from stepping into hole in pavement, she had forgotten existence of a general dangerous condition of pavement in the locality. St. 1923, p. 675.

14. Appeal and error ⚷1068(1)
Municipal corporations ⚷822(2)

In action by pedestrian against city under the Public Liability Law for injuries sustained by pedestrian when she stepped from curb into hole in pavement, giving of instructions on general negligence that broadened city's liability from one arising out of the toleration of physical conditions of city property to one encompassing other negligent omissions and acts of city's agents was error, but not prejudicial, where verdict was returned against city with implied findings establishing a factual basis for city's statutory liability. St. 1923, p. 675.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Mabel E. Owen against the City of Los Angeles to recover for injuries sustained by the plaintiff when she stepped off curb into hole in pavement. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Victor P. Spero, Deputy City Atty., all of Los Angeles, for appellant.

Daniel A. Knapp and David G. Kling, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

The City of Los Angeles appeals from a judgment after verdict awarding plaintiff damages for injuries sustained when she stepped off the curb into a hole in the pavement. A reversal of the judgment is sought upon several grounds. It is claimed by the city that the condition of the street where plaintiff fell was neither defective nor dangerous; that plaintiff was guilty of contributory negligence, and that the court erred in the matter of instructions.

On the first point, the city says: "The evidence in this case fails to show any condition other than that usually to be found in the ordinary rock and oil surfaced street. This being so, it follows that no liability exists on the part of the city for injuries arising therefrom." It is further said: "An examination of Defendant's Exhibits 'E' and 'F' and Plaintiff's Exhibit No. 21 illustrates more forcefully than words the nature, extent and location of the condition." These exhibits are photographs of the curb and surrounding area on the east side of Merced Street, where plaintiff fell. They were taken by one Harry Gravatte, an investigator for the Board of Public Works. Gravatte testified that he made several trips to the location but did not take pictures, "because of the fact that the shadows that crossed the curb were such that a good picture could not be obtained showing the location in the street where Mrs. Owen had fallen." His pictures were taken about a month after the accident. They were taken in bright sunlight and at a time when the curb cast a heavy, black shadow, a foot or more in width, which completely covered the area in the gutter where the alleged defect in the pavement existed. So well are the depressions and inequalities hidden in shadow, that it requires close examination to detect the true condition, and even then it is not too clear. This much, however, does appear: erosion had occurred along the east curb line extending southerly from the ramp of a driveway, with a width measured from the curb of about twelve inches. The surface, except for the crushed rock, had washed away and much coarse rock was exposed over an area of several feet from the curb. While most of the fragments were small, adjacent to the curb numerous larger sizes appear on the photographs, either loose or lightly embedded, some of them about the size of a small hen's egg. An extreme condition of erosion appears around them. Also evident are some lumps or clusters of rocks which approximate the size of a man's fist. The entire surface of the area adjacent to the curb and for several feet south of the driveway is depressed and distinctly uneven. The hole where plaintiff testified she fell, as described by the witnesses, was in this area, some 28 or 30 inches south of the ramp and close to the curb. Several witnesses testified that it was from two to three and one-third inches deep, about four to six inches wide, and from nine to eleven inches in length.

It is the contention of the city that this hole was no more than a trivial defect which it had no duty to repair. We are therefore asked to hold as a matter of law that such a hole, so located, is not a defective or dangerous condition within the meaning of the Public Liability Law (Stats. 1923, p. 675). Counsel for both parties quote from Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, 726, a sidewalk case, in which "One block had tilted up so that there was a difference in grade at the break of not more, and possibly less, than an inch and a half." The city cites the case as holding that the described break in the sidewalk was not a dangerous or defective condition, and plaintiff agrees that the case so held. All of the passages quoted in the briefs were addressed to the question of notice. The discussion in the opinion started with the statement: "Assuming that the evidence will support a finding of a dangerous and defective condition by reason of the break and elevation in the concrete surface of the sidewalk, it clearly will not support the finding that 'the defendant had constructive notice of the said condition of said sidewalk for several months prior to January 19, 1934. * * *'" The Nicholson case did hold, however, that the condition was not so obviously dangerous as to charge the city with constructive notice, not only that the condition existed, but that it was a dangerous condition. This construction was given the Nicholson decision in Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990. In the latter case it was held that as a matter of law a rise of one square in a sidewalk above the adjoining square, extending for several feet, running from nothing at one end to about three-quarters of an inch at the other, located in a much traveled business district of a city, over which many thousands of persons had passed for a period of five years during the existence of the defect, was a condition from which no injury would ordinarily be suffered by persons using the sidewalk with ordinary care, and was not such a defect as would impose liability on a city. Rodkey v. City of Escondido, 8 Cal.2d 685, 67 P.2d 1053, also relied upon by the city, involved a saucer-shaped dip at a street intersection constructed for the passage of storm waters.

[1, 2] These cases, and several cited from other jurisdictions, state the familiar rule that minor defects in sidewalks or streets will not necessarily make the city liable for injuries caused thereby, but none of them involved defective conditions and surrounding circumstances which could be described as substantially the same as the

one we are considering. We do not doubt that one who stepped into a hole in the pavement, such as the one described, would very likely be upset. It would be especially dangerous for women, wearing the common style of shoe.

[3] It is argued by the city that even if the hole in the pavement would have presented a danger to pedestrians, it was not to be anticipated that pedestrians would step into it. It is said that it adjoined the curb where it was unlikely that pedestrians would travel and that it would be particularly unreasonable to anticipate that any person would step off the curb into the gutter in order to pet a cat. It is a question of fact and not of law whether it should be anticipated that pedestrians frequently step on and off curbs into gutters, in the course of entering or leaving their automobiles, crossing the street or using it for other purposes. The question is not whether it was reasonably to be anticipated that a woman would step into the street to pet a cat. The duty of inspection and repair which rested upon the city was not to anticipate the exact thing which plaintiff did at the time of her injury, but the uses which it would reasonably have been anticipated pedestrians would make of the street.

[4, 5] The city would have us hold that the duty to keep streets in a reasonably safe condition for pedestrians is limited to crosswalks and other areas most commonly used, and that pedestrians venture upon other portions of the streets at their peril. But the duty is statutory and it has no such limitation. McLaughlin v. City of Los Angeles, 60 Cal.App.2d 241, 140 P.2d 416; Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773. It is the duty of the courts to see that liability under the law is not unjustly imposed, but it is not their duty or prerogative to lift any part of the just burden from the city and place it upon the individuals who use the streets.

[6] The question, on appeal, whether a condition is defective or dangerous is one which calls for the application of the rule that where there is room for difference of opinion among reasonable minds, the question is one of fact. Fackrell v. City of San Diego, supra, 26 Cal.2d at page 206, 157 P.2d at page 630, 158 A.L.R. 773. Under this rule we hold the question to have been one of fact which is concluded by the implied finding of the verdict.

[7-9] There was evidence from which the jury could have found that the city had actual knowledge of the condition of the street, and also evidence that the eroded condition of the street had existed for several years. Plaintiff testified to this fact and that several years before the date of her accident she had called the city hall on the telephone, had been referred to the city engineer's office and had reported the condition of the street to the man who answered the call, who assured her that the street would be repaired; also, that two years or more before her accident, she encountered a crew of men with a truck of paving material, repairing an excavation in the street made in replacing a pipe, that she requested them to fill a hole which was gradually becoming larger and that they declined to do so because they had no order for such work. She also testified that some four months before her accident she again called the city hall, asked for the city engineer's office, and complained to a man who answered of the condition of the street, being again assured that the matter would be taken care of. It was shown by the evidence of the defendant that the city has a Street Maintenance Division, separate and distinct from the city engineer's office, and not under the supervision of the city engineer; that records of complaints are kept in the Bureau of Maintenance and Sanitation, and that a search of the records had failed to disclose a record of a complaint of the condition of Merced Street near plaintiff's home. Plaintiff's testimony, being believed, was sufficient to support an inference that the information imparted to the city through the engineer's office was transmitted to the agency charged with the duty to make the repair. Proof of the existence for a long period of time of a dangerous or defective condition of a street is sufficient to justify a finding of constructive notice of the condition. Fackrell v. City of San Diego, supra, 26 Cal.2d 196, 206, 207, 157 P.2d 625, 158 A.L.R. 773. In view of what we have said as to the duty of the

city to make the repair, we could not hold the evidence insufficient to justify a conclusion that in addition to knowledge the city had constructive notice of the condition.

[10, 11] The city relies heavily upon its pleaded defense of contributory negligence, contending that plaintiff had known for years of the eroded condition of the pavement in the gutter, that such condition was an obvious one, and that plaintiff's fall was due to her own negligence. Plaintiff's accident happened at about 8:25 o'clock p. m.; she was walking with her husband; they had crossed the street to the east sidewalk when plaintiff saw a neighbor's cat crouched in the gutter. She stepped from the curb, encountered the hole in question, fell and suffered a compound fracture of her right ankle. She testified that before she stepped down she looked, that it was light enough to see the surface of the street, but that she did not notice the hole. The pavement in the gutter had been washed away along the curb, not only in the particular location, but for a considerable distance, including an area in front of plaintiff's home, which adjoined the place of her fall. While plaintiff's knowledge of the general condition of the gutter is admitted, it does not appear that the erosion had created a generally dangerous condition, nor does it appear that plaintiff had knowledge that a hole existed at the point where she stepped from the curb. She testified that she did not know it. Of course, her knowledge of the general condition made it her duty to proceed into the street with more care than would have been demanded if she had been without such knowledge. It was her duty to look and to step down not casually, but carefully, for she had no right, under the circumstances, to believe that the surface of the gutter was even and smooth. No doubt the jury took these facts into consideration. As plaintiff testified that she looked at the pavement before stepping from the curb, and since the jury evidently believed her, it must be deemed a fact that she did, but that she did not notice the hole. An implied finding of the jury was that plaintiff looked carefully. We are asked to overturn this finding because, the city contends, it was established by the evidence that if plaintiff had looked carefully she would have seen the hole. It is not difficult to accept the jury's conclusion on this point. We must assume that in the darkness the hole was not more easily seen than it is in the photographs upon which the city relies. After a careful examination of these exhibits we cannot arrive at a definite conclusion as to the appearance of what we believe to be the hole described by the witnesses. The jury must have experienced the same difficulty.

Whether one who looked, did so carefully, is a question of fact. This has been held most frequently of late in the automobile cases. See cases collected in 2 Cal.Jur. (Supp.) p. 379. And the rule is the same where the thing which threatens danger is a condition of property. Sommerfield v. Miratti, 49 Cal.App.2d 450, 121 P.2d 746, and cases there cited; also other cases cited infra.

[12] The city argues that plaintiff must have known of the existence of the hole because she was familiar with the general condition of the gutter in the vicinity. Plaintiff testified that she did not know the hole was there, and this also must be accepted as a fact unless, as the city contends, she is chargeable with knowledge of it on the ground that in the exercise of ordinary care she would have learned that it was there. We cannot agree with this argument. While there was a general condition of erosion, there was no evidence that there was a generally dangerous condition, or that the erosion had left other holes such as the one in question. It was this hole, and not the condition of the gutter generally, that caused plaintiff's accident. The rule applicable here was stated in Ridge v. Boulder Creek etc. School Dist., 60 Cal.App.2d 453, 460, 140 P.2d 990, 993, as follows: "Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. The doing of an act with appreciation of the *amount* of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent." Plaintiff was not chargeable with knowledge of the danger of the particular condition as a matter of law, merely because she had knowledge

of the general condition of the surroundings. It is a question of fact whether her knowledge was such as to charge her with assumption of the risk. Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 454, 85 P.2d 152; Skoglund v. Moore Dry-Dock Co., 11 Cal.App.2d 287, 53 P.2d 1001; De Graf v. Anglo California Nat. Bank, 14 Cal.2d 87, 92 P.2d 899; Young v. Bates Valve Bag Corporation, 52 Cal.App.2d 86, 125 P.2d 840; Lay v. Pacific Perforating Co., 62 Cal.App.2d 233, 144 P.2d 395; Locke v. Red River Lumber Co., 65 Cal.App.2d 322, 150 P.2d 506; Miller v. Pacific Constructors, 68 Cal.App.2d 529, 540, 157 P.2d 57; McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 43 P.2d 560.

[13] Furthermore, it is argued on behalf of plaintiffs, and it might have been inferred by the jury, that although plaintiff had knowledge of the poor condition of the pavement she did not have it in mind. The city, in reply, cites cases from other jurisdictions holding that forgetfulness of the existence of a dangerous condition is not an excuse for negligent conduct. The law is otherwise in California. It has been held in numerous cases following the holding in Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078, that even with full knowledge of the danger which causes the injury one may be injured and yet be in the exercise of due care. Hayward v. Downer, 65 Cal. App. 450, 224 P. 265; Matteoni v. Pacific Gas & Electric Co., 53 Cal.App.2d 260, 127 P.2d 574; Lay v. Pacific Perforating Co., supra; Hall v. Barber Door Co., 218 Cal. 412, 123 P.2d 279.

At the request of plaintiff, the court instructed the jury in the general law of negligence, defining negligence in the usual terms and stating specifically that if plaintiff proved by a preponderance of the evidence that defendant was negligent, and that such negligence was the proximate cause of her injury, she was entitled to recover unless the defense of contributory negligence was established, as that defense was defined in other instructions. At the request of defendant the court gave a comprehensive and correct definition of the city's liability under the Public Liability Act of 1923, and following that, an instruction reading: "The law just read to you is the only authority under which this action can be maintained, if at all, against the defendant, City of Los Angeles, and it follows that before the plaintiff may be entitled to recover in this case from the City of Los Angeles, she must prove to your satisfaction each and all of the following elements by a preponderance of all the evidence: [Stating the conditions fully.] * * *"

[14] The city contends, correctly, that it was error to give instructions on general negligence. Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 62 P.2d 790; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768. We are not impressed by plaintiff's argument that the two sets of instructions, when read together, were not conflicting. The criticized instructions, in terms, broadened the liability of the city from one arising out of the toleration of physical conditions of city property, to one encompassing other negligent omissions and also negligent acts of the city's agents. It was for this reason that it was held error to give similar instructions in the Wilkerson case, where the question of prejudice was not decided. And it was for the reason that the verdict against the city in the Pittman case may have been based upon evidence which failed to establish a case under the Public Liability Law that the judgment was reversed. But we are satisfied that the error here was not prejudicial. A single breach of duty was charged; it was simple, and clearly defined—was the street in a dangerous condition because of the hole, and had the city received notice or knowledge of it and failed to repair it within a reasonable time thereafter. There can be no reason to doubt that the jury answered the first question in the affirmative. The element of notice and a reasonable opportunity to correct a dangerous condition of property is absent from the instructions on general negligence and in a close case the giving of a formula instruction omitting that element might be seriously prejudicial. But here there was evidence of actual notice as well as evidence of the existence of a condition of disrepair for a period of several years. The chance that the jury did not determine that the city had notice or knowledge long before plaintiff's accident is so slight as to be only a remote possibility. Prejudice to the

city could have resulted only if the verdict had been returned against it without implied findings establishing a factual basis for its statutory liability. We repeat that we are satisfied this did not occur. We find no error in the refusal of two instructions requested by appellant.

The judgment is affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.

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82 Cal.App.2d 971

PEOPLE v. ARBAUGH.

Cr. 4106.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1947.

Rehearing Denied Jan. 2, 1948.

Hearing Denied Jan. 15, 1948.

1. Criminal law 🔑1144(13)

On appeal from judgments of conviction on verdicts of guilty, evidence would be viewed in light most favorable to prosecution.

2. Burglary 🔑41(1)

Evidence sustained conviction of burglary even if testimony of accomplice was eliminated. Pen. Code, § 1111.

3. Criminal law 🔑511(2)

Testimony of accomplice is sufficiently corroborated when the corroborating evidence though slight and entitled of itself to little consideration tends to connect accused with commission of offense. Pen. Code, § 1111.

4. Criminal law 🔑511(7)

Defendant's own statements and admissions, together with facts related by accomplice, can be sufficient proof of guilt to sustain convictions.

5. Criminal law 🔑511(4)

Statements of accused to police officers, recovery of some of stolen goods in his possession and sale by him of certain other stolen goods, sufficiently corroborated testimony of accomplice to sustain convictions of burglary. Pen. Code, § 1111.

6. Criminal law 🔑316, 317

Failure of accused to attempt by his own testimony to contradict, explain or deny any of circumstances established against him, and fact that only evidence offered by him was with reference to a transaction that occurred some two weeks before property allegedly involved therein was stolen, could be considered by jury in determining guilt of burglary.

7. Criminal law 🔑511(4)

Testimony by defendant's superior officers in police department that under rules of the department defendant was required to be armed with his service revolver at all times when on duty and that under those regulations a police officer was on duty 24 hours a day sufficiently corroborated direct testimony of accomplice that defendant was not only actually on duty but was armed in accordance with police regulations at time defendant committed alleged burglaries. Pen. Code, § 1111.

8. Witnesses 🔑269(1), 280

Cross-examination of witnesses for prosecution was properly restricted to subject matter of interrogation on direct examination, and objection was properly sustained in so far as question called for hearsay answer.

9. Criminal law 🔑1170½(5)

Cross-examination of accomplice by defendant's counsel with reference to whether he had talked facts of case over with any member of police department might have been allowed, but sustaining objection to such cross-examination on ground that question was immaterial and not proper cross-examination was not prejudicial in view of entire cross-examination of accomplice.

10. Burglary 🔑46(1)

Instruction defining burglary and the elements thereof was not improper by reason of statement therein that "it would be wholly immaterial whether the defendant actually stole anything while in such premises or not", because not limiting possession of stolen property to recent possession, in view of the fact that instruction was not dealing with possession of stolen property but was defining burglary and elements.

11. Burglary ⚷46(7)

Instruction that mere possession of stolen property, however soon after taking, unexplained by person having possession, is not sufficient to justify conviction, but is a circumstance to be considered in connection with other evidence in determining innocence or guilt was proper and was not erroneous for alleged failure to limit possession to "soon after" the burglary.

12. Burglary ⚷38

Element of time elapsing between burglary and possession of property stolen therein goes to weight rather than admissibility of evidence in that regard.

13. Burglary ⚷38, 45

Where defendant is found in possession of property stolen in burglary, however soon after the taking, such possession is circumstance which, when unexplained, and taken in connection with other incriminating evidence, may be considered by jury in determining guilt or innocence, and weight or intrinsic value of such evidence of possession in light of time elapsing between burglary and discovery of possession by defendant is for the jury.

14. Burglary ⚷42(1)

The primary question in connection with possession of stolen property is whether defendant was found in possession under circumstances and conditions which justify conclusion that he was the guilty party in burglary charged against him.

15. Burglary ⚷46(7)

Instruction that possession by defendant of property stolen from burglarized premises would be circumstance tending in some degree to show guilt, though not sufficient standing alone to warrant finding of guilty, and that in addition to proof of possession there must be proof of corroborating circumstances which may consist of acts, conduct, or declarations of defendant and any other proved circumstances tending of themselves to establish guilt, was proper.

16. Criminal law ⚷814(20)

Where nature of evidence is such as to warrant only a verdict for higher degree of offense, refusal to instruct as to a lesser degree is proper.

17. Criminal law ⚷824(1, 3)

The court is required, of its own motion, to instruct on general principles of law pertinent to cause but appellant cannot predicate reversal upon failure to instruct upon specific matters, such as with respect to lesser degrees of offense charged, in absence of request.

18. Criminal law ⚷814(20), 824(3)

Where court gave code instruction on reasonable doubt, code definition of burglary, defined the degrees thereof, and instructed jury that if they believed defendant guilty beyond reasonable doubt, they must find degree thereof, failure to instruct that if there were reasonable ground of doubt as to whether defendant was guilty of first or second degree burglary, he could be convicted only of lower of such degrees was not error, particularly where evidence was such that if defendant was guilty at all he was guilty of burglary of the first degree, and no such instruction was requested by defendant. Pen.Code, § 1097.

19. Burglary ⚷10

The statutes relating to form of indictment when defendant is armed and the deadly weapons act do not affect or modify the statute defining degrees of burglary. Gen.Laws, Act 1970, § 3; Pen.Code, §§ 460, 969c, 3024.

20. Burglary ⚷28(1)

In prosecution for burglary in the first degree, it was not necessary to allege or prove that at time of commission of offense the defendant was not authorized, licensed, or the possessor of a permit to carry a deadly weapon. Gen.Laws, Act 1970, § 3; Pen.Code, §§ 460, 969c, 3024.

21. Burglary ⚷14

A policeman who commits a burglary while armed with his service revolver, which under police regulations he is required to carry and which under the law he is permitted to carry, is not immune from prosecution and conviction of burglary of the first degree. Gen.Laws, Act 1970, § 3; Pen.Code, §§ 460, 969c, 3024.

22. Criminal law ⚿878(4)

Verdict of guilty under count charging burglary was not inconsistent with acquittal under count charging grand theft from the burglarized premises since the offenses were not identical and jury could have found that defendant entered building with intent to unlawfully and feloniously commit a theft but did not steal therefrom the amount covered by count charging grand theft. Pen.Code, § 954.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Glen O. Arbaugh was convicted of burglary committed while armed with a deadly weapon, and he appeals.

Affirmed

William C. Ring, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In five counts of an amended information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of burglary, while a sixth count charged him with the commission of the offense of grand theft.

In each count is was also charged that at the time of the commission of the offense therein stated the defendant was armed with a deadly weapon, to-wit, a revolver.

Following pleas of not guilty to each count, the cause proceeded to trial before a jury which returned verdicts finding the defendant guilty of burglary as charged in counts II, III, IV and V, and not guilty as to counts I and VI. The jury also found that at the time of the commission of the burglaries of which he was found guilty, defendant was armed with a deadly weapon, to-wit, a revolver. A motion for a new trial was denied.

From the foregoing judgments of conviction, defendant prosecutes this appeal.

Upon the dates named in the amended information and at the time of his arrest, appellant was a police officer of the City of Long Beach, assigned to duty as a radio car officer.

[1] Because appellant challenges the sufficiency of the evidence to support the verdicts on all counts, it becomes necessary to set forth an epitome of the evidence relied upon to sustain said convictions. Viewing the evidence in the light most favorable to the prosecution, as we are required to do following guilty verdicts, we find in the record with reference to Count II, testimony that sometime during the night of January 6, 1946, the California Laundry, located at 1203 West Ocean Avenue in the City of Long Beach, was burglarized, and a considerable amount of wearing apparel and flat work, sheets, pillow cases, shirts and towels, were taken. It was some ten days before the proprietor of the laundry was able to determine what property was taken because he had to wait until the customers of the laundry who owned the property in question notified him of shortage. All laundry that was brought in had individual markings. Charles C. Harris, a customer of the laundry, claimed the loss of some shirts shortly after January 7. His laundry mark was 312-K. Defendant had never been a customer of the laundry in question. The attention of the witness Moody, owner of the laundry, was directed to an Arrow brand shirt with three markings on it, 312-K and 91-6, and a Flosheen brand shirt bearing the same numbers, and he testified that the owner of these two shirts, as indicated by the laundry mark, was the aforesaid Charles C. Harris. A Mrs. Hasha of Long Beach, whose laundry mark was H-164, also made a claim shortly after January 7, 1946, for the loss of some sheets of flat work. The witness Moody was shown a sheet which he identified as the property of Mrs. Hasha because it bore her laundry mark.

Charles C. Harris testified that during the early part of January, 1946, he took to the California Laundry six white shirts bearing his laundry mark 312-K, that when he returned for the shirts on January 11, they were missing. He identified two shirts bearing his laundry mark as the shirts he had left at the laundry and stated that it was his best judgment that the shirts belonged to him.

The following evidence was addressed to Count III: Walter B. Jessing owned a dry-cleaning establishment at 1344 West Willow Street, Long Beach, which he operated under the name of Bee-Jack Cleaners. On the evening of February 8, 1946, he closed and locked his place of business and was the last one to leave. He returned to the store the following day at 3:20 a. m. because defendant called at his home, told him that his place of business had been burglarized, and he accompanied the defendant to his establishment. Upon his arrival the witness noticed his place of business was open and the back window had been broken. Officer Golson, defendant's working partner, was waiting at the store when the witness and defendant arrived. A preliminary check showed that some articles were missing, and the next morning when the witness completed his inventory he found missing a number of suits of clothes, sport shirts and jackets. When at the trial this witness was shown a jacket, he testified that it had been left wih him for cleaning by Mr. Nixon, that the jacket was in the store on February 8, but was missing when the inventory was taken the next day.

This witness also identified a three-piece suit of clothes as belonging to a Gil Binger. This suit had been cleaned and pressed and was in the store February 8 but found missing on the morning of the 9th.

A shirt was identified by the witness as belonging to Al Miller and as having been left for alterations on February 8, but was also missing on the morning of the 9th.

The witness testified that the next time he saw any of these garments was when he was taken to defendant's apartment by police officers, at which time he discovered and identified the garments and the police took them into their possession.

The witness also identified a suit of clothes as belonging to a Mr. Grenstad, which garment had been left for cleaning and was in his establishment February 8, but missing on the morning of the next day. The next time the witness saw this suit of clothes was on September 27, 1946, at the police department.

On cross-examination, this witness testified that when he and defendant went to the dry-cleaning establishment early on the morning of February 9, Officer Golson was inside the place. That when the witness next saw the foregoing garments they were hanging in the closet at the residence of defendant.

Mrs. Edna B. Grenstad, Harold G. Nixon, and Gilbert Binger identified some of the foregoing articles as belonging to them and as having been left by them at the dry-cleaning establishment.

Police Officer A. J. Anderson of Long Beach testified that he was acquainted with defendant; that on or about September 7, 1946, he went to the latter's residence in Long Beach in company with Mr. Jessing of the Bee-Jack Cleaners. This witness identified the foregoing articles of clothing as having been found by him and Mr. Jessing in a closet of the apartment occupied by defendant on September 7, 1946, and that he removed the property to the detective bureau at the police station.

Concerning Count IV, there was testimony by Harold Nixon that he and his partner, Douglas G. Wallace, owned a radio store at 1521 West Willow Street, Long Beach. That on Sunday afternoon, February 17, 1946, after cleaning his place of business, he locked the place up and departed. The following morning when he returned he found one of the "job tickets" lying out in front of the store and when he entered discovered that a window had been broken and the bars thereon knocked off. That when he left on the preceding evening that window was closed and barred. He found that three radios, some cash, and tools were missing from the store. One radio was a camera-type portable; one was a Majestic, single-record player; and a Truetone automatic combination. These latter sets were table models. At the trial the witness identified two radios which he stated were in his store on February 17, 1946, one a Truetone and the other a Majestic radio. Concerning the Majestic radio, the witness testified that the job ticket he found in front of the store had been attached to that radio and that the owner thereof was a man named Hank. That the Truetone radio was owned by a Chief Petty Officer in the Navy named Herring. The next time the witness saw these two radios was some five months later at the Long Beach police station.

George S. Fatino testified that he knew defendant and had a business transaction with him concerning the purchase of a radio. This witness identified a check in the sum of $55 as having been issued by him. He stated that at the time he issued the check there was no writing, figures or printed matter upon the check, which he delivered to his brother-in-law, Levi Ballard, and at the same time received from Ballard and the brother of the witness the Truetone radio above referred to. The radio was received by him on the date the check was issued, namely February 23, 1946. That he kept the radio in his home until Long Beach police officers took it therefrom.

It was stipulated that the defendant received and endorsed the check in question and that the check was paid by the bank.

It was stipulated that if Homer E. Herring were called as a witness and sworn he would testify that the foregoing Truetone radio belonged to him; that he would identify it because the nut on the center of the turntable was missing and a felt washer under the extreme end knob on the front of the radio was also missing.

Harry E. Brady testified that he is employed at the United States Naval Drydock; that he was acquainted with and related by marriage to George S. Fatino; that he had known defendant for approximately fourteen years. That during the month of February, 1946, he and his brother-in-law Ballard met defendant on the street, following which he and Ballard accompanied defendant to the latter's apartment, where they looked at a radio which to the witness appeared to be the same as one of those introduced in evidence at the trial. That at the time the witness told defendant he would advise George Fatino about it. This witness identified a check as having been issued by him in favor of defendant for the sum of $55. Subsequently, the witness saw the radio in question at Mr. Fatino's home.

This witness was also shown a check for $21 dated January 9, 1946, payable to the order of defendant, signed by the witness, and which he stated he delivered to defendant in payment for some linens. That defendant asked the witness if he wanted to buy some linen, which was very hard to get at that time, and the witness stated that he would. That defendant then showed him some sheets and towels, approximately twelve sheets and a dozen or a dozen and half towels. That defendant first told the witness he would sell them for $25, but later agreed to take the sum of $21, at which time the witness wrote and delivered the foregoing check and took the linens home. When shown certain linens at the trial, the witness stated that they appeared similar to some of those he had purchased from appellant. Subsequently this witness delivered to a Long Beach officer two sheets and one or two small towels which he stated were part of the articles which were purchased by him from defendant. He testified that these articles which he purchased from defendant were the only ones in his home upon which there were laundry marks because his wife did her own laundry and all the other linens belonging to him had no laundry marks on them.

As to Count V, the record reflects that J. L. Wood testified that in January, 1946, he was manager of a retail food market called Ben's Market, located at 1370 West Willow Street in Long Beach. That on Sunday, April 27, 1946, he was taking inventory at the market and left there about 4 o'clock in the afternoon, after locking up. That about 6 o'clock that same evening he returned to the market to obtain some provisions for home consumption. At that time he noticed that there were less than 30 pounds of butter in the icebox, but everything appeared to be in order about the store. On the following morning about 9 o'clock, he returned to his place of business and noticed that the office door was open, whereas it was closed the evening before. In the store he found 10 pounds of butter stacked up on some merchandise directly in front of the door to the icebox. He then looked for some "rolled money" which he kept in a built-in desk and found approximately $429 missing. The window on the west side of the store had been opened and the chains on it were broken. Some of the cans were knocked off the shelf and a sign or marker, indicating the fruit section, directly under the window, was bent where the window had fallen down. Under the front door of the store there was a note written on a card, which note, except for the printed matter thereon, it was stipulated was in the handwriting of the defendant. The card bore printed matter reading: "Long Beach Police Department, Crime Prevention Bureau. To the Management of." Then follows, in pencil, "Ben's Mkt." The printed words, "Your door," are scratched out and then follow the printed words "window (underlined) was found unlocked at — M., ———, 1946. Property left out ——— and is now at our Property Clerk's office. Alvin F. Slaight, Chief of Police By". Then appears in defendant's handwriting the names "Golson & Arbaugh." On the other side of the aforesaid card, in the handwriting of the defendant, appears the following: "Please leave the back shade up so we can see the safe everything looks ok at 12.30 but could not see in back window. Golson & Arbaugh Long Beach P. D."

The following additional evidence was addressed generally to Counts II, III, IV and V: Gran Golson, admittedly an accomplice of defendant, testified that he was a provisional police officer of the City of Long Beach; that he first met defendant when he was assigned to duty on the police force in July, 1945. Shortly before Christmas of that year he was assigned to work on a police radio car with defendant and continued to work with him most of the time thereafter up to and including the month of April, 1946. He testified that they were on what is called the "graveyard shift", that is from about 11:30 p. m. to 7:30 a. m. This witness testified that he was familiar with the premises known as the Bee-Jack Cleaners; that in the early morning hours of February 9, 1946, he and the defendant drove in their radio car to the vicinity of the establishment. After stopping the car they "snooped" around the building, arrived at a side gate, went behind the building and several other establishments. That defendant said, "Let's go in here and look around inside here". That shortly thereafter defendant mentioned the fact that he liked clothes and they opened the gate and went into the back of the cleaning establishment. They then approached a small window in the lavatory in the rear of the building, whereupon defendant said, "I believe this is the window into the lavatory in this cleaners", and thereupon proceeded to break the window glass, reached through, opened the window and crawled through. The witness testified he followed defendant into the lavatory through the same window; that defendant had a flashlight and was wearing a pair of gloves. The witness testified that both he and defendant at that time were armed, each with a revolver. After effecting entrance they proceeded into the shop and examined various clothes in the place. That defendant selected a couple of suits, two or three shirts, and then the two of them went out through the front door to the police car where defendant placed the garments in the turtleback of the vehicle, saying, "I think we ought to get in touch with the owner and notify him". That defendant then obtained the address of Mr. Jessing, the owner of the establishment, and while the witness remained at the building defendant went to Mr. Jessing's residence and shortly thereafter returned with Mr. Jessing. That Mr. Jessing thereupon looked the place over, stating that he was unable to then determine that anything had been taken. He then locked up the premises and, after drinking some coffee with this witness and defendant, the latter two drove Mr. Jessing home. That the witness and defendant then drove to the latter's residence where they parked in the alleyway; defendant took the foregoing wearing apparel out of the turtleback into his residence.

The witness further testified that on the night of February 17 he was working with defendant when the Nixon Radio Store was burglarized. The witness testified that he suffers from a disability for which he draws compensation from the government, that as a result of this affliction he is subject to very violent headaches resulting from a painful concussion which from time to time causes him to "pass out" for periods of time varying from 15 minutes to an hour. That during the time he was employed in the police department he had these "black outs" intermittently. That he had no recollection of going into the Nixon-Wallace store or of defendant entering the same. That he did have a recollection that on that particular night he had a "black-out" or a period of total unconsciousness, and did not see any radios in or about the police car. That three or four days thereafter he had a conversation with defendant at police headquarters wherein he mentioned to defendant that he would like to have a radio-phonograph, to which defendant responded that perhaps he could "fix him up", that he had one over at his house. That a day or two later the witness went to defendant's apartment and purchased a Majestic radio from him for $25 in cash. At the trial, the foregoing Majestic radio which was taken in the radio shop burglary was identified by the witness as being the one he purchased from defendant. Subsequently, this radio was taken from the home of the witness by police officers. This witness testified that on the night of the burglary of the radio store, both defendant and himself were armed with their revolvers; that he had never seen defendant when the latter was not armed with a revolver while on duty at night.

This witness testified that he was familiar with the premises and buildings known and described as the California Laundry. That on the night of January 6, or the early morning of the 7th, he was on duty with the defendant and drove to the laundry; that defendant said, "Let's stop here, I think I will go back and check this building back here." That defendant got out of the car and went back around the corner, returning in about five or ten minutes with a stack of white shirts, white towels and sheets, in his arms. That defendant put the articles in the back of the car saying, "I got myself some white shirts. I sure like white shirts." That they then drove to the alley in the rear of defendant's residence whereupon the latter took the articles into the building and when he returned did not have them with him. That at the time defendant left the car near the laundry and returned with the articles he was armed with a revolver. This witness further testified that on the night of April 28, 1946, and the early morning of the 29th he and defendant drove to the vicinity of Ben's Market while on duty. That while driving along Willow Street they were stopped by a cab driver who advised them that there appeared to be a side window open in the market. The witness and defendant drove back to the front of the market and were able to see a window open on the west side of the building. That defendant said, "Let's go in and look around and see what we can find." They drove the police car to the west side of the building and after alighting from the car, defendant walked up the steps back of a signboard which was close to the building, put his head in the window of the building, pushed the window, snapping the chains that held it, and entered. The witness followed defendant into the building through the same window. That at that time the defendant was armed with a revolver as was also the witness. After entering the building the two separated, the witness going into the front part of the market, while defendant remained in the rear. That defendant called the witness to the rear of the building and entered the office; that defendant pointed to a large quantity of coin wrappers of various denominations, saying, "Look at all these wrappers. * * * It is too bad there is not any money". That at that time they looked into a tall desk with a top, observed more papers and coin wrappers but, according to the witness, did not see any money. That the witness then walked over to the refrigerator, removed four or five pounds of butter and stacked it up on top of a bin. When the witness started to pick up the butter, defendant said, "Forget the butter * * * let's get out of here now." They then left the building by the same window through which they had entered. That defendant then said he thought they should leave a note to "kinda make it look good". He then wrote the foregoing note on a form that he carried in his brief case and slipped it under one of the doors. They then left the premises. The witness testified that he had not seen the defendant take any money out of the market.

Loren Q. Martin, Captain of Detectives of the Long Beach Police Department and one of the investigating officers, testified that on September 6, 1946, he had a conversation with defendant wherein he asked the latter if he was acquainted with a man named Harry Brady, to which defendant replied in the affirmative, stating that he had known Mr. Brady for a long time. Captain Martin asked defendant if he had sold any sheets and towels to Mr. Brady, to which defendant replied that he had not. The witness then informed defendant that Mr. Brady was in an adjoining office and had told the officers that he had purchased some towels and sheets from defendant for some $22 and had given a check in payment therefor; that the check was in the possession of the police and bore defendant's endorsement. Thereupon, defendant denied that he had sold anything to Mr. Brady but that the latter had, from time to time, borrowed money from defendant and that the check was for a loan. In this conversation defendant denied that he had ever gone into the foregoing radio store or taken a radio therefrom. He also denied that he had ever sold or delivered a radio to George S. Fatino. Captain Martin then informed defendant that Mr. and Mrs. Fatino were in another office and had stated that they had purchased from defendant a radio-and-record player, then exhibited to defendant; that they had paid defendant $55 for the same; that this payment was made by a check for that amount; that the check, endorsed by the defendant, was in the possession of the police.

At that time defendant stated to Captain Martin that he desired to talk with him alone, and the latter asked other officers to withdraw from the room; that defendant stated it would be satisfactory to him for Lieutenant Tubbs to remain. According to the witness, upon the retirement of the other officers, defendant "then told me that if we would give him some kind of a break that he would help us clear up these burglaries that had been worrying us. And I told him that we would not give him any kind of a break". Subsequently, additional conversation was had in the presence of Captain Martin and Chief of Police Slaight in the latter's office, at which time Chief of Police Slaight told defendant, "The thing we are interested in right now is whether or not you took a radio out to George Fatino's house," to which defendant replied "that he took the radio out to Mr. Fatino's house and delivered it to him and received a check for $55.00 which he cashed and turned the money over to Officer Golson. He said that this was done at the request of Officer Golson". On cross-examination, the witness Captain Martin testified that when the defendant was on duty he was required to carry a gun at all times, and that under police regulations an officer is considered as being on duty twenty-four hours a day.

Detective Inspector Lloyd G. Wilson testified that he took the Truetone radio from the residence of Mr. Fatino to the police department. He also testified that he took another exhibit, a sheet from the home of Mr. Brady, to the police department, and that both articles remained there until they were brought into court.

Detective Inspector Harry W. Boggess of the Long Beach Police Department testified that on September 7, 1946, he went to the home of defendant and took therefrom two shirts, which he brought to the police station, where they remained until introduced into evidence at the time of the trial. He further testified that on September 8, 1946, he had a conversation with defendant in the sergeant's office of the Long Beach City Jail, at which time the defendant's statements were freely and voluntarily made and were not made pursuant to any offer of immunity or hope of reward. That during the conversation Inspector Hepler was also present. That defendant stated that he had been accused of a lot of things and that "he wanted to get everything straightened out and he couldn't think clearly in that jail. He wanted to get out of that jail," and that if the witness would secure his release from jail "he would clear up a lot of things". Referring to certain shirts introduced into evidence, the witness Boggess testified that defendant first stated they belonged to him, but when the witness informed him that he knew the shirts were stolen from the California Laundry defendant then stated that he did not know whether all the shirts were his or not. Questioning defendant concerning a gray suit and some other garments, the witness told him that the owner of the Bee-Jack Cleaners had personally accompanied Inspector Anderson to defendant's apartment, had taken the garments from the apartment, and that they had all been identified, including the gray suit, the sport jacket and the sport shirt. To this defendant replied, "Well, I really don't know what I have got in that apartment over there. I have a lot of property in there." After defendant had told Inspector Boggess that he would "show him a lot of things" when he got outside of the jail, places that had been entered, Inspector Boggess and Inspector Hepler took him in their automobile for a tour of Long Beach. During the ride, Inspector Boggess told defendant that George Fatino had given defendant a check for $55 for a radio and that the witness didn't see how defendant could explain "his way out of that one". To this defendant said, "Well, I know, I know, I took the check but Golson gave me the radio." Referring to another radio, defendant then said, "The radio that you got out at Golson's house was also one that came out of the Nixon-Wallace Radio Shop." The two police inspectors then drove to the vicinity of the aforesaid radio shop where Inspector Boggess told defendant that Golson had told him that he, Golson, had passed out in the car while defendant broke into the Nixon-Wallace Radio Store. To this statement defendant responded that Golson was a damned liar saying, "Golson broke into the store and handed me the radios out". Inspector Boggess then said, "You mean the Truetone radio that Mr. Fatino had, and the Majestic radio that I got out at Mr. Golson's home," to which defendant responded, "Yes. He knew what he was doing all the time." Inspector Boggess then said, "You were there when the radios were handed out, weren't you?" to which defendant replied, "I was standing outside and he passed them to me out there."

Defendant was then driven to the vicinity of the Bee-Jack Cleaners where another conversation ensued, Inspector Boggess telling the defendant that Golson had informed him that defendant was the man that "had broken in, that he took his club, broke the back window out into the lavatory, reached in and unlocked the door, when they both went in"; that Golson had stated he did not get any of the clothing but that defendant got it all and took it to his home. In response to this statement defendant said, "Golson's a damned liar. I didn't get any of the clothing." Inspector Boggess then said, "Gran, I got one of the suits, the jacket and a shirt out of your apartment", and, according to Inspector Boggess's testimony, defendant replied, "If you did, I don't know how they got there."

Driving to Ben's Market, another of the burglarized places, Inspector Boggess asked defendant if he ever went into that place, to which he replied that he had never been there in his life, whereupon the inspector said, "Why, I have a card down there with your handwriting on it which says that you found this place open, you searched it and if there is anything missing for the owner to call the station", to which, according to the witness, defendant replied, "Oh, yes, we did; we found it open and left a card." Inspector Boggess then said, "Did you take anything out of there while you were in there?" to which defendant stated, "We never touched a thing." The witness testified that he then said, "What did you mean, 'we'?" The witness Inspector Boggess then testified as follows: "He says, 'Golson'. I says, 'Well now listen, I know different. I know that there was in the neighborhood of three or four hundred dollars taken out of that market in bills and rolled money' and, I says, 'I do know that you got your share of it'. He then told me that the money was taken to Golson's house and split up; that he got $160.00 of it, or approximately that much."

Defendant did not take the witness stand in his own behalf, and his defense in the main consisted of the testimony of the witness Walter Housen who resided in the same building as defendant did, and who testified that on February 5, 1946, he was present when defendant purchased from a Mrs. Brazenda a radio, some sheets, and towels for the sum of $55. This witness was unable to identify with certainty the radio allegedly purchased by defendant on that occasion, and was equally uncertain of the identity of the sheets and towels.

It should also be noted that the transaction testified to by this witness, involving the purchase of this radio, occurred some weeks prior to the date when the Nixon-Wallace Radio Shop was burglarized. No denial was made by defendant, nor was any evidence introduced by him in denial or explanation, of any of the foregoing evidence presented by the prosecution in support of the other burglaries charged against him.

[2-6] Appellant first challenges the sufficiency of the evidence to sustain the guilty verdicts on the ground that the same is totally lacking in any corroboration of the testimony of the accomplice Golson, as required by section 1111 of the Penal Code. We deem it unnecessary to here reiterate the evidence, as we have hereinbefore narrated it in detail. Suffice it to say that when the testimony of the accomplice is eliminated, and the evidence of other witnesses as well as the entire conduct of appellant is examined, there is ample evidence to connect him with the commission of the crimes of which he was convicted. Though it be conceded that the corroborating evidence when standing by itself, is slight and entitled of itself to little consideration, it nevertheless does tend to connect appellant with the commission of the offenses. This is all that is required. Appellant's own statements and admissions, together with the facts related by the accomplice, can be sufficient proof of guilt to sustain the convictions. Appellant's statements to the police officers, the recovery of some of the stolen goods in his possession, and the sale by him of certain other stolen goods, all measure up to the requirements of section 1111 of the Penal Code. In determining the guilt of appellant the jury was entitled to take into consideration the fact that he made no attempt by his own testimony to contradict, explain or deny any of the circumstances established against him, and that the only evidence offered by him was with reference to a transaction that occurred some two weeks before the property allegedly involved therein was stolen. The following cases enunciating the fundamental principles of law applicable to the testimony of accomplices are more than sufficient to establish the sufficiency of the corroborating evidence in the case now engaging our attention. People v. Bridges, 73 Cal.App.2d 913, 914, 167 P.2d 793; People v. Willmurth, 77 Cal.App.2d 605, 611, 176 P.2d 102; People v. Braun, 31 Cal.App.2d 593, 600, 88 P.2d 728; People v. Tibbitts, 35 Cal.App.2d 669, 672, 96 P.2d 812; People v. Knoth, 111 Cal.App. 250, 253, 295 P. 577; People v. King, 40 Cal.App.2d 137, 141, 104 P.2d 521; People v. Meyers, 1 Cal.App.2d 620, 624, 37 P.2d 191; People v. Negra, 208 Cal. 64, 69, 280 P. 354.

[7] Appellant asserts that the only evidence that he was armed with a deadly weapon at the time of the commission of the offenses of which he was convicted, was that furnished by the accomplice. There was testimony by appellant's superior officers in the police department that under the rules and regulations of the department he was required to be armed with his service revolver at all times when he was on duty, and that, under the aforesaid regulations, a police officer was on duty twenty-four hours a day.

In the light of the rules governing the sufficiency of testimony corroborating the accomplice, we have no hesitancy in saying that the evidence given by appellant's superior officers permitted the drawing by the jury of inferences sufficient to furnish the necessary corroboration of the direct testimony of the accomplice that appellant was not only actually on duty but was armed in accordance with police regulations at the time he committed the offenses of which he was convicted.

[8, 9] Appellant next complains that the court erred in restricting the cross-examination of certain witnesses for the prosecution. Without enumerating the five specific instances called to our attention, we are satisfied that the contention is without merit. As to the first instance, the ruling was correct for the reason that the witness under cross-examination was not interrogated on direct examination concerning the accomplice Golson, regarding whom the questions objected to were asked. As to the second occasion, the objection was properly sustained, and counsel for appellant conceded that the sub-

ject matter of the interrogation was not gone into on direct examination. The objection referred to in the third instance was properly sustained on the ground that the question clearly called for hearsay answers. For the same reason the objections referred to in the fourth instance were properly sustained. The fifth and final instance concerned the attempt of appellant's counsel to cross-examine the accomplice Golson with reference to whether he had "talked the facts of this case over with any members of the police department?" The objection was sustained on the ground that the question was immaterial and not proper cross-examination. While this and other questions similar thereto might have been allowed, nevertheless, from a reading of the entire cross-examination of the accomplice we are convinced that the rulings did not operate to prejudice any substantial right of appellant, and do not therefore justify a reversal.

[10] Appellant next asserts that the court erred in not limiting its instructions regarding possession of stolen property to "recent possession", stating that the court dealt with stolen property in but two instructions, that in defining burglary the court instructed the jury that "it would be wholly immaterial whether the defendant actually stole anything while in such premises or not". Appellant urges that "were that literally true, evidence of the possession of stolen property by the defendant would never be admissible to identify him with the burglary". A reading of this instruction in its entirety reveals that by it the court was not dealing with the possession of stolen property but was defining burglary and the elements thereof.

[11-14] As to the second instruction, appellant complains that the court therein "omitted all reference to the time it was found in the defendant's possession", stating that "if a burglary was committed and" thereafter "the defendant was found in possession of property taken in the burglary, such is a circumstance of guilt". That it was prejudicial error for the court not to limit such possession to "soon after" the burglary. In so far as here pertinent the criticized instruction reads: "The mere possession of stolen property, however soon after the taking unexplained by the person having possession is not sufficient to justify conviction. It is, however, a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt." We find no error in the instruction as given. The element of time elapsing between the burglary and possession of property stolen therein goes to the weight rather than the admissibility of evidence in that regard. We understand the law to be as stated by the court, that when a burglary has been committed, and the defendant is found in possession of the stolen property, "however soon after the taking," such possession of the stolen property is a circumstance which, when unexplained, and taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant charged with the burglary, and the weight or intrinsic value of such evidence of possession in the light of time elapsing between the burglary and the discovery of possession by the defendant is a question for determination by the jury. People v. Russell, 34 Cal.App.2d 665, 669, 94 P.2d 400; People v. Shaw, 46 Cal. App.2d 768, 771, 117 P.2d 34; People v. McCann, 34 Cal.App.2d 376, 377, 93 P.2d 643; People v. Golembiewski, 25 Cal.App. 2d 115, 117, 76 P.2d 717. The primary question is whether a defendant was found in possession of the stolen property under circumstances and conditions which justify the triers of fact in concluding that he was the guilty party in the burglary charged against him.

[15] Appellant also attacks that portion of the instruction in which it is stated that the possession of stolen property would be a circumstance tending in some degree to show his guilt, asserting that the law attributes no such result to mere possession, but that "proof of such possession and guilty conduct" lends relevancy to the possession. That is exactly what the trial court stated to the jury, as a reading of the instruction in its entirety will readily indicate. We quote from the instruction:

"* * * If you should find from the evidence that a burglary was committed on the premises involved in this case and that thereafter the defendant was found in possession, or claimed to be the owner, of property stolen from the burglarized premises, such a fact would be a circumstance tending in some degree to show guilt, although not sufficient, standing alone and unsupported by other evidence, to warrant your finding him guilty. In addition to proof of possession of such property there must be proof of corroborating circumstances tending of themselves to establish guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant, and any other proved circumstances tending to show the guilt of the accused."

Appellant next challenges the correctness of six instructions given as to the law governing the corroboration of an accomplice. It would unduly prolong this opinion to here set forth in detail the instructions in question. However, they clearly and correctly set forth the law applicable to the corroboration of an accomplice as required by section 1111 of the Penal Code, and are in conformity with the principles enunciated in a veritable forest of cases, including those hereinbefore set forth in support of our conclusion that, in the instant case, the evidence of the accomplice was adequately corroborated.

[16-18] Although he requested no such instruction, appellant now contends that reversible error was committed by the court in failing to instruct the jury in accordance with section 1097 of the Penal Code, that if there was reasonable ground of doubt as to whether he was guilty of first or second degree burglary, he could have been convicted only of the lowest of such degrees. The court gave the code instruction on reasonable doubt; the code definition of burglary, defined the degrees thereof, and instructed the jury that if they believed the appellant guilty of burglary beyond a reasonable doubt, they must find the degree thereof. There are two additional answers to appellant's contention in this regard. The first is that the admissible evidence was such that appellant must have been acquitted, had the jury not been satisfied beyond a reasonable doubt that he was guilty of burglary of the first degree. When the nature of the evidence is such as to warrant only a verdict for the higher offense or degree it is proper to refuse to instruct as to a lesser offense or degree. People v. Tolli, 93 Cal.App. 62, 64, 268 P. 1078. Secondly, even though it be conceded that appellant was entitled to have the jury instructed in conformity with section 1097 of the Penal Code, no such instruction was requested by him, and he can not now complain that it was not given. While the court is required, on its own motion, to instruct the jury on general principles of law pertinent to the cause on trial, an appellant cannot predicate a reversal upon the failure of the court, in the absence of a request, to instruct upon specific matters. Included in these matters requiring a request on the part of a defendant is an instruction as to lesser degrees of the offense charged. In the absence of such a request the defendant is precluded from complaining of the failure of the trial court to give the same. People v. Modina, 146 Cal. 142, 144, 79 P. 842; People v. Dozier, 35 Cal. App.2d 49, 60, 94 P.2d 598, and cases therein cited.

[19-21] Appellant next contends that the judgments upon Counts II, III, IV and V "for burglary in the first degree are contrary to law in that there is no allegation in the amended information, no evidence that defendant, as a police officer, was not permitted to be armed on the occasions of the alleged burglaries". While it is difficult for us to follow appellant's reasoning on this point, his argument impresses us as being one contending that if a policeman commits a burglary while armed with his service revolver, which under police regulations he is required to carry, and which under the law he is permitted to carry, he is immune from prosecution and conviction of burglary of the first degree. In support of his argument, appellant refers to the Deadly Weapons Act (Deerings Gen.Laws, Act 1970, Stats. 1923, p. 695, and amendments) which exempts certain persons authorized to carry concealed deadly weapons from prosecution thereunder. But appellant was not charged with a violation thereof in this case. Appellant also refers to section 969(c) of the Penal Code which provides that when a

defendant is armed under circumstances bringing him within subdivision 2 of section 1168 of the Penal Code (now found in section 3024 of the Penal Code) and section 3 of the Deadly Weapons Act, prohibiting the possession of such weapons by certain persons, such charge shall be added to the indictment or information in the manner therein prescribed. In other words, appellant argues that the provisions of Penal Code section 969(c) and the Deadly Weapons Act limits or modifies section 460 of the Penal Code, which defines the degrees of burglary. Were appellant's contention sound it would mean that a police officer, or a person licensed to carry a concealed deadly weapon, could not be convicted of burglary in the first degree because he was so armed at the time of the commission of the crime. The mere statement of the appellant's contention is a sufficient answer thereto. Section 969(c) of the Penal Code and the foregoing sections of the Deadly Weapons Act were never intended to affect or modify section 460 of the Penal Code defining the degrees of burglary. They refer only to the question of increased penalties that may be imposed upon one who is armed with a deadly weapon at the time of his commission of or arrest for the commission of a felony charged against him. It is therefore, not necessary in a prosecution for burglary, under section 460 of the Penal Code, to allege or prove that at the time of the commission of the offense the perpetrator thereof was not authorized, licensed, or the possessor of a permit to carry a deadly weapon.

[22] Finally, appellant insists that the verdict and judgment of guilty under Count V charging the crime of burglary is inconsistent with the not guilty verdict returned on Count VI, charging the offense of grand theft. This claim is without merit. The two crimes of burglary and grand theft are not identical. The jury may well have believed that appellant entered the building occupied by Ben's Market with the intent to unlawfully and feloniously commit theft, as charged in Count V, but that he did not steal therefrom the sum of $430 as charged in Count VI. The essential elements of the crime of grand theft charged in Count VI are not present in the crime of burglary set forth in Count V. In any event, under section 954 of the Penal Code as amended, where as here, separate and distinct offenses are charged, each must stand on its own merit and a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon the other and separate count contained in the amended information. People v. Amick, 20 Cal.2d 247, 250, 251, 252, 125 P.2d 25.

The judgments are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

MORAN v. BOARD OF MEDICAL EXAMINERS et al.*

Civ. 15993, 16027.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1947.

Hearing Granted Feb. 16, 1948.

1. Administrative law and procedure 🔑792
Physicians and surgeons 🔑11(3)

Evidence sustained action of state board of medical examiners in suspending license to practice as physician for having prescribed narcotics to addicts, and finding of trial court that the board's finding that ministration and prescriptions by the physician were not emergency treatments was not supported by weight of evidence, but was an unjustified invasion of province of administrative tribunal. Business and Professions Code, § 2391; Health and Safety Code, §§ 11163, 11225.

2. Physicians and surgeons 🔑11(2)

The violation of statutes against prescribing and administering narcotics involves moral turpitude and is unprofessional conduct. Health and Safety Code, §§ 11163, 11225, 11330, 11390–11395; Business and Professions Code, § 2383.

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* Subsequent opinion 196 P.2d 20.

3. Physicians and surgeons ⚷11(3)

Where physician sought to annul order of state board of medical examiners suspending license for having prescribed narcotics to addicts, burden of proving that conditions existed which authorized the physician to prescribe narcotics at time of his treatment of the addicts was on the physician. Health and Safety Code, § 11330; Business and Professions Code, §§ 2383, 2391; Code Civ.Proc. § 1981.

4. Administrative law and procedure ⚷792

Findings of an experienced administrative body supported by substantial evidence should not be disturbed by reviewing court, especially when made after a full and formal hearing on matters involving technical and scientific evidence.

5. Poisons ⚷4

Where there was nothing sudden about the condition of any addict for whom physician prescribed narcotics but they were all chronic users of narcotics, the physician's action in prescribing narcotics could not be justified on ground of "emergency treatment" of patient. Health and Safety Code, § 11330; Business and Professions Code, § 2391.

See Words and Phrases, Permanent Edition, for all other definitions of "Emergency Treatment".

6. Physicians and surgeons ⚷11(3)

Order of state board of medical examiners suspending physician's license to practice because he prescribed narcotics to three addicts was not an abuse of discretion under evidence. Business and Professions Code, § 2391.

7. Mandamus ⚷190

Where order of state board of medical examiners suspending physician's license was proper, the physician was not entitled to recover any costs incurred in purchase of transcript of Board's disciplinary proceedings. Business and Professions Code, § 2391.

Appeals from Superior Court, Los Angeles County; Henry M. Willis and A. W. Ashburn, Judges.

Proceeding by James A. Moran against the Board of Medical Examiners of the State of California and R. O. Bullis and others, members of the State Board of Medical Examiners, for a writ of mandate to compel the annulment of an order of suspension of license to practice as a physician and surgeon. From an adverse judgment, the defendants appeal.

Reversed with instructions.

Joseph Scott, of Los Angeles (Cuthbert J. Scott, of Los Angeles, of counsel), for petitioner.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents and appellants.

MOORE, Presiding Justice.

Petitioner is a university graduate. Having been licensed to practice medicine in Louisiana and having served as a medical officer in the United States Navy, from which he was retired in 1943 for physical disability, he was in February, 1944, upon a reciprocity basis licensed as a physician and surgeon by the state board of medical examiners. In September of that year he commenced his private practice in Monterey county and there continued until the suspension of his license on August 19, 1946, for having prescribed narcotics to three addicts in violation of section 2391, Business and Professions Code. The addicts were one woman, herein referred to as Mrs. S, and two men, G and H. Dissatisfied with the decision petitioner filed this action for a writ of mandate against the board and its ten members individually, herein referred to as members, who with the board are referred to collectively as appellants, demanding that the order of suspension be annulled. Following a trial upon the amended petition, the alternative writ, the answer and the transcript of the disciplinary proceedings before the board, the trial court made findings favorable to petitioner's contentions and by its judgment ordered appellants to set aside and annul their action in suspending petitioner's certificate and to reinstate him as a licensed physician and surgeon. Contending that such judgment is not warranted by the law or the facts appellants bring this appeal.

The evidence established before the board and submitted to the court below is substantially as follows:

Petitioner continued the private practice of medicine in Monterey county until his suspension on August 19, 1946. He had been practicing thirteen months when he was first consulted by Mrs. S on October 13, 1945. He then gave her face one injection of novocaine and one of alcohol. Between that day and December 11 he delivered to Mrs. S 18 prescriptions for morphine sulphate, a total of 480 doses of one-half grain each, and prescribed a hypodermic syringe for its injection into her body because she complained of the taste and asked for the syringe. From her complaints, case history and a physical examination he diagnosed her disease as trifacial neuralgia or tic douloureux. He observed a muscular tic in the left side of her face which was the only objective symptom. She had severe pains in her extremities and in her body. It was his first case of tic douloureux. Within eleven days after her first call he learned from the letter of an eastern dentist who had treated her that she was a confirmed morphine addict. He made no attempt to get her committed other than to ask the county hospital whether she might obtain treatments there. Failing in this, he continued his morphine prescriptions at the rate of about ten doses daily. He communicated with Las Encinas, a privately owned hospital at Pasadena, requesting her admission for treatment for addiction. Upon her rejection for lack of a vacancy he continued to prescribe the drug in larger amounts. On November 21 he prescribed 40 doses. After getting 20 doses on November 23 she obtained 40 on November 26, 60 doses on November 30, 60 on December 5, and 20 doses on December 11.

Doctor Moulton was requested to visit Mrs. S at the home of her sister in San Mateo on December 16, 1945. He found no objective symptom of gall bladder ailment of which she at first complained nor of tic douloureux, or other incurable disease. After being closely questioned by Doctor Moulton she finally confessed that she was an addict and that her trouble was her need for morphine. He observed at her home that she had empty tubes labeled "20 tablets, half grain morphine" and empty morphine surretes. He gave her no treatment but caused her to be moved to the Alexander Sanitarium.

Doctor Alden was the consulting psychiatrist at that institution. Using the nurses' notes and the findings of other members of the medical staff he conversed with Mrs. S and concluded that she was suffering from withdrawal of narcotics. Although such withdrawal resulted in severe bodily pains, she received only one and a half grains during her stay. Doctor Alden testified that the necessity for treatment for any other infirmity or disease was not indicated.

In the case of Mr. G petitioner prescribed morphine sulphate for him from October 22 to November 23, a total of 180 doses. He was suffering from asthma. He told petitioner on his first call "how much morphine he was using" and had used "for a long time," from which petitioner said he concluded it was a sufficient quantity to make the man an addict. The only remedy for the asthma he gave Mr. G was "some vitamin C" and to alleviate the choking petitioner also gave him adrenalin and morphine. He kept neither a chart nor a history on the case. Doctor Fraser testified that the unfortunate man was accused in late January, 1946, of an intemperate use of narcotics; that as medical examiners for the courts he and Doctor Beardslee examined the addict and found that he had suffered from asthma for some time; that he told them he had suffered from asthma so severely that doctors had given him narcotics with the result that whenever he had an attack he felt he could not endure it without the use of narcotics. Whether to give the man 20 half-grain doses of morphine sulphate for use during a week was necessary the witness would not say, but he was positive that it had no therapeutic effect and admitted that the drug is recognized by some physicians as a proper prescription for the alleviation of chronic asthma.

The case of Mr. H is not to be overlooked. On September 18, 1945, the petitioner telephoned the division of narcotic enforcement inquiring relative to H who was at that time in petitioner's office requesting morphine sulphate for a "heart condition." Although he suspected H of being an addict he prescribed 20 fourth-grain tablets of morphine sulphate. He thereupon requested the information in the files of the division concerning H. The evidence was that on September 28 and again on November 10 petitioner prescribed 20 doses third-grain pantopon for H notwithstanding his suspicion of the latter's addiction. He testified that H had complained of spinal arthritis and that he had prescribed the narcotics because of the man's extreme pain.

Upon this evidence the board ordered that petitioner's certificate to practice medicine and surgery be suspended for one year and that thereafter he be on probation for five years during which he shall not acquire or prescribe narcotics or obtain a federal nacotic permit. Upon the petition for writ of mandate and appellants' return the board's action was reviewed by the court below.

The court found in accordance with petitioner's allegation that the board's findings to the effect that petitioner's treatment of the three addicts was not emergency treatment is not supported by the weight of the evidence, but on the contrary that the preponderance of evidence before the board shows that petitioner's treatment of such individuals was emergency treatment and that their condition at all times was complicated by the presence of an incurable disease. From such finding the court concluded that petitioner has been arbitrarily denied the right and privilege to practice medicine and surgery in this state by reason of the action of appellants in suspending his privilege to practice his profession, and that the action of appellants was arbitrary in that they have prejudicially abused their legal discretion in suspending his certificate. The ensuing judgment ordered appellants to "set aside, rescind and annul their action in suspending petitioner's certificate * * * and to reinstate said petitioner as a physician and surgeon * * * and to restore the petitioner's certificate to practice medicine and surgery in California."

Petitioner admitted that the three parties treated were known to be addicts; that after having such knowledge he repeatedly prescribed morphine for S and G. But he contended that his practice was correct for the reason that in the cases of the last two addiction was complicated by the presence of an incurable disease, while in the case of H he was discharged as soon as his addiction was established. Appellants contended that there were no symptoms of an incurable disease in either case and that petitioner continued to defy the law despite the fact that there was no objective symptom of such disease.

[1] With these contentions and the record of the proceedings before the board the matter was submitted to the superior court with the results reported above. The question for this court's decision is whether the evidence was such as to warrant the superior court's conclusion that the findings of the board, to wit, that the treatments of the three addicts were not emergency treatments and that the addictions of the parties were not complicated by the presence of incurable diseases was unjustified. The record shows that the board had before it substantial proof to warrant the suspension of petitioner's license to practice medicine. For that reason the finding of the trial court was not justified.

[2] The following are the provisions of the Health and Safety Code relating to the administration of narcotics: "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division." Section 11163. "Every person who issues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows all of the following: (a) The name and address of the patient. (b) The date. (c) The character and quantity of narcotics involved. (d) The pathology and purpose for which the prescription is issued, or the narcotic administered, prescribed, or dispensed." Section 11225. "Any narcotic employed in treating an addict for addiction shall be administered by a physician, or by a registered nurse acting under his instruction." Section 11390. "No person shall treat an addict for addiction except in one of the following: (a) An institution ap-

proved by the Board of Medical Examiners, and where the patient is kept under restraint and control. (b) A city or county jail. (c) A State prison. (d) A State narcotic hospital. (e) A State hospital. This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury." Section 11391. "A physician treating an addict for addiction shall not prescribe for or furnish an addict more than any one of the following amounts of narcotics during each of the first fifteen days of such treatment: (a) Eight grains of opium. (b) Four grains of morphine." Section 11392. "After fifteen days of treatment the physician shall not prescribe for or furnish to the addict more than any one of the following amounts of narcotics during each day of such treatment: (a) Four grains of opium. (b) Two grains of morphine." Section 11393. "At the end of thirty days from the first treatment, the prescribing or furnishing of narcotics shall be discontinued. " Section 11394. "The physician treating an addict for addiction shall within five days after the first treatment report by registered mail, over his signature, to the State division, stating the name and address of the patient, and the name and quantities of narcotics prescribed. *The report shall state* the progress of the patient under the treatment. The physician shall in the same manner further report on the fifteenth day of the treatment and on the thirtieth day of the treatment, and thereafter shall make such further reports as are requested in writing by the State division." Section 11395. It is to be borne in mind that sections 11390 to 11395 relate to the "Treatment of Addicts for Addiction," however, they emphasize the hostility of the State to the use of opium and morphine and the necessity for strict observance of kindred regulations. The violation of the statutes against prescribing and administering narcotics involves moral turpitude (Business and Professions Code, sec. 2383) and is unprofessional conduct. Brainard v. State Board of Medical Examiners, 68 Cal.App.2d 591, 593, 157 P.2d 7.

[3] Under the statutes petitioner as a practicing physician was permitted to prescribe narcotics as a part of his treatment for a disease, ailment, injury or infirmity other than addiction, if he in good faith believed that such disease or ailment required the application of a narcotic (section 11330); or he might prescribe its use in an emergency treatment of a patient whose addiction was complicated "by the presence of an incurable disease, serious accident or injury, or the infirmities attendant upon age." Business and Professions Code, sec. 2391. However, the burden of proving that all or one of such conditions existed at the time of his treatments of the three addicts was upon petitioner. Code Civ.Proc., sec. 1981; People v. Moronati, 70 Cal.App. 17, 21, 232 P. 991; People v. Agnew, 16 Cal.2d 655, 663, 107 P.2d 601. Such doctrine derives from the "rule of convenience" and is ubiquitously applied. People v. Osaki, 209 Cal. 169, 191, 286 P. 1025, 1035. The significance of this rule will be emphasized as the reasons for the judgment are further explored.

The direct evidence consists of (1) the testimony of Inspector Creighton who had found petitioner most cooperative; (2) the testimony of petitioner's mother who had observed all three of the addicts and had seen that they were suffering on the occasions of their consulting petitioner; (3) the testimony of petitioner who had examined the three patients. From his examination he found Mrs. S suffering severe pain in her side, head, face and abdomen. He gave her narcotics to control her pain; he was treating her for tic douloureux and trifacial neuralgia which after becoming chronic are difficult to control. She claimed to have had gall bladder trouble. He did not know that she was a veteran user of narcotics. She had a frequent muscular tic or spasm on the entire left side of the face. She supplied him with the names and addresses of her former doctors with whom petitioner communicated. He received a reply from a dentist in Cincinnati who had given her "a left infra orbital injection for tic in 1928, which she says was successful for six years. She now asks that I give you this information in the hope you will make another injection for her. She was then and is still * * * an addict." After his application to Las

Encinas in October he repeated his request in early November, with the same result. But he continued to prescribe the morphine sulphate for her until the ides of December.

He found Mr. G. to be suffering from an acute asthmatic attack. This addict's spells of choking would recur regularly. Petitioner first administered adrenalin without effect. Then he tried Vitamin C and morphine which "seemed to control his symptoms." He repeated the dose every two or three days. During 31 days he prescribed 180 doses of one-half grain each of morphine sulphate. He testified that he found that H had spinal arthritis; that he prescribed the narcotic "because of extreme pain and suffering"; that he did not consider H an addict although he was suspicious; that he believed all three of the named patients were pathological.

The foregoing is substantially the total of the evidence of the first class, and the only direct evidence that sheds any light upon the honest intentions and good faith of petitioner in his contention that his prescriptions of the morphine were to alleviate the pain of his patients suffering from incurable diseases. Evidently because it was the only direct evidence on the point that petitioner prescribed the morphine in good faith as a part of his professional service, the learned trial judge annulled the board's order cancelling petitioner's license.

But there was other proof upon that issue, to wit, the circumstantial evidence from which incriminating inferences may be drawn: (1) The excessively large number of doses given to S and G knowing that they were addicts. Although he knew that Mrs. S should be hospitalized for her addiction and attempted to gain her admittance into Las Encinas he continued to prescribe the generous dosage to her for six weeks after that institution had rejected her and notwithstanding her refusal to enter the county hospital. Such prescriptions were clear violations of section 11391, supra, from which an inference of guilt might be fairly deduced and an adverse finding made under section 2391, Business and Professions Code. (2) He prescribed 180 doses for Mr. G for his asthma knowing that G was an addict and that morphine had no curative qualities. See section 11393, supra. He told a special agent that the only reason G had to have morphine was his addiction; that he "did not know how many prescriptions" he wrote for him. Nor did he keep a record or history of his case. "I was sure he was an addict when he first came to me, but I wrote prescriptions for him for narcotics." After having already prescribed 100 doses for G, on November 13 he reported him as an addict to the division of narcotic enforcement giving his name, age, address, and dose: one and a half grains of morphine sulphate daily. (3) A similar report was made on November 15 with reference to Mrs. S after having already prescribed 180 doses for her subsequent to October 13. His failure to keep records and to make reports on both of these parties constituted violations of section 11395 and sufficed to justify the inferences of violations of that statute. (4) He prescribed twice for H, suspicious that he was an addict, before dismissing him. (5) He delayed reporting his prescriptions to the division of narcotic enforcement "for quite some time." (6) As further light upon his intent, petitioner prescribed for a Mrs. Peabody, not mentioned in either count of the accusation, after being apprised by the division of her addiction. She claimed to suffer from arthritis, gall stones and spinal arthritis. He gave her "20 dilaudid, one half grains." (7) In order to have a supply for his office he wrote prescriptions for morphine for his mother who served as his nurse.

The board was not only entitled, but was required, to consider such circumstances in determining whether petitioner acted in good faith and honestly believed that each of the addicts in question was suffering from incurable disease as well as from addiction. While the testimony of petitioner was direct and although he was the only person who could testify as to the thoughts he entertained, yet the circumstances particularized by him as well as those given by Doctors Moulton and Alden and by the special agents of the board, and his persistency in prescribing morphine for addicts when it could serve no purpose save that of gratifying appetites for the narcotic—these circumstances justify the inference of unprofessional conduct on the part of petitioner. And if in the minds of the members of the board such inferences outweighed the direct testimony of petitioner, the board was acting within its lawful discretion in suspending his license.

[4-6] It is elemental that the findings of a jury will not be upset by a reviewing court if there is any substantial evidence to support them. With what greater reason should the findings of an experienced administrative body be allowed to stand, especially when made after a full and formal hearing upon matters "involving technical and scientific evidence." Drummey v. State Board of Funeral Directors, 13 Cal. 2d 75, 86, 87 P.2d 848, 854; McDonough v. Goodcell, 13 Cal.2d 741, 746, 91 P.2d 1035, 123 A.L.R. 1205; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 446, 65 P.2d 1296, 115 A.L.R. 1. The board members knew as a scientific fact that the diseases claimed by the addicts were not incurable and that morphine has no therapeutic value. Also, as experienced physicians they knew that no emergency treatment was involved. "Emergency" connotes a sudden or unexpected situation demanding immediate action. (Oxford English Dictionary.) There was nothing sudden about the condition of any addict involved. They were all chronic users of narcotics. Petitioner's claim of good faith has slender support in view of his repeated prescriptions to S and G without pretending to examine them and without promptly reporting his acts as required by statute. People v. Kinsley, 118 Cal.App. 593, 601, 5 P.2d 938. If he did not act in good faith in prescribing the drug he violated the law (ibid), and the board was constituted to determine that very question.

The determination by the learned trial judge that the board's finding, to wit, that the ministrations and prescriptions by petitioner were not emergency treatments, is not supported by the weight of the evidence received by the board and was an unjustified invasion by the court of the province of that administrative tribunal. There was substantial evidence to support the board's finding and its judgment should not have been set aside.

[7] Petitioner assigns as error in case 16027 the trial court's order disallowing the item of $117 paid to the board's phonographic reporter for the transcript of the disciplinary proceeding. In view of our decision in cause 15993 that the judgment of the board should be upheld in suspending petitioner, it follows that he is not entitled to recover any costs incurred in the purchase of the transcript of the board's proceedings.

The judgment in cause 15993 is reversed with instructions to enter judgment denying the peremptory writ of mandate. The order in cause 16027 retaxing costs at $31.60 is affirmed.

WILSON, J., concurs.

McCOMB, Justice (concurring).

I concur in the order reversing the judgment of the trial court in cause No. 15993 for the sole reason that petitioner failed to apply to the trial court for a judicial review within thirty days after the medical board could have made an order for reconsideration of his case. (Sec.11523, Government Code.) Also I concur in affirming the order disallowing petitioner's costs in the sum of $117.

Petitioner, by requesting the phonographic reporter to prepare a transcript of the record, did not meet the requirements of section 11523 of the Government Code which extends the time for judicial review when petitioner has requested the *agency* to prepare and deliver to him all or part of the record. The phonographic reporter is not the agency or any part thereof. Section 11523 of the Government Code reads in part as follows: "Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him."

Since the board's decision was made August 16, 1946, the time for seeking judicial review expired thirty days later on

September 15, 1946, in view of the fact that petitioner had not acquired additional time by requesting the agency to prepare for him all or any part of the record.

82 Cal.App.2d 943

DOLL v. MARAVILAS et al.

Civ. 15777.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1947.

1. Quieting title 🔑52

In action to quiet title to restaurant equipment, wherein parties entered into a stipulation that articles belonged to plaintiff, plaintiff was not entitled to a provision in the judgment quieting title to those articles which concededly belonged to plaintiff. Code Civ.Proc. § 738.

2. Quieting title 🔑44(1)

In action to quiet title, plaintiff must establish title to the property in dispute.

3. Quieting title 🔑44(4)

In action to quiet title to restaurant equipment by purchaser of the restaurant against lessees of the vendors, wherein purchaser introduced a bill of sale from purchasers transferring all personalty "more particularly described" in inventory attached to chattel mortgage, but wherein such mortgage was not introduced in evidence, purchaser failed to establish title to disputed personalty in restaurant. Civ.Code, § 3534.

4. Landlord and tenant 🔑53(2)

Where vendors who had leased restaurant under lease obligating lessees to replace, at their own cost and expense, any items that became broken, damaged, or lost, waived benefit of replacement provision and permitted lessees to acquire title to replacements prior to sale of restaurant to purchaser, purchaser was not entitled to have title quieted in her to the replaced equipment.

5. Landlord and tenant 🔑48(1)

Whether purchaser from lessors was entitled to recover attorney's fees from lessees under provision in lease for attorney's fees, in event that it became necessary to enforce the lease, depended on whether lease was breached by lessees.

6. Appeal and error 🔑1011(1)

The trial court's finding on conflicting evidence is binding on the District Court of Appeal.

7. Landlord and tenant 🔑34(5)

In suit by purchaser of restaurant from lessors to cancel lease of restaurant and equipment, on ground that lessees breached lease by a 10-day closing and by failing to keep restaurant open during certain business hours, evidence sustained findings that 10-day closing was with purchaser's consent and that purchaser was bound by the lessors' liberal interpretation of the meaning of "business hours".

8. Landlord and tenant 🔑53(2)

Purchaser of leased premises was bound by vendors' interpretation of the terms of the lease, since an assignee can gain no better position than his assignor with respect to the subject matter of the assignment.

9. Contracts 🔑147(1)

A contract is to be interpreted so as to give effect to the mutual lawful intention of the parties as it existed at the time of contracting. Civ.Code § 1636.

10. Contracts 🔑170(1)

Construction of a contract may be shown by the conduct of the parties in respect to uncertain terms where the meaning so determined is not unreasonable in view of the language used. Civ.Code, § 3535.

11. Landlord and tenant 🔑53(2)

Where lessors, who had leased restaurant at automobile cabin camp under lease requiring restaurant to be kept open during all business hours, allowed lessees to run the restaurant to suit themselves and to keep open for such hours as they found reasonable in view of food and help shortages and demand, such interpretation of "business hours" was not unreasonable and one who purchased the camp and restaurant from lessors was bound by such interpretation. Civ.Code, §§ 1636, 3535.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Hours".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ruth Doll against Steve Maravilas and others to quiet title to certain restaurant equipment, to cancel lease of restaurant and equipment, and to enjoin certain of the defendants from removing equipment from the restaurant. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Dailey S. Stafford and William H. Haupt, both of Los Angeles, for appellant.

Don Lake, of Los Angeles, for respondents Maravilas.

SHINN, Acting Presiding Justice.

This is an appeal by the plaintiff, Ruth Doll, from a judgment for defendants Jock and Maravilas in an action to quiet title to certain restaurant equipment, to cancel the lease of the restaurant and the equipment, and to enjoin the defendants Maravilas from removing the equipment from the restaurant.

The background of the case is as follows: On or about January 8, 1945, one Tharalson, a real estate broker, contacted Olive Vienna, appellant's mother and agent in the matters here involved, regarding the purchase from respondents Jock of the Evergreen Auto Court consisting of approximately 49 cabins generally furnished, a gas station and a restaurant, both equipped, and other buildings. Tharalson left with Vienna overnight certain papers including the two chattel mortgages then on the property and the restaurant lease. The mortgages and the lease included inventories of what each covered. The purchase of the Evergreen Auto Court by appellant from defendants Jock was not consummated, however, until one month later, February 8, 1945, at which time the Jocks likewise executed an assignment to appellant of their reversion under the restaurant lease. Meanwhile, respondents Maravilas, the lessees under the restaurant lease, on or about January 24, 1945, arranged to refit the restaurant. Beginning during the first week in February and for a few weeks thereafter, the restaurant was closed while it was renovated, old equipment removed, and new equipment installed, all under the direction and at the expense of respondent Steve Maravilas, and all unknown to appellant. In August, 1945, Steve Maravilas sought from Vienna an extension of the restaurant lease which otherwise would expire within a year. When such extension was not forthcoming, a dispute about the ownership of certain of the restaurant equipment arose between the Maravilas and Vienna. The Maravilas commenced the operation of an additional restaurant on or about September 1, 1945. About this time they curtailed somewhat the hours of operation of the restaurant here involved by closing Saturdays and not remaining open for the evening meal on their five operating days per week. They also closed for a ten-day period around Labor Day. Vienna claimed that the Labor Day closing was in violation of their lease and demanded possession, but accepted their rent on September 12th. However, the dispute between the Maravilas and Vienna continued, and upon an alleged threat of the Maravilas to remove the disputed equipment, appellant commenced this suit.

[1-3] The quiet title cause of action will be first considered. At the trial respondents Jock disclaimed any interest in the restaurant equipment claimed by appellant, and respondents Maravilas entered into a stipulation with appellant that they disputed appellant's claim to only the following items of restaurant equipment of the lease inventory claimed by appellant: (1) Two booths including tables; (2) gas range including hot plate; (3) pie case; (4) Silex stove and accessories; (5) cash register; (6) steam table; (7) ceiling fan. At the conclusion of the trial appellant expanded the list of items in controversy by adding the following, by way of an amended complaint: (1) ceiling cooling system; (2) sink; (3) counter and stools. Appellant objects in two particulars, so far as her

quiet title cause of action is concerned, to the trial court's judgment that she take nothing. She asserts first that the trial court should have quieted her title to those articles which the court found in accordance with the aforementioned stipulation to belong to her. This contention is without merit. There being at the time of the judgment no claims to these articles adverse to appellant's claim of ownership of them, a provision in the judgment quieting her title to them was not warranted. Code Civ.Proc., sec. 738; Taylor v. McConigle, 120 Cal. 123, 127, 52 P. 159; Martin v. City of Stockton, 39 Cal.App. 552, 559, 179 P. 894; Williams v. Rush, 134 Cal.App. 554, 560, 25 P.2d 888; cf. Baar v. Smith, 201 Cal. 87, 99, 255 P. 827; Drake v. Russian River Land Co., 10 Cal.App. 654, 657, 658, 103 P. 167. Appellant next contends that the trial court's finding against her ownership of the ten disputed articles is erroneous. This contention is likewise untenable. It is settled beyond question that to prevail in a quiet title action, a plaintiff must establish his title to the property in dispute. Tanner v. Title Insurance & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383; Williams v. City of San Pedro etc. Co., 153 Cal. 44, 49, 94 P. 234. This, appellant failed to do. Appellant appears to claim title to the articles listed in the inventory of the restaurant lease together with three additional articles. This inventory does not purport to show what was owned by the lessor; it merely purports to establish what was leased by the lessor. Appellant's claim of title to the restaurant equipment in dispute rests upon the terms of the bill of sale she took from respondents Jock, like her claim of title to the Evergreen Auto Court and its contents generally. The bill of sale, according to its terms, transferred to appellant the Evergreen Auto Court together with all personalty located thereon, "being more particularly described in Inventory attached to that certain Chattel Mortgage dated August 25, 1942," etc. Particular expressions limit general ones. Civ.Code, sec. 3534. Accordingly, to ascertain the personalty which passed to appellant under the bill of sale from respondents Jock, resort should be had to the inventory of the chattel mortgage of August 25, 1942. This chattel mortgage was not introduced in evidence. It is true that appellant introduced in evidence a bill of sale of certain restaurant equipment, dated March 17, 1942, and an undated list of such equipment which one George Young, a witness and the original lessor of the restaurant to Steve Maravilas, identified as containing the equipment which was in the restaurant when he leased it to Maravilas in August, 1942. Apparently we are asked to assume that the inventory of the missing chattel mortgage is identical in content with this list. This we cannot do.

It may be that the evidence would have supported an interpretation which gave effect to the general description in the bill of sale notwithstanding the reference to the inventory attached to the chattel mortgage, upon the theory that there was an ambiguity for which the Jocks were responsible (Civ. Code, sec. 1654), or because they believed that plaintiff was relying on the general description (Civ.Code, sec. 1649). But the finding that plaintiff had no title does not necessarily rest upon a failure of the court to give effect to the general language. It is supportable upon the ground that the Jocks did not have title to the articles in question.

[4] The record shows that title to the ten disputed articles is not in appellant. Appellant bases her claim of ownership of this equipment upon the provision of the lease obligating the Maravilas, as lessees, "to replace, at their own cost and expense, any items that become broken, damaged or lost." Respondents Jock, appellant's immediate predecessor as landlords of the Maravilas, however, waived the benefit of this replacement provision and permitted Steve Maravilas to acquire title to replacements. As to the seven disputed items which are contained in the inventory of the lease, the Jocks signified their consent to this arrangement by striking from the inventory of Maravilas' copy of the lease those items which Maravilas had replaced. Mrs. Jock initialed these deletions. The Jocks also acquiesced in Maravilas' claim of ownership of the three disputed items which are not contained in the lease inventory. The apparent reason for this generous attitude of the Jocks was the fact that much of the leased equipment had been

there about 20 years and most of it was secondhand. The history of the disputed equipment is enlightening. Steve Maravilas replaced the Silex equipment at his own expense when he moved in as Young's tenant in 1942. About two or three months later he installed the ceiling cooling system, also at his own expense. The ceiling fan was not removed from the restaurant until February, 1945, when he and Jock took it out. The ceiling cooling system, being an addition by Maravilas, was removable by him at the termination of the lease according to its terms. The sink became badly cracked. Jock took it out and Maravilas replaced it at his own expense. About the time the Maravilas entered into their lease with the Jocks, Maravilas replaced the range, the steam table, and the pie case at his own expense. A few months later he bought a cash register when the Jocks removed the one in the restaurant to their office. The 1945 refitting by Maravilas, which was undertaken with the consent of the Jocks, involved trading in the range, the counters and stools, and the two booths for another range, steam table, pie case, counter and stools. The replacements cost approximately $2,000, while $160 was allowed for the trade-in. The replacements were purchased on a conditional sales contract, and at the time of the trial, title to these articles was still in the conditional vendor. From the foregoing it can be seen that the findings of the trial court as to appellant's lack of title to the disputed equipment are supported by substantial evidence.

[5-7] Inasmuch as the restaurant lease expired on August 11, 1946, appellant's third cause of action, for injunctive relief, has become moot. But the same may not be said regarding her second cause of action, for cancellation of the lease, on account of the provision in the lease for attorney's fees in the event it became necessary to enforce the lease. Whether appellant is entitled to attorney's fees under this provision depends upon whether the lease was breached. Appellant claims that the Maravilas breached the lease by their ten-day closing around Labor Day and by their failure to keep the restaurant open during business hours. The trial court found adversely to these claims. It found that the Labor Day closing was done with the consent of appellant and that appellant is bound by her predecessor's liberal interpretation of the meaning of "business hours." Its finding as to the Labor Day closing was made upon conflicting evidence and is therefore binding upon us. Appellant, however, brands the evidence supporting this finding as inherently improbable because at the time this concession was allegedly made, the parties were engaged in a dispute over the ownership of various items of the restaurant equipment. We do not so regard it in view of the further circumstance that the parties were seeking to compromise their dispute.

[8-11] The question presented by the "business hours" controversy is an interesting one. Is a successor landlord bound by his predecessor's interpretation of the terms of the lease? We believe that generally he is. It is a well-established rule of law that an assignee, such as appellant is, can gain no better position than his assignor had with respect to the subject matter of the assignment. Western Oil, etc., Co. v. Venago Oil Corporation, 218 Cal. 733, 738, 24 P.2d 971, 88 A.L.R. 1271; Rest., Contracts, sec. 167. Likewise, it is elementary that a contract is to be interpreted so as to give effect to the mutual lawful intention of the parties as it existed at the time of contracting. Civ.Code, sec. 1636. This means that throughout the life of an unmodified contract its interpretation is governed by the mutual intention of the original parties at the moment of contracting. In other words successors in interest are bound by the construction reasonably given contractual terms by the original parties. Furthermore, since contemporaneous exposition is generally the best (Civ.Code, sec. 3535), such construction may be shown by their conduct in respect to uncertain terms where the meaning so determined is not unreasonable in view of the language used. Universal Sales Corporation v. California etc. Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Rest., Contracts, sec. 235e. In the instant case the original parties to the lease before us were the Maravilas and the Jocks. The lease read, "said premises shall

be open for business by the Lessees during all business hours during said term." The Jocks allowed the Maravilas to run the restaurant to suit themselves and to keep open for such hours as they found feasible in view of food and help shortages and demand. This liberal interpretation of what was meant between the original contracting parties by "business hours" is not unreasonable under the surrounding circumstances. This was a fixed rent rather than a percentage lease; consequently, the rental value of the property to the landlord was unaffected by the restaurant's operating hours. While it undoubtedly added to the customer appeal of the auto court to have a going restaurant on the premises, the cabins had cooking facilities and they were not rented on a room and board basis. Even Young, the Jock's predecessor as landlord of the Maravilas, left the daily operating hours of the restaurant up to them. On the basis of the foregoing we are satisfied that the trial court's findings that the lease was not breached is correct.

The judgment is affirmed.

WOOD, J., and VALLEE, Justice, pro tem., concur.

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83 Cal.App.2d 15

In re SPAULDING'S ESTATE.

SPAULDING v. SEATON.

Civ. 13415.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1947.

Rehearing Denied Jan. 19, 1948.

Hearing Denied Feb. 16, 1948.

1. Wills 🔑163(3)

That an illicit relation existed between testator and legatee when will was executed did not give rise to a presumption of undue influence nor of itself justify an inference of undue influence.

2. Wills 🔑166(3)

Evidence from which jury could have inferred that an illicit relation existed between testator and legatee when will was executed and that legatee therefore had an opportunity to influence testator's perversely inclined mind, and that the will unduly favored legatee over contestant, the more natural object of testator's bounty, was insufficient to permit the setting aside of the will on the ground of undue influence.

3. Wills 🔑166(1)

It is not every connection, however slight, of the person accused of undue pressure in the making of a will that is sufficient to permit the conclusion that what, otherwise, would only have been possibility or suspicion, has become a fact.

4. Wills 🔑324(3)

In will contest before probate, evidence which at most showed mere opportunity to unduly influence testator and existence of illicit relation between testator and legatee at time will was executed was insufficient to go to the jury in behalf of contestant who was nephew and adopted son of testator who died some four years after execution of will.

5. Appeal and error 🔑110

An order denying motion for a new trial is not appealable.

* * *

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Proceeding in the matter of the estate of Frederick J. Spaulding, also known as F. J. Spaulding, deceased, wherein Bryan J. Spaulding filed a contest before probate which was opposed by Lodie L. Seaton, proponent. From a judgment admitting the will to probate and from an order granting nonsuit as to undue influence and from an order denying motion for a new trial, the contestant appeals.

Judgment and order granting motion for nonsuit as to undue influence affirmed, and appeal from order denying new trial dismissed.

Charles A. Christin and Everett H. Roan, both of San Francisco, for appellant.

Gaylord & Gaylord and Walter H. Duane, both of San Francisco, for respondent.

DOOLING, Justice.

Bryan Jennings Spaulding, adopted son and sole heir at law of Frederick J. Spaulding, deceased, filed a contest before probate of the last will of the decedent, alleging that testator was not of sound mind at the time of the execution of said will, that the will was procured by the undue influence of proponent, to whom decedent bequeathed practically his entire estate, and that said will was not properly attested and executed.

At the end of contestant's case the contest with respect to the attestation and execution of the will was withdrawn and a motion for nonsuit was granted as to the undue influence count but denied as to the insanity count. The jury found decedent of sound mind and the will was admitted to probate. Contestant appeals from the judgment admitting the will to probate, from the order granting the nonsuit as to the undue influence count and from an order denying his motion for a new trial. His argument on appeal is solely concerned with the nonsuit as to the undue influence count. With respect to this count the contest was based on allegations of control of the young proponent over the aged decedent mostly because of an unnatural sexual relation existing between them, use of that influence by proponent to suggest the proposed will and pressure to execute it by threatening to discontinue the unnatural relation.

At the trial contestant did not adduce any direct proof of the alleged suggestion and pressure. He contends however that there was circumstantial evidence entitled to go to the jury, consisting of a number of factors indicative of subversion of decedent's volition, which in combination would justify an inference of undue influence, although each factor standing alone would be insufficient. For this contention he relies mostly on Estate of Graves, 202 Cal. 258, 262, 259 P. 935, followed by this court in Estate of Reiss, 50 Cal.App.2d 398, 405, 123 P.2d 68. In the Graves case [202 Cal. 258, 259 P. 936] it is said:

"Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination. 26 Cal.Jur., pp. 647, 648. Appellant correctly contends that mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with interest, or a motive to do so, does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on her testamentary act. Estate of Morcel, 162 Cal. 188, 194, 121 P. 733. But in this case it clearly appears that the appellant took an active part in securing the execution of the will at a time when there existed a confidential relation between himself and Mrs. Graves. The rule is well settled that: '"where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud" (Estate of Baird, 176 Cal. 381, 384 (168 P. 561); Estate of Nutt, 181 Cal. 522, 528 (185 P. 393), and that "a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will." Estate of Higgins, 156 Cal. 257, 261, 104 P. 6.' Estate of Relph, 192 Cal. 451, 465, 221 P. 361, 367."

We do not think that the facts proved and the inferences that can be legitimately drawn from them bring this case under the principle applied in Estate of Graves, supra, and in many other such cases. See for example Estate of Teel, 25 Cal.2d 520, 528, 154 P.2d 384, and cases there cited.

Frederick Spaulding died on January 18, 1944. The will offered for probate was dated February 27, 1940, at which time decedent was 63 years of age. He had adopted contestant, a nephew of his, in the year 1917 when contestant was nearly 21 years of age. In the year 1918 decedent made a will of which contestant was the principal beneficiary. Until the year 1926 decedent and contestant lived and worked together, building houses and gas stations and operating cabins and auto courts. However decedent became repeatedly involved in trouble with the authorities because of a tendency to sex perversion. In the year 1926 he was sentenced to imprisonment at San Quentin. In 1931 he was paroled in the custody of contestant but stayed with contestant for a few months only. In March, 1935, he made a will leaving nearly his whole estate to a young man with whom he was then acquainted. About the month of November, 1935, decedent tried to commit suicide when he faced a new sex perversion charge when still on parole. The will made in 1935 was revoked in January, 1936. Beginning in the year 1936 decedent served a term of approximately two years at Folsom Penitentiary. When he was released from there he stayed only a few days with contestant. Since then until testator's death the relations of decedent and contestant remained good but they did not visit each other frequently. After having travelled for some time decedent, in the latter part of the year 1939, bought a hotel in Fresno, which he ran himself. In the early part of the year 1940 the witness James T. Collingsworth saw proponent and decedent a few times together at the hotel. When asked who the proponent was decedent said: "It is just a punk we picked up. He has a room back here." The further evidence of the witness Collingsworth and his wife is such that a jury would certainly have been entitled to conclude from it that about the time of the execution of the will decedent entertained illicit relations with proponent. There is no evidence as to relations between them prior to December, 1939, or later than March, 1940.

With respect to the making of the will proponent called as a witness by contestant, testified that in February, 1940, probably two weeks before the 27th, the date of the will, decedent asked him by letter to come to him; decedent then suggested that proponent would come to work for him and also that a will be made in his favor. Proponent did not want to take a steady job at the hotel but decedent nevertheless wanted to make the will. An hour or two later proponent went with decedent to decedent's attorney Mr. Hays, whom he had never met before, solely to be introduced to him. After the introduction he left decedent and Mr. Hays and sat on a bench in a corner far from where they were talking. The distance was as large as two rooms; he could not hear what was spoken. Mr. Hays testified that when the will was signed only decedent, Mr. Hays himself, and his secretary were present. Decedent was his regular client. Decedent gave him the facts required for drawing of the will and came back after the will had been drawn. Some time elapsed in between but the witness did not remember whether it was on the same day or whether there were one or two days in between. Prior to the execution of the will proponent came to the office with decedent and was introduced to the witness; he does not remember any conversation except the introduction. It was the only time he met proponent. He does not know whether proponent was present when decedent discussed the will. Witness had made an extraordinarily large reception room by cutting off the hall; at one end near the desk of the secretary was a bench. He does not recall where the conversation between himself and decedent took place. He believes that proponent was there during the time the will was being discussed but he has a distinct recollection that he did not participate in any way in the conversation. Proponent did not return to the office when the will was executed. The deposition of Mr. Hays' secretary is in accord with the testimony of Mr. Hays.

[1] There did not exist between decedent and proponent a relation recognized as being confidential in character nor is there any proof of confidence or reliance actually reposed by decedent in proponent. The illicit character of the relation does not cause a presumption nor does it in itself justify an inference of undue influence. "The question is as to the effect of the influence upon the testator's mind, not as to its moral character or its source, although in some cases the character of the person exerting the influence may be an important factor in determining its effect." In re Ruffino, 116 Cal. 304, 316, 48 P. 127, 130. Compare Annotation 66 A.L.R. 243.

[2] Had the evidence been permitted to go to the jury they could have inferred from it that an illicit relation gave pronoment an opportunity to influence the testator's perversely inclined mind and also that the will unduly favored proponent over contestant, the more natural object of testator's bounty. But these two circumstances are insufficient to permit the setting aside of a will on the ground of undue influence. In Estate of McGivern, 74 Cal.App.2d 150, 156, 168 P.2d 232, 235, this court stated: "It is the settled rule that: 'Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act. Estate of Langford, 108 Cal. 608, 41 P. 701; In re Estate of Carithers, 156 Cal. 422, 105 P. 127.' In re Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762, 765.

"In Re Estate of Morcel, 162 Cal. 188, 195, 121 P. 733, 735, the Supreme Court, in speaking of the quantum of proof necessary, said: 'And it must also be borne in mind that a mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground. (In re) Estate of Keegan, 139 Cal. (123), 127, 72 P. 828. The evidence against the will must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re McDevitt's Estate, 95 Cal. [17] 33, 30 P. [101], 106. "In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." In re Langford, 108 Cal. [608], 623, 41 P. [701], 705.' "

With respect to the unnatural character of a will it is said in Estate of Tribbey, 58 Cal.App.2d 100, 104, 135 P.2d 603, 605:

"Whether or not the will was unnatural in its provisions is of no great importance in the absence of sufficient evidence that the will was not the spontaneous act of a competent testator. It has been said that one has a right to make an unjust will, an unreasonable will, or even a cruel will. In re McDevitt, 95 Cal. 17, 33, 30 P. 101."

[3] What is completely lacking in the evidence here is proof of any actual pressure exerted on decedent, either operating directly on the testamentary act or in any other way. Appellant argues that the fact that proponent accompanied the testator to the attorney when testator gave instructions for the will is, in combination with the elements of opportunity and undue benefit, sufficient to permit an inference of a pressure overpowering testator's volition at the time of the making of the will. Not all connection, however slight, of the person accused of undue pressure with the making of the will is sufficient to permit the conclusion that what otherwise would only have been possibility or suspicion has become a fact. In Estate of Anderson, 185 Cal. 700, 717, 718, 198 P. 407, 414, the supreme court said:

"It is also claimed, however, that there was present in the case at bar the element of activity on the part of the aunt in the procurement of the will. The only evidence of such activity is that she obtained a letter of introduction to the lawyer who prepared the draft of the will, and went with the testatrix to his office and there remained in an outer room during the interview between the testatrix and the lawyer.

But this is not the activity in the procurement of the will which is necessary in order to give rise to a presumption of undue influence. The activity must be in the use of the relation for the overcoming of the will of the testator. As was said in Estate of Ricks, [160 Cal. 450, 117 P. 532] (to quote again): 'there must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament.'

"It is also worthy of note in this connection that in Estate of Morcel, 162 Cal. 188, 121 P. 733, heretofore referred to, where the husband was accused of procuring the will of his wife by undue influence, the same activity as that shown here appeared, that is, the husband went with the wife to the lawyer's office when the will was drawn and executed (in fact he remained in the room during the whole time), the same contention as to a presumption arising was made as is made here, and the contention is directly overruled. Other cases of well-nigh identical facts where the same contention was made are Estate of Latour, 140 Cal. 414, 423, 73 P. 1070, 74 P. 441, Estate of Calef, 139 Cal. 673, 73 P. 539, and Estate of Purcell, 164 Cal. 300, 128 P. 932.

"Our conclusion then is that the evidence is insufficient to sustain the verdict of undue influence."

See also Estate of Easton, 140 Cal.App. 367, 35 P.2d 614.

In this case the testator went to his attorney of whom he was a regular client; there is nothing to indicate that he went there at the instigation of proponent; proponent, after having been introduced to the attorney, did not participate in any way in the discussion of the instructions; he did not accompany the testator when the testator returned to execute the will; the attorney and his secretary who acted as attesting witnesses did not consider testator under undue influence. In the circumstances of the visit to the attorney's office there is nothing to indicate that testator did not act entirely in accord with his own desire.

Besides, the practical disinheritance of contestant was obviously not a new thought of decedent, as in 1935 he made a will to the same effect (compare Estate of Flatau, 10 Cal.2d 701, 704, 76 P.2d 506) and decedent allowed the present will to stand until his death, four years after the execution, although there is no evidence as to the duration of his relation with proponent. Compare Estate of Morcel, 162 Cal. 188, 199, 121 P. 733; Estate of Lances, 216 Cal. 397, 404, 14 P.2d 768; Estate of Morey, 147 Cal. 495, 505, 82 P. 57; but see Estate of Hettermann, 48 Cal.App.2d 263, 273, 119 P.2d 788.

[4] We conclude that here there was no substantial evidence, contradicted or uncontradicted, which would have entitled the jury to find undue influence. Only by entering upon the field of conjecture could a jury have decided that in making this will decedent was moved not by his own unnatural inclination but by undue pressure of proponent.

[5] The judgment and the order granting a motion for a nonsuit as to the undue influence count are affirmed. The appeal from the order denying a new trial is dismissed, the order not being appealable.

NOURSE, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

83 Cal.App.2d 1

GARRISON, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

Civ. 16018.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1947.

Rehearing Denied Jan. 7, 1948.

As Corrected Jan. 8, 1948.

Hearing Denied Feb. 16, 1948.

1. Insurance ⚷67

An agreement by new life insurance company, rehabilitating old insolvent life insurance company's business, to pay insolvent company's liquidator amount of all allowed claims against such company, subject to provisions that aggregate payments should not exceed full amount of claims finally allowed and that moneys paid and remaining in liquidator's hands after all such claims were paid should be returned to new company, obligated such company to pay only principal amounts of such claims without interest from date of old company's established insolvency. Civ. Code, § 1641; Insurance Code, § 1013.

2. Insurance ⚷67

The Civil Code section respecting interpretation of uncertain contract does not require that doubt as to liability of new life insurance company, rehabilitating insolvent old life insurance company's business, for interest on allowed claims paid by new company, be resolved in claimant's favor in view of preceding sections. Civ. Code, §§ 1635 et seq., 1638, 1640, 1641, 1644, 1647, 1654.

3. Insurance ⚷67

A new life insurance company, organized to rehabilitate old insolvent life insurance company's business, was not reincarnation or continuance of old company, and hence did not impliedly promise to pay all of such company's indebtedness, in view of Insurance Code provisions respecting insolvency and liquidation proceedings, though old company was equitable owner of new company's stock and old company's assets were transferred to, and its burdens assumed by, new company, as required by law. Insurance Code, §§ 1010 et seq., 1043.

4. Insurance ⚷67

A new life insurance company, whose offer to reinsure noncancelable income total disability policies issued by old insolvent insurance company was rejected by policy holders, was not responsible for old company's breaches of policies, and hence owed no interest on claims, filed with and allowed by state insurance commissioner as liquidator of old company, for such breaches since no contract existed between policyholders and new company.

5. Insurance ⚷67

An insolvent insurance company's obligation to pay established claims against it on noncancelable income total disability policies, with interest, out of assets fructifying after organization of new company to rehabilitate old company's business, imposes no liability on new company to pay interest accrued against old company on such claims since establishment of its insolvency.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Maynard Garrison, State Insurance Commissioner, against the Pacific Mutual Life Insurance Company of California, a corporation, John Harnish, and others for a declaration respecting the liability of the Pacific Mutual Life Insurance Company, as rehabilitator of defendant corporation's business, for interest on claims, allowed by petitioner as conservator and liquidator of defendant corporation, for its breaches of certain noncancelable income total disability policies. From a judgment declaring the rehabilitator's liability limited to payment of the principal amount of such claims, respondents Harnish and others appeal.

Affirmed.

George W. Manierre, of Los Angeles, for appellants.

Mitchell, Silberberg & Knupp and Perry Price, all of Los Angeles, for petitioner.

O'Melveny & Meyers, Pierce Works, and John Whyte, all of Los Angeles (Aubrey Harwood, of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

The question for decision is whether an insurance company which was organized to conserve an insolvent insurance company and to rehabilitate its business is obligated to pay interest on claims allowed by the conservator against such insolvent based upon the breach by the latter of certain policies, in the absence from the rehabilitation agreement of a specific promise to pay such interest, the agreement having provided for the payment to the liquidator for the benefit of such claimants an amount equal to the sum of all "allowed claims" against the insolvent company.

As of July 22, 1936, the Insurance Commissioner as conservator of the Pacific Mutual Life Insurance Company of California, herein referred to as "old company," with the trial court's approval on December 4, 1936, entered into a Rehabilitation and Reinsurance Agreement, herein designated as "R agreement," with Pacific Mutual Life Insurance Company, herein referred to as "new company." On February 2, 1937, the Insurance Commissioner of California was appointed as conservator and liquidator of the old company and since the last mentioned date such Commissioner and his successors have been the duly appointed, qualified and acting liquidators of the old company. On May 6, 1937, the Commissioner pursuant to statute[1] published notice to the policy holders, creditors, shareholders and all other persons interested in the assets of the old company, requiring claimants to file their claims with him together with proofs thereof within six months after the date of the first publication of such notice. The R agreement is a lengthy document containing 28 paragraphs or *articles* under the terms of which new company became obligated to take over and conduct the insurance business of the old company, protect the latter's assets, reinsure its policy holders and liquidate its obligations.

Appellants were holders of the old company's noncancellable income policies,[2] insuring them against total disability. (R agreement, art. 1.) Their claims having arisen from old company's breach of such contracts and having been allowed by the conservator, appellants asserted their right to be paid legal interest by new company from the date of old company's established insolvency. The current Insurance Commissioner, herein referred to as petitioner, rejected such additional liability as not having been definitely assumed by new company. At the same time, as a protection to the creditors of old company, he demanded that new company continue to transfer additional funds until an adjudication of the matter might be obtained. He instituted this action for the purpose of obtaining a declaration with reference to the liability of new company for the claimed interest. The actual filing was expedited by new company's payment to petitioner of $787,263.25, the amount of the principal of all claims "finally allowed," as full compliance with its obligation under the R agreement.

Upon the presentation of the petition the court below issued its order directing all persons interested as creditors, policy holders or claimants of old company to appear and show cause why the court should not make an order determining (a) whether the liability of new company under article 17 is limited to the payment of a sum equal to the principal amount of the claims filed with the liquidator and finally allowed, or (b) extends to the payment of a sum equal to the amount of all such claims including such interest, if any, as may have accrued on such claims.

New company denied that it was obliged to pay any sums on account of interest. Appellants by their answer alleged that article 17 should be so construed as to extend new company's liability "to the payment of interest accrued and to accrue upon the principal sum of the claims of appellants theretofore approved, allowed and paid." A trial of the issues thus created resulted in the judgment that under the proper interpretation of article 17 of the R agreement, liability of the new company to make payments to the liquidator (other than its liability to pay costs and legal expenses of the liquidator) "is limited to the payment of a sum or sums equal to the principal amount of the claims against the Pacific Mutual Life Insurance Company of California filed with the liquidator and finally allowed, irrespective of whether or not the holders of such claims may now or hereafter be entitled to any interest upon such claims as against the liquidator or against The Pacific Mutual Life Insurance Company of California or its shareholders." The correct interpretation of article 17 is the solution of the present controversy. By the second sentence thereof new company agrees "to pay to the liquidator for payment to claimants an amount equal to the sum of all claims against old company filed with the liquidator and finally allowed."[3] While the true construction of R agreement must be derived primarily from its language, the significance of the words used therein will more readily appear from the position and status of the parties at the time of its execution. On July 22, 1936, old company had become insolvent and was in custodia legis. The Insurance Commissioner pursuant to statute had taken summary possession of old company and was acting as conservator and liquidator. Insurance Code, sec. 1013. He was thereafter by valid order appointed conservator by the superior court which appointment was approved by the Supreme Court. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761. For the purpose of conserving the good will as well as the assets of old company the conservator organized new company and purchased all of its capital stock for $3,000,000.00 of old company's funds and transferred all of its assets to new company. Ibid., 10 Cal.2d at page 321, 74 P.2d at page 770. For the commissioner to hesitate to exercise the power of his office and to save old company from burdensome litigation, would have been fatal for all of its policy holders.

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[1] Insurance Code, section 1021. "Upon the making of an order to liquidate the business of such person, the commissioner shall cause to be published notice to its policyholders, creditors, shareholders, and all other persons interested in its assets. Such notice shall require claimants to file their claims with the commissioner, together with proper proofs thereof, within six months after the date of first publication of such notice, in the manner specified in this article."

[2] See Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 97, 142 P.2d 741; also, same parties, 22 Cal.2d 77, 79, 136 P.2d 779.

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[3] (17) In the event the Commissioner shall hereafter be appointed Liquidator of the Old Company, the New Company agrees to assume, and does hereby assume and agree to pay, all costs and expenses of such Liquidator, including attorney's fees, fixed and approved as provided by law. The New Company * * * does hereby agree to pay to the Liquidator for payment to claimants an amount equal to the sum of all claims against the Old Company filed with the Liquidator and finally allowed; provided, however, that the New Company shall not be required to make any payment or payments on account of any claims so filed with the Liquidator except to the extent and in the manner hereinafter provided (but the New Company, with the consent of the Commissioner, may waive the foregoing limitation and anticipate any such payments);

(a) The New Company will, as of the effective Date of this agreement, with the approval of or in accordance with the requirements of the Commissioner, establish reserves against all policies and policy liabilities of the Old Company subject to assumption or reinsurance hereunder (but, with respect to Non-Can Policies, only to the extent described in paragraphs 11 and 13 hereof). If any policy holder or policy claimants shall elect to reject assumption and reinsurance hereunder, the New Company agrees to pay to the Liquidator, immediately after the time for filing claim with said Liquidator shall have expired, an amount equal to the reserves so originally established against their policies or claims.

(b) Whenever * * * any sums are transferred to the special fund for the restoration of benefits under Non-Can Policies, the New Company shall pay to the Liquidator a further sum of money bearing the same ratio to the moneys so transferred as the Non-Can Policies whose holders have rejected reinsurance hereunder and upon which claims have been filed in the liquidation proceedings as aforesaid, bears to the Non-Can Policies whose holders have accepted reinsurance hereunder.

Until such time as the measure of the claims * * * shall have been determined to the satisfaction of the Liquidator, * * * Non-Can Policies shall * * * be evaluated on the basis of the percentage * * * of their monthly benefit originally provided, whether or not the holders thereof have accepted reinsurance hereunder.

When the measure of the claim to the allowance * * * shall have been determined to the satisfaction of the Liquidator * * * Non-Can Policies shall thereafter be evaluated for the purposes of this subparagraph on the basis of allowable claim. * * *

(c) Any remaining amount necessary to pay and discharge the claims as aforesaid shall be paid at the time benefits under the Non-Can Policies are fully restored.

(d) The aggregate of the payments to be made in subparagraphs (a), (b), and (c) hereof, shall not exceed the full amount of claims finally allowed in the Liquidation proceedings as aforesaid. Any moneys paid hereunder and remaining in the hands of the Liquidator after all claims filed with him and finally allowed have been paid, shall be by him returned to the New Company.

[1] The language of the second sentence of Article 17 reasonably and fairly construed means no more than the promise of new company to place in the hands of the commissioner all the moneys necessary for the payment of specified indebtedness which had been incurred under the administration of old company. The means of ascertaining the amount of such indebtedness was not left to speculation or calculation, except the requirement to add the amounts of all the claims as "allowed." That definitely excluded rejected claims. If it had been the intention of the authors of R agreement to include indefinite sums not yet ascertained, or unliquidated sums whose amounts would have been dependent upon the length of the period of delay in payment, reason would have required more specific language.

Appellants' contentions (1) that the word "paid" as used in sub-paragraph (d) means "paid in full with interest," and (2) that the phrase "full amount of claims finally allowed" included interest by implication, are merely gratuitous assertions. The word "paid" is used daily, in all walks of life, with reference to payment of a fixed, definite sum. Certainly, payment of the principal sum only could be implied where the debt is specified with the distinctness which characterizes the second sentence of article 17. The use of the words "full amount of claims" cannot be said to connote a future computation of new company's obligation. The word "full" as used to modify "amount" signifies a totality of the "allowed" claims.

In determining whether holders of membership shares in a building and loan association were entitled to payment of the principal of their claims before the payment of interest for the period of liquidation upon the claims of investment certificate holders who had already received payment of their principal the Supreme Court observed: "The law gives preference in the matter of payment of the claim, which, reasonably interpreted, means, the principal sum due; and this claim has already been satisfied in full. As to interest the statute is silent." In re Pacific Coast Building-Loan Ass'n, 15 Cal.2d 134, 146, 99 P.2d 251, 256.

Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328, was two actions, one on behalf of the depositors in the savings department of a bank in liquidation for a declaration that the superintendent of banks, as liquidating agent, should transfer to the savings department the balance of funds in the commercial department after payment of 100 per cent of the *claims* of the commercial depositors and before paying them any interest during the period of liquidation. The other action was on behalf of the stockholders who sought a declaration that no interest should be paid to creditors or depositors before distribution to the stockholders. The decree which was adverse to both plaintiffs was modified by the court (2 Cal.2d at page 350, 41 P.2d at page 333) as follows: "That the depositors and creditors of the commercial department are not entitled to the payment of interest on their claims before the surplus funds in that department are applied to the payment of claims of other creditors of the bank, and that the depositors of the savings department are entitled to have the fund now held in the commercial department applied to the payment of their claims; that if any corporate assets remain after the claims of all depositors and creditors of the bank have been paid, the assets remaining shall be applied by the defendant to the payment of interest on such claims from the date of suspension of business to the date of payment before any distribution is made to the stockholders."

The Georgia Court of Appeals made a similar ruling. The state had deposited certain funds with a bank which became insolvent. The surety of the defunct bank paid the state and acquired its claim upon which it sued the City Bank which had taken over the assets of the bankrupt bank and agreed "to pay in full all claims entitled to priority." However, the court held that the contract "to pay in full all claims" covered only the principal of the indebtedness and announced the rule that "When a debtor becomes insolvent and his affairs are placed in the hands of a receiver for liquidation, it is just to all his creditors, regardless of the rank of their claims, that the *amounts of their debts shall be calculated as of the date of the suspension.*" Standard Accident Co. v. Luther Williams Bank, 51 Ga.App. 633; 181 S.E. 201, 202.

Exploring the R agreement for further proof of new company's intention with reference to the payment of interest as required by statute (Civil Code, sec. 1641), it is found first that in the second sentence of article 17 new company "does hereby agree to pay the liquidator * * * an amount equal to the sum of all *claims* against old company." The word "interest" is conspicuously absent. Appellants contend that if interest had not been intended the agreement would have said so. On the contrary, for the reasons already recited a charge of interest would have been positively expressed. This conclusion is reinforced by the appearance of (1) the phrase "with interest" in article 6 (c) which provides for "the restoration of the amount of the working capital * * * together with interest thereon at the average rate of interest earned by the new company during the period, to the sources from which it came"; (2) the same phrase in article 14 which makes provision for the use of the special fund by new company "to the end that the benefits originally provided in said non-can policies * * * may eventually be fully paid * * * with interest on deferred restoration payments of such benefits at the rate of 3½% per annum." Such carefully worded provisions for payment of interest spell a definite absence of intention to pay interest by a fair interpretation of article 17. It is unreasonable to think that new company, under the court's supervision, would have agreed to pay seven per cent interest on their claims to those who had refused reinsurance in new company without saying as much, while by the very same instrument it agreed expressly to pay only three and one half per cent interest to the acceptors of the reinsurance plan on deferred restoration benefits.

[2] Appellants contend that any doubt as to new company's liability for interest on their claims must be resolved in their favor. In support thereof they cite section 1654 of Title III of the Civil Code. In the first place an application of the rules embodied in the 19 preceding sections of Title III, "Interpretation of Contracts," removes all doubt as to the meaning of article 17. Its language is "clear and explicit" and the construction herein adopted "does not involve an absurdity." Sec. 1638. Expression of the real intention of the parties was not frustrated by any fraud, mistake or accident. Sec. 1640. The whole of the R agreement taken together enables each clause to help the others to the interpretation that payment of the claims filed and allowed against old company does not require the inclusion of legal interest from July 22, 1936, the day on which old company was found to be insolvent. Section 1641. The provision to pay "all claims against the old company" by usage implies payment without interest, since interest is not customarily intended in the absence of an express covenant to pay it. Sec. 1644. The circumstance, to wit, old company's established insolvency at the time of the execution of the R agreement, compels the interpretation that interest was not to be added to the claims. Sec. 1647. It is customary practice in liquidation proceedings to marshal the assets of the debtor, fix the amount of its liabilities and disburse the assets among the creditors pro rata. Such a process would not be possible if during the season of liquidation the claims should be varied by the additions of varying amounts of interest.

It is only in case that uncertainty exists after applying "the preceding rules" that the language "should be interpreted most strongly against the party who caused the uncertainty to exist." Sec. 1654. Appellants invoke the first portion of the second sentence of the cited section which declares that the promisor, i. e. new company, is presumed to be the party which caused the uncertainty to exist. But they may not resort to section 1654 unless it be first established that uncertainty exists in the language of article 17. This is not shown.

[3] Appellants contend that new company is a reincarnation of old company and therefore has impliedly promised to pay all

of the latter's indebtedness. In this they ignore provisions of the Insurance Code, Article 14 of Chapter 1, Part 2, Division 1, which article deals with insolvency and liquidation proceedings. Section 1043 of such article provides that in any proceeding under the article the commissioner may mutualize or reinsure the business of any person affected by proceedings thereunder and may enter into rehabilitation agreements. New company was organized by the sovereign power for the purpose of rehabilitating the business of one of its own creatures whose very existence inhered in the blood and sweat of the people. It was to go forward under the guidance of the state. Its identity is utterly distinct from that of old company, notwithstanding the latter's equitable ownership of new company's stock. It cannot be fairly said that it is a continuance of old company. It did not take over the latter's assets or assume its burdens at the behest of old company. Such transfer and assumption were rendered indispensable to the public weal and were required by law to conserve the common good in general and the army of policy holders of old company in particular. New company was not organized by old company to do service in a prescribed manner for the latter but was created by the state to perform a public service. It must be and act in its own right upon the arena of trade and commerce and of human existence, free from the fetters of a collapsed institution which in the kaleidoscope of a changing world will soon be only a memory.

[4] At the outset of new company's career it was repudiated by appellants' rejection of its offer to reinsure their policies in old company. Such action by appellants furnishes an additional reason why new company is not responsible for a breach of old company's contracts. Since it is a separate entity that came into being after old company's insolvency was declared, it is not liable for damages arising out of old company's breach resulting from such insolvency. Unless it is liable to appellants for breach of contract there is no basis upon which it can be adjudged to owe interest to appellants upon the "claims against the old company filed with the liquidator and finally allowed." There could be no such liability because no contract existed between appellants and new company.

[5] In the foregoing discussion the right of the former holders of noncancellable policies ultimately to collect interest on their claims as contemplated by article 14 (R agreement) has been constantly in view. The time and circumstances of enforcing such obligation and the assets out of which collection may be made are not pertinent to the issues here involved. Old company has assets which in due time may so fructify as to enable it to pay a portion or all of its indebtedness including the claimed interest. See Greva v. Rainey, supra. But merely because of the latter's obligation to pay established claims with interest out of such assets new company is not for that reason required to pay such interest which has accrued against old company since its insolvency was established.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

WEBBER v. WEBBER.*

Civ. 16043.

District Court of Appeal, Second District,
Division 2, California.

Dec. 19, 1947.

Hearing Granted Feb. 16, 1948.

1. Evidence 🔑20(1)

It is common knowledge that housework done by capable women earn not less than $7 per day for seven or eight hours work.

2. Divorce 🔑235, 286

Determination as to whether order for wife's support should be made against husband in divorce action is one which rests largely in trial court's discretion, and in absence of showing of abuse of such discretion the judgment thereon will not be disturbed.

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* Subsequent opinion 199 P.2d 934.

3. Divorce 🔑286

That another judge might have taken a view of the matter different from that of judge who tried divorce action was not a criterion whereby to determine that substantial justice had not been done by trial court in denying award for wife's support.

4. Appeal and error 🔑996

If either of two inferences may reasonably and fairly be drawn from facts, a judgment cannot be reversed on ground that it is not sustained by evidence.

5. Divorce 🔑286

On appeal from judgment denying award for support and maintenance, prevailing party is entitled to benefit of every inference to be drawn from evidence and of every favorable intendment inherent in such inference.

6. Courts 🔑26

The only limitation upon exercise of discretionary judicial power is that it must not be abused, that is, it must not plainly appear to effect injustice.

7. Divorce 🔑235

Awarding or denying support money to wife in divorce action is function for exercise of trial court's discretion.

8. Divorce 🔑240(1)

A wife who is divorced on account of husband's cruelties, in absence of community property and of husband's separate assets, can demand only such support as he is reasonably able to furnish from his earnings.

9. Divorce 🔑240(2)

Although award for wife's support from earnings of divorced husband may under certain circumstances be determined according to his ability to earn, where his earnings are by his daily labor, no such allowance should be made as would encourage idleness on part of ex-wife.

10. Divorce 🔑238

Refusal of award for wife's support upon granting her divorce on ground of husband's cruelties was not abuse of discretion, where husband was man of limited earning power and wife was able-bodied woman capable of earning her own support.

11. Divorce 🔑237

A finding of cruel acts on part of either party to a marriage which have caused no serious detriment to the prevailing party does not warrant unjust awards against the losing party.

12. Divorce 🔑240(1)

Where wife was able-bodied woman capable of earning her own support and husband was man of limited earning power, allowance of $90 monthly for ten months was a fair compliance with statutory requirement that such suitable support should be allowed wife as court might deem just "having regard to circumstances of the parties respectively". Civ.Code, § 139.

13. Divorce 🔑227(2)

Award to divorced wife of $115 for attorney's fees and costs was not unreasonably small, in view of husband's limited financial means, where husband's cross-complaint had been abandoned and all witnesses called were on behalf of wife.

14. Divorce 🔑239

In wife's action on ground of cruelty, finding that wife was strong and able bodied and could earn her own support was not inconsistent with finding that by reason of husband's acts she had been made ill and nervous and endured mental anguish.

15. Appeal and error 🔑1046(5)
Trial 🔑29(4)

A court should not only be fair but should appear to be fair, and its failure to do so may constitute cause for reversal.

16. Appeal and error 🔑1046(5)

Whether conduct on part of trial judge has prevented a fair trial must be determined according to facts of each appeal.

17. Appeal and error 🔑1046(5)

Trial judge's apparent prejudgment on issue of wife's support in divorce action after hearing only husband's testimony upon issue of his ability to pay, though improper, did not require a reversal, where evidence showed that trial judge's legal discretion in refusing support was not ultimately abused.

18. Divorce 🔑184(12)

In wife's divorce action on ground of cruelty, trial judge's remarks to plaintiff's counsel in regard to washing "dirty linen", though improper, did not require a reversal, where examination of record disclosed that no material prejudice resulted from the assigned remark.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mertelle A. Webber against LeRoy Webber, also known as Roy Webber, for divorce. From those portions of judgment awarding plaintiff an interlocutory decree of divorce which denied her attorney's fees and support and maintenance, the plaintiff appeals.

Affirmed.

Marshall Stimson, Noel Edwards and Charles Murstein, all of Los Angeles, for appellant.

Stanley M. Evans and J. J. Hughes, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment awarding her an interlocutory decree of divorce "and from those portions of the interlocutory judgment" which denied her attorney's fees and support and maintenance. Evidently she has abandoned the appeal from that portion of the judgment which awarded her a divorce and custody of her 17 year old son and one half of the community property, which is of nominal value, and urges her appeal solely with reference to the specified portions of the decree. Reversal is demanded on the grounds that (1) the court abused its discretion in refusing to include in its judgment an order for her support by defendant and for the payment of additional attorney's fees; (2) the findings are not supported by the evidence; (3) certain conduct of the trial court constituted prejudicial error.

Plaintiff and defendant had been married about 36 years prior to the date of their separation on February 5, 1946. At the time of the trial in February, 1947, she was 53 years of age. There are eight children, all of whom have attained their majority except the one son.

The evidence shows: appellant has no property or any source of income whatever; while her health is fairly good her eyes are "apparently weak" and she needs eyeglasses; she has cavities in her teeth and suffers pain by reason thereof; she has no trade or profession whereby to earn a livelihood; she has not worked during the 37 years since her marriage to defendant except at a kindergarten two hours a day, where she earned a total of $5, and at house work for which she received $5 for two days' work. Appellant maintains there is no testimony that she can earn $7 per day as contended by respondent, and that inasmuch as the latter earns take-home pay in the sum of $40 to $47 per week he should be required to support her.

[1-4] From the foregoing résumé of the proof on the issue of support it is to be observed that the defendant while an able-bodied man is not a success as a money maker, and that if any order is made for him to provide for plaintiff it would necessarily come from wages which reasonably should not exceed the amount which plaintiff could readily earn by working 20 days per month. The court below correctly observed that it is common knowledge that house work done by capable women earns not less than $7 per day for seven or eight hours work. Inasmuch as appellant is in reasonably good health no valid reason is suggested why the court should require the husband to pay for her support when her income may reasonably be as much as his own. Upon such issue the determination as to whether an order for support should be made against the husband is one which rests largely in the sound discretion of the trial court, and in the absence of a showing of abuse of such discretion the judgment thereon will not be disturbed. Lamborn v. Lamborn, 80 Cal.App. 494, 501, 251 P. 943. Because another judge might have taken a view of the matter different from that of the judge who tried the case is not a criterion whereby to determine that substantial justice was not done by the trial court in denying the award now claimed to be due her by plaintiff. If either of two inferences may reasonably and fairly be drawn from the facts the judgment cannot be reversed on the ground that it is not

sustained by the evidence. Mah See v. North American Accident Insurance Company, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123. The court found "that defendant has no ability to earn more than sufficient for his own support and maintenance, has no property of any kind or character and no money except said $50 postal savings, and has no ability to pay further for the support and maintenance of plaintiff or for her attorney's fees or costs herein."

[5, 6] On an appeal from a judgment denying an award for support and maintenance the prevailing party is entitled to the benefit of every inference to be drawn from the evidence and of every favorable intendment inherent in such inference. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183; Drabkin v. Bigelow, 59 Cal.App.2d 68, 74, 138 P.2d 750. Plaintiff has argued the applicability or nonapplicability of numerous decisions in support of her contention that the findings are contrary to the evidence. Arnold v. Arnold, 76 Cal.App.2d 877, 174 P.2d 674; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34; Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751; Mohun v. Timm, 20 Cal.App.2d 136, 139, 66 P.2d 701; Hill v. Donnelly, 43 Cal.App.2d 47, 52, 110 P.2d 135; Rosenfield v. Vosper, 45 Cal.App.2d 365, 371, 114 P.2d 29; Pratt v. Pratt, 141 Cal. 247, 252, 74 P. 742; Parmann v. Parmann, 56 Cal.App.2d 67, 69, 132 P. 851. In none of the cited authorities is there to be found a parallel factual situation such as to require a reversal of the instant judgment on account of the trial court's abuse of discretion in not making an award to appellant for her support. The only limitation upon the exercise of discretionary judicial power is that it must not be abused; in other words, it must not plainly appear to effect injustice. Fine v. Fine, 76 Cal.App.2d 490, 495, 173 P.2d 355.

[7-10] Awarding or denying support money is a function for the exercise of the trial court's discretion. Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670. The wife who is divorced on account of the husband's cruelties, in the absence of community property and of the husband's separate assets, can demand only such support as he is reasonably able to furnish from his earnings. Merritt v. Merritt, 220 Cal. 85, 88, 29 P.2d 190. While the award from the earnings of the divorced husband may under certain circumstances be determined according to his ability to earn (see Ostertag v. Bethlehem, 65 Cal.App.2d 795, 807, 151 P.2d 647), yet where his earnings are by his daily labor no such allowance should be made as would encourage idleness on the part of his ex-wife. Lamborn v. Lamborn, supra, p. 498 of 80 Cal.App., 251 P. 943. In view of the authorities and the proof in the instant action it cannot be said that the trial court abused its discretion.

[11, 12] In the early stages of the pendency of the action, on March 21, 1946, an order directed defendant to pay $90 a month for the support of plaintiff and the minor child. After July the boy became partially self-supporting. The payments aggregated $900. But during those ten months plaintiff made no attempt to be employed. Whether she acted in good faith in not accepting available domestic employment during that period and whether her failure to gain industrial employment at gainful wages were matters which in view of defendant's age and comparative poverty the trial court may properly have considered in the exercise of its discretion in denying plaintiff any further award. That plaintiff was the prevailing party is not in itself sufficient justification for disregarding equitable considerations suggested by the evidence as favorable to defendant. A finding of cruel acts on the part of either party to a marriage which have caused no serious detriment to the prevailing party does not warrant unjust awards against the losing party. Lamborn v. Lamborn, supra, page 500 of 80 Cal.App., 251 P. 943. Where an able-bodied woman is capable of earning her own support and her divorced spouse is a man of limited earning power it cannot be said as a matter of law that an allowance of $90 monthly for ten months is not a fair compliance with the statutory requirement that such suitable support be allowed the wife as the court may deem just "having regard to the circumstances of the parties respectively." Civil Code, sec. 139. See Murray v. Murray, 26 Wash.2d 370, 378, 174 P.2d 296, 300. The record

indicates that the court observed the quoted portion of the cited section.

[13] Nor was error committed by the court in refusing to award plaintiff further sums as attorney's fees. Her counsel had been paid $115 for fees and costs. For a man of defendant's financial status such sum was not an unreasonably small fee to be paid for the counsel fees of his wife in addition to the alimony she had enjoyed prior to the trial. The cross-complaint was abandoned and all the witnesses called were on behalf of plaintiff.

[14] The findings are supported by the evidence upon all issues including the fact of plaintiff's "good health." She testified that the acts of which she complained made her unhappy, nervous, weak and ill, yet that her "health is fairly good." While she was "in need of eyeglasses and my eyes are apparently weak," she produced no proof of a pathology of her eyes. She had "a great deal of pain" with her teeth and "there are cavities" in them, but she offered no proof of the probable cost of necessary dental surgery. She presented only her own opinion that she should have $25 per month for medical and dental care. Such ills as these beset a large percentage of society without complaints of ill-health or without abandoning life's struggle. The finding that plaintiff is strong and able-bodied and can earn her own support is not contrary to inferences fairly deducible from plaintiff's own testimony, to say nothing of the inferences the court may fairly have drawn from her presence as a witness. In this connection plaintiff contends that the judgment should be reversed because of the fact that the finding that by reason of defendant's acts she was made ill and nervous and endured mental anguish is inconsistent with the finding that the impairment of her health was slight and that she did not suffer a severe nervous disorder. Such findings are not inconsistent but indicate an attempt to present with accuracy the conditions found.

Finally, appellant deems herself to have been aggrieved by the court's conduct in making statements assigned to have been "grossly improper." Plaintiff commenced the presentation of her case by calling defendant for cross-examination. Code Civ. Proc. sec. 2055. By him it was proved that the community property consisted of $50 of postal savings bonds, that his only means of support was his labor and that he had been laid off for about three weeks. After plaintiff had proved the cruelties of her husband and the meager receipts from her own industry, defendant's attorney offered to "withdraw the cross-complaint if they waive alimony." Thereupon the following ensued:

"The Court: They do not need to waive alimony. *The Court will waive it for them.*

"Mr. Murstein: What it that, your Honor?

"The Court: I say they do not have to waive it; the Court will waive it himself.

"Mr. Murstein: This woman has been married for 37 years. I think she is entitled to be supported.

"The Court: Go ahead and *wash your dirty linen.* I won't stop you."

A short time later in declaring adjournment for the day the court stated: "Yes, I will instruct all witnesses in this case to return tomorrow at 10:30, and I think after that I will exclude the witnesses. There is no necessity of having them listen to the *washing of the dirty linen.*"

The italicized statements do not comport with the orthodox and prevalent concept of judicial behavior. Nothing is more disconcerting to a litigant or to his advocate than for a judge to give expression to sentiments which indicate that he is prejudiced against the cause, a party or his counsel. The layman usually enters the court room with the confident belief that the judge has a superior knowledge and that he speaks with inspired finality upon the issues presented. By reason of such ubiquitous ideal a judge's declaration at the commencement of a trial which is tantamount to a decision upon a primary issue freezes the cerebral flow, implants a feeling of frustration and inspires the disgust of the injured party and his sympathizers. Such behavior is calculated to weaken the patriotic zeal and to diminish the fervent respect for the courts which all good citizens have cherished since early schooldays. Such respect for judicial authority is a force for maintaining a universal adherence to the ideal of submitting justiciable controversies to judicial arbitrament and should not be discouraged.

[15] At the time of the judge's announcement that he would waive alimony on behalf of plaintiff he had heard only the defendant's testimony upon the issue of his ability to pay. Plaintiff had merely recited the acts of cruelty on which she based her cause for divorce. Unless he possessed powers of divination far beyond the talents of mundane jurists he could not have known the number and character of witnesses to be called or the substance of their own or of the plaintiff's testimony upon her needs and her health or of property that might have been shown to belong to defendant. A court should not only be fair but should appear to be fair, and its failure to do so may constitute cause for a reversal. Pratt v. Pratt, 141 Cal. 247, 252, 74 P. 742; Rosenfield v. Vosper, 45 Cal.App.2d 365, 372, 114 P.2d 29.

[16, 17] But whether such conduct on the part of the judge has prevented a fair trial must be determined according to the facts of each appeal. In the Pratt case the judge definitely indicated the course to be pursued should the defendant defy the court's voluntarily prescribed course, and "did in a very irregular way control the conduct of the case on the side of defendant." [141 Cal. 247, 74 P. 743.] In the Rosenfield case this court set aside the judgment because of what appeared to be a protracted effort over the several weeks of trial by the judge to force a compromise of $7,500 in favor of the plaintiff despite certain proof that he had agreed to accept $1,000 in full for his claim. In Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34, 38, cited by plaintiff, the judgment was reversed because the trial judge expressed and maintained throughout the trial an aversion to specified pertinent evidence offered; refused to hear available evidence of events that had occurred prior to a designated date; rejected pertinent proofs of certain vices "in the interest of good morals." And after the trial had proceeded for two or three days the judge by letter transmitted to the plaintiff at her home stated that he desired to discuss the case with her privately in chambers; held the conference and advised her that he did not look with favor upon separate maintenance and advised her to ask for a divorce. These authorities do not require a reversal of the instant judgment. Despite the court's apparent prejudgment on the issue of support for plaintiff the evidence shows that its legal discretion was not ultimately abused.

The court's order to plaintiff's counsel to "go ahead and wash your dirty linen" was likewise unbecoming. It could have had no effect upon plaintiff other than to depress her and to cause her to feel like a pariah; to be without hope of a sympathetic tribunal that would hear, consider and determine her cause upon its merits. There was no "dirty linen" washed at the trial. That phrase as ordinarily used implies that vices and immoralities have been charged; that mean accusations and vile recriminations have been spoken. See the Oxford English Dictionary; Webster's New International Dictionary, 2d Ed. Nothing of the sort had passed the lips of either. Prior to the judge's command plaintiff in clean and simple words had recounted the years of her life with defendant, the number of their children, the years of her residence in the county, and defendant's acts of cruelty. The latter consisted of a drab narrative of her husband's remaining away on week-ends and of his absence from home in the afternoon when he worked at night, and of his remaining out late in the morning when he worked in the day time; of his orders to "go to hell" when she reproved him for his neglect, of his refusals to take her to places of amusement or to visit their friends; and of his declarations that he did not love her; that she was worthless and not fit to be a mother.

Such testimony does not merit the anathema implied by the popular metaphor used by the trial judge. But had the good woman related a series of outrages suffered at the hands of a brutal husband garnished with his unflattering words of censure it would have been merely testimony of a witness fulfilling her sworn duty to tell the truth. When the parties to an action have rested a trial court often finds it to the public interest to assume magesterial character and to pronounce in piquant terms the scorn with which the law regards the conduct of one or both of the litigants. But while the trial is in progress the interests of justice demand that neither party be subjected to disparaging remarks by the court unless they are essential to an orderly procedure of the trial. The completely successful presentation of a cause is oftentimes assured only by an atmosphere of kindness and patience on the part of the judge, and such method is universally successful when his honor keeps his own counsel while unoffending witnesses and courteous counsel endeavor to perform their respective duties.

[18] However, the assignments with reference to the language of the judge do not justify a reversal. Neither plaintiff nor her attorney was silenced. She testified with apparent freedom for more than an hour after the criticized remarks, and her attorney boldly led her through every phase of the case and presented the testimony of five other witnesses. An examination of the record discloses that no material prejudice resulted from the assigned remarks but that the decree awards substantial justice.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

82 Cal.App.2d 926

PEAK v. INDUSTRIAL ACCIDENT COMMISSION.

No. 13609.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1947.

Rehearing Denied Jan. 17, 1948.
Hearing Denied Feb. 9, 1948.

1. Workmen's compensation 🔑1895

In compensation proceeding, record was insufficient to overcome claimant's positive averment that he did not receive a copy of medical report of employer's physician who had treated claimant, as required by rule of the Industrial Accident Commission. Labor Code, §§ 5703, 5704.

2. Administrative law and procedure 🔑476
Workmen's compensation 🔑1696

Where compensation claimant was not sent a copy of report of employer's physician who treated claimant, as required by rule of Industrial Accident Commission providing that, where written evidence in form of medical reports is filed in lieu of oral evidence, correct copies thereof shall be served on adverse parties, award was set aside because claimant was not given an opportunity as provided by statute to produce testimony in explanation or rebuttal before decision is rendered. Labor Code, §§ 5703, 5704.

3. Administrative law and procedure 🔑749
Workmen's compensation 🔑1935

Where in original compensation proceedings, two proceedings for two other injuries were consolidated for hearing with original compensation proceeding, and findings included the other two injuries, presumably the two other injuries were included in award to claimant.

4. Workmen's compensation 🔑1402

In compensation proceeding, moving pictures, taken by employer's insurer of claimant without claimant's knowledge for purpose of showing that claimant's injuries were not as severe as he claimed, were properly admitted though copies of the picture had not been sent to claimant. Labor Code, §§ 5703, 5704.

5. Workmen's compensation 🔑823

Where compensation claimant was compelled to submit himself to physician for examination at request of employer's insurer, and employer made a deduction from the claimant's wages for time when claimant was absent from work while submitting to such examination, amount of deduction should be included in award.

6. Administrative law and procedure 🔑669
Workmen's compensation 🔑1864

Where compensation claimant in his petition for rehearing made no mention of certain contention, he was barred from raising that contention in proceeding to review and annul award denying his petition for rehearing. Labor Code, § 5904.

7. Administrative law and procedure ⚷484
Workmen's compensation ⚷1738

Industrial Accident Commission did not lose jurisdiction of compensation proceeding because of its failure to file its findings within 30 days of final hearing as provided by statute. Labor Code, § 5800.

8. Administrative law and procedure ⚷456
Workmen's compensation ⚷1332

Where no answer was filed in a compensation proceeding, the conduct of the hearing and the allowance of evidence by the nonanswering defendant were matters in the discretion of the Industrial Accident Commission. Labor Code, §§ 5505, 5506.

9. Administrative law and procedure ⚷456
Workmen's compensation ⚷1167

Compensation proceedings before the Industrial Accident Commission should be liberal and not restricted by any technicalities of pleading.

10. Administrative law and procedure ⚷456
Workmen's compensation ⚷1332

Failure of employer and insurance carrier to file with the Industrial Accident Commission any answer to claimant's application for adjustment of claim did not constitute an admission of all matters set forth in claimant's application, and therefore commission did not act erroneously in permitting carrier to appear at hearing and introduce evidence and cross-examine the plaintiff. Labor Code, §§ 5307, 5505, 5506.

◆

Proceeding by George Peak, petitioner, to review and annul an award of the Industrial Accident Commission of the State of California, denying petitioner's application for a rehearing.

Award annulled and cause remanded to Commission for further hearing.

Geo. Peak, in pro. per.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondent.

BRAY, Justice.

Petitioner, claiming to have sustained injuries in the course of his employment by the Reliance Trailer and Truck Company, filed with the Industrial Accident Commission an application for adjustment of claim. After hearings thereon, the commission found that he had sustained such injuries and that they caused temporary total disability from September 8 to and including November 30, 1945, in addition to one day in February and two days in March, 1946. An award was made of compensation for said periods at the rate of $30 per week, together with further medical treatment to cure and relieve him from the effects of the injury. Petitioner applied to the commission for a rehearing of his application, which was denied. He now seeks to have this court review and annul the commission's award.

Petitioner is acting in propria persona, and in his briefs airs every possible complaint, proposes innumerable questions without citing authority, on matters well established by law, and in general makes it rather difficult to separate the wheat from the chaff. We have considered all points raised by petitioner, most of which are without merit and do not justify discussion here. There are, however, seven points worthy of consideration, one, major, the others, minor.

1. The Dr. Tyler Report.

Petitioner was injured "in the latter part of August." He was treated by his employer's physician for several days. He claims that upon his arrival home on September 1, 1945, he could not walk and that "on Monday" (apparently September 3) he called a Dr. Tyler, who ordered him to the hospital at once. While at the hospital Dr. Tyler continued to treat him. Petitioner claims that his total temporary disability commenced on September 1. The commission found that it commenced September 8. At the time of making its award, the commission had on file and before it a letter or report of Dr. Tyler, dated September 27, in which the doctor stated that he had seen petitioner (apparently for the first time) on September 8. That the finding by the commission as to the date of the commencement of disability is based upon this report, is admitted by the commission's answer. "Dr. Tyler in his report of September 27, 1945, states that he called on Mr. Peak

September 8, 1945, and that he placed him in the hospital at that time * * *. In view of Mr. Peak's inaccuracy as to dates generally, the Commission very properly took as a fact the statement of Dr. Tyler who had his records to which to refer." This report is also referred to by the commission as support for other findings.

[1] Petitioner swears positively that he never received a copy of this report. There is nothing in the record to show to the contrary. There is a letter dated April 7, 1947 (Defendants' Exhibit No. 2) sent by the insurance carrier to the commission in which it encloses certain medical reports, including the one in question, to the commission. This letter states "Copies of these reports are being forwarded to Mr. George Peak, 1601 Fifth Street, San Rafael." There is no affidavit of mailing nor any positive statement that the reports actually were mailed to petitioner. On April 29 petitioner wrote the referee: "I have just received from the California Casualty Indemnity Exchange some Medical Reports, very fragmentary, * * * and none at all from Dr. Tyler the physician who ordered me to the hospital in September 1945 * * *. Am I correct in my understanding that they were to furnish me with copies of all the medical reports they wished to file in the matter?"

The commission contends that when the following colloquy took place the failure of petitioner to say that he did not get Dr. Tyler's report constituted either an admission that he had received it, or a waiver of his failure to get it:

"Referee: Medical file of the California Casualty Indemnity Exchange under covering letter dated April 7, 1947, received into evidence as Defendants' Exhibit # 2.

"Mr. Peak: Did Dr. *Dr.* DeLancey send in a report?

"Mr. Fuller [for the commission]: We have Dr. C. A. DeLancey's report. Did you get copies?

"Mr. Peak: Have you got Dr. Tyler's report of the x-rays?

"Mr. Fuller: If you mark which ones you didn't get I will jot it down and see that copies are sent.

"Mr. Peak: I didn't get Dr. Williams, none of Dr. DeLancey's or Dr. McCarthy. Have you got one of Dr. Sale?"

This colloquy does not have the effect contended by the commission. Neither the letter of the carrier, nor this colloquy, can overcome the petitioner's positive averment that he did not receive the Tyler report. Therefore, we must assume that he did not receive it.

Section 5703 of the Labor Code provides: "The commission may receive as evidence * * * and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) Reports of attending or examining physicians."

Section 5704 provides: "Transcripts of all testimony taken without notice *and copies of all reports* and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce testimony in explanation or rebuttal thereof before decision is rendered." (Emphasis added.)

Section 1 of Rule XI, Rules of Practice and Procedure of the commission, provides: "Where written evidence is filed in lieu of oral evidence, in the form of *medical reports,* * * * sufficient correct copies thereof shall be prepared by the party filing and shall be served upon the adverse parties before or at the hearing." (Emphasis added.) Rule VIII, section 5, provides: "Copies of all * * * reports * * * shall be served on all adverse parties by the parties filing same. * * * Proof of such service may be made by either affidavit of service or by a written statement endorsed upon such pleading, report or document, or in a letter of transmittal setting forth the names and addresses of the persons served, the date of service and the fact as to whether such service was made personally or by mail." There is no such proof in this record. Rule XIX entitled "Medical Reports" provides: "* * * all parties to the application must * * * send to the Commission copies of all medical reports of all doctors appointed by them and all other medical reports that they may have in their possession or under their control relating to the dispute or controversy and send copies of such reports to the adverse party's attorney or representative, if there be one; otherwise to said party."

In Southern California Edison Co. v. Industrial Acc. Comm., 75 Cal.App. 709, page 716, 243 P. 455, page 458, referring to the use by the commission of excerpts from expert testimony received by it in other cases, under a section of the Workmen's Compensation Act which has been reenacted into the present sections 5703 and 5704 of the Labor Code, the court said: "But the record does not show that there was a compliance with the provisions of the foregoing section, for, manifestly, to meet its requirements it would be necessary to attach to or make a part of the record in the instant case any such excerpt of expert testimony received in any other case, and in addition it would be necessary to have it appear in the record that *copies of such testimony were served upon the parties in this proceeding.*" (Emphasis added.)

Petitioner makes some reference to other medical reports which were filed with the commission, of which he claims he did not receive copies. It is not clear to us just what reports these are. Of course, he is entitled to copies of any reports that were filed with the commission. As to x-rays, under Rule XIX, section 2, petitioner is not entitled to copies of x-rays, but only to have them made available to physicians designated by him.

[2] It appears that the requirements of the Labor Code and of the Rules of the commission have not been complied with, and hence petitioner was not given an opportunity as required by section 5704 of the Labor Code "to produce testimony in explanation or rebuttal thereof before decision is rendered." We have no way of knowing whether such testimony exists. The award will have to be set aside to give him the opportunity of producing it if it does exist.

2. Additional Claims of Injury.

[3] Petitioner claims that at the hearing he filed additional claims for two other injuries and that although the findings were that he sustained the injuries, he was awarded nothing. As these cases were consolidated for hearing with the original case, and as the findings included these injuries, it must be presumed that they were included in the award.

3. Movie Film.

[4] At the hearing, moving pictures taken of petitioner by the insurance carrier without his knowledge for the purpose of showing by his activities that his injuries were not as severe as claimed, were shown. The rolls of film were admitted in evidence. Petitioner complains that he did not receive copies. Petitioner does not refer to any requirement of law or rule providing that he must be given such copies, and we know of none, nor has he been injured in any way by failure to receive such copies.

4. Deduction from Wages.

[5] At the end of the hearing of April 18, 1947, the carrier requested that petitioner be examined by another physician. Pursuant to this request petitioner submitted himself to that doctor for examination on the day appointed. He was necessarily absent from his work 1½ hours and his employer docked his wages accordingly. While this question has not been passed upon by the courts, it is obvious that the employee is entitled to compensation for time lost while complying with the request of the employer's insurance carrier in being examined by the carrier's physician. By Labor Code, section 4053, the employee is bound to submit to such examinations or his right to begin or maintain any proceeding for the collection of compensation is suspended. As this deduction was made after the hearing it was not an issue before the commission. However, as there must be a further hearing of this matter, undoubtedly the commission will include in its new award an allowance for the amount of wages deducted.

5. Wife's Services.

[6] Petitioner contends that he is entitled to an award for the services of his wife in nursing and administering to his needs during his illness. In his petition

for rehearing petitioner made no mention of this contention. Hence he is barred from raising it here. "The petitioner for rehearing shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the manner (matter) upon which the rehearing is sought other than those set forth in the petition for rehearing." Sec. 5904, Labor Code.

6. Jurisdiction of Commission.

[7] Petitioner contends that the commissioner lost all jurisdiction to make any award because it did not file its findings within thirty days of the final hearing. To follow this argument to its logical conclusion would mean that the commission never can make an award to petitioner for the disability consequent upon his injuries. Petitioner cites section 5800, Labor Code, which provides: "After final hearing by the commission, it shall, within thirty days, make and file: (a) Its findings upon all facts involved in the controversy. (b) Its order, decision, or award stating its determination as to the rights of the parties." He contends that a failure to file the findings and to make its order within the prescribed 30 days causes the commission to lose jurisdiction of the proceeding. To hold that a failure of the commission to so act within the prescribed period causes the commission to lose jurisdiction to make an award to an injured employee, would be absurd.

7. No answer filed.

[8] Neither the employer nor the insurance carrier filed with the commission any answer to petitioner's application for adjustment of claim. Petitioner contends that this constituted an admission of all of the matter set forth in his application and that, therefore, the commission acted erroneously in permitting the carrier to appear at the hearing and introduce evidence and to cross-examine petitioner. At the opening of the hearing the following occurred.

"Referee: What facts can be admitted, Mr. Fuller?

"Mr. Fuller: We can admit everything. The issue is nature and extent of disability.

"Referee: Admit injury?

"Mr. Fuller: Yes."

Where no answer is filed, the conduct of the hearing and the allowance of evidence by the non-answering defendant is a matter in the discretion of the commission. Section 5505 of the Labor Code, after providing that a defendant "may" answer within five days of the service of the application upon him, provides: "Evidence upon matters not pleaded by answer shall be allowed only upon the terms and conditions imposed by the commission, or by the commissioner or referee holding the hearing." Section 5506 of the Labor Code provides in part: "If the defendant fails to appear or answer, no default shall be taken against him, but the commission shall proceed to the hearing of the matter upon the terms and conditions which it deems proper."

[9, 10] It is apparent from the above code sections that the discretion of the commission in this respect is very broad, and properly so, too. The proceedings before the commission should be liberal and not restricted by any technicalities of pleading. The commission, in its Rules of Practice and Procedure adopted pursuant to Labor Code, section 5307 ("The commission may: (a) Adopt reasonable and proper rules of practice and procedure"), and in the spirit of the liberality indicated by the Labor Code, has provided, Rule VII, section 8: "The filing of an answer is not mandatory. * * *" and section 10: "Evidence upon matters not pleaded by answer shall be allowed only upon such terms and conditions as may be imposed by the Commission or Commissioner or Referee holding the hearing."

The award is annulled and the cause remanded to the commission for further hearing in accordance with the views herein expressed.

PETERS, P. J., and WARD, J., concur.

83 Cal.App.2d 11

PEOPLE v. FLORES.

Cr. 4177.

District Court of Appeal, Second District,
Division 2, California.
Dec. 19, 1947.

1. Automobiles ⇨355(13)

In prosecution of motorist for having caused the death of a pedestrian by gross negligence in driving automobile, evidence supported implied finding that motorist was driving at a dangerous speed. Pen.Code, § 192, subd. 3(a); Vehicle Code, § 510.

2. Criminal law ⇨304(8)

Judicial knowledge may be taken that East First street in Los Angeles is bounded by structures for residence and business for more than three miles east of Alameda street, and is traversed by a double-track streetcar line.

3. Automobiles ⇨344

Automobile speed laws are designed to prevent injury to persons, and, when a motorist is found to have committed a homicide while violating such laws, he is guilty of involuntary manslaughter. Pen.Code, § 192; Vehicle Code, §§ 510, 511.

4. Automobiles ⇨344

A finding that a motorist was grossly negligent in injuring another with an automobile is sufficient to support conviction of involuntary manslaughter. Pen.Code, § 192.

5. Automobiles ⇨344

Where a motorist does not see his victim until the instant of impact or not at all, the motorist is guilty of an entire indifference to those using the street or highway simultaneously with him, and is guilty of involuntary manslaughter. Pen.Code, § 192.

6. Criminal law ⇨260(11)

The finding, in prosecution of a motorist of causing death of a human being by gross negligence in driving an automobile, of motorist's negligence, if supported by substantial evidence, is conclusive on reviewing court and can be reversed only when court becomes convinced by evidence that freedom from gross negligence was so clearly established that reasonable minds could not differ on the question. Pen.Code, § 192.

7. Automobiles ⇨344

Motorist who drove automobile on a residence and business street in city at more than 50 miles an hour, and who struck and killed a pedestrian whom he did not see, was guilty of "gross negligence" and of involuntary manslaughter. Pen.Code, § 192, subd. 3(a); Vehicle Code, §§ 510, 511.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence".

8. Automobiles ⇨355(13)

In prosecution of motorist for causing death of a pedestrian by motorist's gross negligence in driving automobile, evidence was not insufficient to establish gross negligence because there was no showing as to the exact location of motorist's impact with the pedestrian. Pen.Code, § 192, subd. 3(a).

Appeal form Superior Court, Los Angeles County; William R. McKay, Judge.

Charles Flores was convicted of having caused the death of a human being by gross negligence in driving a motor vehicle, and he appeals.

Judgment affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from a conviction by the court without a jury of having caused the death of a human being by his gross negligence in driving a vehicle. Penal Code, sec. 192, subd. 3(a). On this appeal he contends that the judgment is not supported in that there is no evidence of his having proceeded with excessive speed at the time of the accident.

The witness Morris testified that at about 8 o'clock p. m. on March 23, 1947, as he was driving westerly at about 30 miles an hour on East First street in the city of Los

Angeles and while at a distance of about 50 yards east of the intersection of Clarence street, a coupe proceeding at a speed of 50 or 60 miles per hour cut sharply in front of him. When the coupe entered the intersection of Clarence street its speed was not diminished. When it arrived at a point between 100 and 200 feet west of the intersection it struck a man on the north side of First street and about two feet from the cars parked by the north curb. The stricken man was thrown into the air. The coupe continued westward at an accelerated speed, ignoring the stop sign at Mission Road about two blocks west of Clarence. Driving at about 65 miles per hour the witness pursued the fleeing car for about eight blocks when he and his companion, the witness Minster, read and memorized the license number, 62 A 531, on the coupe and observed that a man was in the driver's seat. They then returned to the scene of the accident where the deceased lay upon the ground and where Morris gave the license number to the officers. The testimony of the witness Minster was a substantial repetition of that of Morris.

The witness Palacios testified that he was with appellant while they visited the latter's sister on Soto street which is east of Clarence; that as Flores drove west on East First street near Clarence street and as they were going along in the dark, the car jarred as though it had "hit a bump"; that he told appellant, "we must have hit somebody back there," but that they did not return to see; that both had drunk about three rounds of whisky and gin just before the drive; that he remained with appellant in a barroom until 12 o'clock, when appellant was taken away by the police.

[1, 2] From the above résumé it is seen that the implied finding that the coupe was driven "at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway," and at a speed which "endangers the safety of persons or property," is supported by the evidence. Vehicle Code, sec. 510. Section 511 of the Vehicle Code fixes 15 miles an hour as the maximum speed for motor vehicles when traversing an intersection of a highway where the driver does not have a clear and unobstructed view of such intersection during the last 100 feet of his approach thereto and of its traffic for a distance of 100 feet along such intersecting street, and limits speed to 25 miles per hour in any business or residential district. Judicial knowledge may be taken that East First street is bounded by structures for residence and business for more than three miles east of Alameda street where Morris abandoned pursuit of appellant, and is traversed by a double track street car line. Appellant's companion observed that the coupe had probably struck a man and testified that they did not stop to render aid.

[3-5] The judgment is not based upon section 480 of the Vehicle Code but upon that subdivision of section 192 of the Penal Code whereby the unlawful killing of a human being without malice is made manslaughter where the accused in driving a vehicle with gross negligence commits "an unlawful act, not amounting to felony." Speed laws are designed to prevent injury to persons, and when an accused is found to have committed a homicide while violating such laws he is guilty of involuntary manslaughter. People v. Mitchell, 27 Cal. 2d 678, 683, 166 P.2d 10. In such a situation it is not necessary that his driving should have been wanton or reckless. A finding that he was grossly negligent is sufficient to support the conviction. People v. Crow, 48 Cal.App.2d 666, 672, 120 P.2d 686. And where a driver did not see his victim until the instant of impact or not at all he is guilty of gross negligence or of an entire indifference to those who were using the street or highway simultaneously with him. People v. Leitgeb, 77 Cal.App. 2d 764, 176 P.2d 384.

[6, 7] The finding of an operator's gross negligence in driving a motor car, when supported by substantial evidence, is conclusive upon the reviewing court and can be reversed only when that court becomes convinced by the evidence that freedom from gross negligence was so clearly established that reasonable minds could not differ upon the question. Ibid. There is no fact proved or theory proposed in the record of the instant cause that could reasonably warrant an inference of appellant's

freedom from gross negligence. He drove his coupe in the night on a residence and business street at a speed greater than was reasonable and prudent, to wit, in excess of 50 miles an hour. By reason of his having thereby killed a person without malice and while committing such lawless act he is guilty of involuntary manslaughter under section 192 of the Penal Code. People v. Barnett, 77 Cal.App.2d 299, 175 P.2d 237.

[8] Appellant contends that there was no evidence as to the exact location of his impact with the deceased and that for this reason the evidence is insufficient to sustain a finding of negligence. The authorities cited (Lake v. Churchill, 20 Cal.App.2d 411, 67 P.2d 107, and People v. McLachlan, 36 Cal.App.Supp.2d 754, 93 P.2d 280) are not in point and are readily distinguishable. One is a civil suit in which the only direct proof was that which established that the defendant exercised due care. In the other the appellate court determined upon a review of the record that under the established facts there was no negligence on the part of the accused. They are therefore not pertinent.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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82 Cal.App.2d 780

In re CARR'S ESTATE.

Appeal of SULLIVAN.

Civ. 13544.

District Court of Appeal, First District, Division 2, California.

Dec. 10, 1947.

Rehearing Denied Jan. 9, 1948.

1. Jury 🔑19(7½)

Right to demand a jury trial in a probate proceeding is statutory. Probate Code, § 371.

2. Jury 🔑25(1)

Where a will contest with request for jury trial was instituted before probate, and before trial a second and conflicting instrument was offered for probate, the proponent of the second instrument was not entitled to demand a jury trial on question as to which was the later will; that being for court to decide. Probate Code, § 371.

3. Wills 🔑277

A written opposition to a will is a bar to its admission to probate until disposed of in the manner provided by law.

4. Wills 🔑309

Upon proceedings for the probate of a will involving both a contest of the will and a petition for probate, the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether a prima facie case has been established in favor of validity of the will, sufficient to warrant submission of case to a jury.

5. Wills 🔑217

Where a will contest was instituted, court could not admit a second and conflicting offered instrument to probate at a time when the contest remained undisposed of.

6. Appeal and error 🔑151(2)

Where a will contest was instituted and, before trial, a second and conflicting instrument was offered for probate and will contested was erroneously admitted to probate before contest was disposed of, proponent of the second instrument was a "party aggrieved" entitled to appeal notwithstanding proponent was not a contestant.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

7. Wills 🔑364

Notice of appeal from order admitting an instrument to probate, and denying probate to another instrument filed 57 days after formal order was signed by judge and filed, was filed within the 60 days required under the rule on appeal providing that date of entry shall be the date of filing the signed order, as against contention that the 60 days within which appeal was required to be taken ran from the minute order. Rules on Appeal, rule 2(b).

◆

Appeal from Superior Court, San Benito County; A. M. Runnells, Judge.

Proceeding in the matter of the estate of Viola C. Carr, deceased, wherein Elizabeth Carr Sullivan petitioned for probate of an instrument as the will of the deceased and Carmel Martin (and family) and H. G. Jorgensen petitioned for probate of another instrument as the will of deceased. From an order admitting to probate the instrument offered by Martin and Jorgensen and denying probate to the instrument offered by Sullivan, Sullivan appeals.

Order reversed.

Mahaney, McDonald & Isenberg, of San Francisco, and Chester E. Ross, of Hollister, for appellant.

Hudson, Martin, Ferrante & Street, of Monterey for respondent.

GOODELL, Justice.

This is an appeal from an order which admitted to probate as the last will and testament of Viola C. Carr, a document dated January 16, 1935, with a codicil dated September 18, 1937, and which denied probate to a document purporting to be her will dated January 16, 1935, with two codicils, one dated June 18, the other June 19, 1935. The order appointed Judge H. G. Jorgensen executor.

Mrs. Carr died in Monterey on August 4, 1943, at the age of 90 years. She was a widow and had no children. Her heirs at law are two nieces, Adeline W. Kennedy and Alice Kennedy Shallberg, and a nephew, Phillip Sheridan Kennedy.

At the hearing both wills were before the court on petitions for probate after due notice had been given as to both. The one admitted named Carmel Martin and his family as residuary legatees and devisees; the one rejected named Elizabeth Carr Sullivan, a sister-in-law of decedent, as residuary legatee and devisee.

Several years before the hearing a contest of the Martin will had been filed by the three heirs at law and it had not been dismissed. The attorneys who now appear for appellant are also the attorneys for the contestants of the Martin will.

When the hearing opened counsel for appellant asked "for a jury trial on the question as to which is the later will". The court ruled that the request was too late and proceeded to take testimony respecting decedent's handwriting and testamentary capacity, from which a prima facie case was made out that both wills and all three codicils were entirely written, dated and signed by Mrs. Carr, and that she was of sound mind at all the times in question. The court then ordered that the Martin will be admitted to probate and that the Sullivan will be rejected.

The question now presented, as stated by appellant, is: "Where a will contest with request for jury trial is instituted before probate and before trial thereof a second and conflicting instrument is offered for probate, should the court consolidate the conflicting petitions and will contest into a jury trial?"

[1, 2] The court was confronted with two distinct problems. The Sullivan will was not contested. The question whether it was later than the Martin will was for the court to decide. "There is no right to demand a jury trial in a probate proceeding unless that right is granted by statute. * * *" (In re Estate of Van Deusen, 30 Cal.2d 285, 291, 182 P.2d 565, 571). Section 371, Probate Code, prescribes the issues triable by jury and that question is not among them. See, also In re Estate of Gregory, 133 Cal. 131, 136, 65 P. 315. The difficulty was that until the contest of the Martin will was disposed of there was no way of telling which was the last will and testament.

The contest of the Martin will was at issue and had been set for trial for April 23, 1945, but apparently had been dropped from the calendar. The ground of contest was undue influence, clearly triable by jury. Sec. 371, Probate Code. No jury was in attendance at the hearing in question for it had been noticed simply as for the probate of both wills.

[3] In re Estate of Mollenkopf, 164 Cal. 576, 578, 129 P. 997, holds that a written

opposition to a will is a bar to its admission to probate until disposed of in the manner provided by law. In Re Estate of Black, 199 Cal. 257, 262, 248 P. 1015, 1017, the court said:

[4] "We are satisfied that, upon proceedings for the probate of a will involving both a contest of the will and a petition for probate, the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a prima facie case has been established in favor of the validity of the will, sufficient to warrant the submission of the case to a jury." In Re Estate of Cook, 205 Cal. 581, 589, 271 P. 1083, 1087, it is said: "As a valid contest was on file at the time the petition for the probate of the will came on for hearing, the probate court was in error in hearing and thereafter granting said petition without first disposing of, in the manner provided by law, the contest then on file." In Murray v. Superior Court, 207 Cal. 381, 385, 278 P. 1033, 1034, the court says: "It has been held that upon the institution of the contest before probate the offer to prove the will is arrested, and the probate thereof cannot be decreed until the contest is determined. [In re] Estate of Gregory, 133 Cal. 131, 65 P. 315; 26 Cal.Jur., p. 1078."

[5] It must be concluded that the court erred in admitting the Martin will to probate at a time when the contest remained undisposed of.

Respondents, however, claim that appellant is not a party aggrieved by this order, and point out that "The only persons entitled to have the contest tried are Adeline Kennedy and Alice Kennedy Shallberg, and they have not appealed."

[6] This appellant was decidedly aggrieved by the order, for one of its consequences was to deny probate to the will which named her as residuary legatee and devisee. Had she not appealed the order would have become final and she would have been foreclosed for all time. Treating her as a beneficiary under an earlier will she was an interested party (In re Estate of Plaut, 27 Cal.2d 424, 428, 164 P.2d 765, 162 A.L.R. 837 and cases cited), and the fact that she was not named as a contestant of the Martin will would make no difference for if that will were upset it would be invalid "as to every one interested therein, regardless of whether they actively participated in the contest" which contest would inure "to the benefit of persons who did not join therein as contestants. * * *" Voyce v. Superior Court, 20 Cal.2d 479, 483, 127 P.2d 536, 539. In Re Estate of Plaut, 27 Cal.2d 424, 425, 426, 164 P.2d 765, 766, 162 A.L.R. 837, supra, it is said that "an interested person is one who has 'such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside' In re Estate of Land, 166 Cal. 538, 137 P. 246, 248; see 26 Cal.Jur. 1081." If the Martin will were set aside the will under which appellant would take would be the only will before the court.

While the court did not err in holding that appellant was not entitled to a jury trial on the probate of the will she offered, it did err in admitting the Martin will to probate, and appellant was aggrieved by that order.

Other points raised by appellant need not be discussed in view of our conclusion on the principal point.

[7] Respondents contend that the appeal was not taken in time. The minute order of January 14, 1947, directed "Counsel to prepare and file the order within 10 days." On February 25, 1947, the formal order was signed by the judge and filed. Notice of appeal was filed on April 23, 1947, which was 57 days after the formal order and 99 days after the minute order. Respondents would start the 60-day period running from the minute order, but Rule 2(b) of the Rules on Appeal, found at 22 Cal.2d 1, provides that in such cases as this "the date of entry shall be the date of filing of the signed order." Accordingly the appeal was taken within the 60 days.

The order is reversed.

NOURSE, P. J., concurs.

DOOLING, J., having heard and denied a motion to dismiss the contest herein while sitting in the Superior Court, refrains from participating in this decision.

JORGENSEN v. JORGENSEN. *

Civ. 16041.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1947.

Hearing Granted Feb. 16, 1948.

1. Judgment 🔑443(1)

Fraud or mistake is "extrinsic" when it deprives the unsuccessful party of an opportunity to present his case.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

2. Judgment 🔑443(1)

Where party has been given proper notice of action, has not been prevented from full participation therein and has had opportunity to present his case to court and to protect himself from any fraud attempted by his adversary, fraud perpetrated is "intrinsic" and he cannot attack judgment after time for appeal or other direct attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

3. Divorce 🔑249(3)

In divorce case, it is duty of court to apportion and assign the community property to the respective parties. Civ.Code, §§ 146, 147.

4. Divorce 🔑254

Where plaintiff in divorce suit requested that property settlement agreement covering all property rights be approved and incorporated in divorce decree, plaintiff could not thereafter in separate action have portions of decree approving property settlement set aside on ground that agreement was induced by fraudulent representations that certain property was separate property instead of community property, and that issue of separate or community nature of property had not been decided in the divorce case.

5. Divorce 🔑254

Where plaintiff in her divorce suit had requested court to approve property settlement agreement and incorporate it in divorce decree, alleged fraudulent statements by defendant inducing the agreement that certain property was separate property rather than community property constituted "intrinsic fraud" and could not be made basis for setting aside divorce decree in separate action.

6. Divorce 🔑254

In action to set aside portions of divorce decree approving property settlement on ground that plaintiff's acceptance thereof had been induced by fraudulent representations, court properly refused admission of evidence for plaintiff, since issue of whether property was separate or community property had been determined by judgment in divorce case approving the agreement.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Bebe Jorgensen against Earle M. Jorgensen to obtain a judgment setting aside those portions of interlocutory divorce decree approving a property settlement on ground that defendant had procured plaintiff's acceptance of the settlement by fraudulent representations, wherein the defendant filed a cross-complaint. Judgment for the defendant and the plaintiff appeals.

Judgment affirmed.

Mitchell, Silberberg & Knupp, Guy Knupp and Peery Price, all of Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Myers and Pierce Works, all of Los Angeles, for respondent.

WILSON, Justice.

After having been married for 20 years plaintiff and defendant entered into a property settlement agreement on June 15, 1944, in the negotiation and preparation of which they were separately and independently represented and advised by counsel. Plaintiff filed an action for divorce in which defendant's default was entered on July 5, 1944. The action was tried on July 18, 1944. The interlocutory decree was signed on that date and was entered on July 25, 1944. The final decree was signed on July 27, 1945, and entered July 30, 1945.

The property settlement agreement, after referring to the possibility of a divorce of the parties, provided that "Such decree of divorce, if any, may incorporate this agreement as a part thereof." The interlocutory judgment of divorce specifically approved the agreement, a copy of which is attached to the judgment, and ordered the parties to perform their respective rights and duties vested in and imposed upon them by virtue of the agreement. The provisions of the interlocutory judgment were carried into the final judgment and were declared to be binding on the parties.

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* Subsequent opinion 193 P.2d 728.

This action was commenced on January 3, 1946, for the purpose of obtaining a judgment setting aside those portions of the interlocutory decree that approved the property settlement on the ground as alleged in the complaint that defendant had procured plaintiff's acceptance of the agreement by false and fraudulent representations that certain property was his separate property when in fact it was community property, and as alleged in a count added by an amendment to the complaint that defendant had made the representations through mistake, he having been advised that the property in question was his separate property.

When the cause came on for trial and the first witness was called to testify defendant objected to the introduction of any evidence on the ground that the complaint as amended did not state facts sufficient to constitute a cause of action. The objection was sustained. Defendant then introduced evidence in support of the allegations in his cross-complaint to quiet title to the corporate stock to which plaintiff had laid claim in her pleadings. Judgment was entered that plaintiff take nothing by her complaint and that defendant's title be quieted against her claims to the stock. Plaintiff has appealed from the judgment.

When the divorce action was heard plaintiff presented the property settlement agreement to the court for approval and testified that she was satisfied with it. Defendant did not appear and was not represented at the hearing. The complaint in the instant case alleges that about June 1, 1945, plaintiff first became doubtful of the truth of defendant's representations in reference to the property and consulted attorneys with respect to whether the property claimed by defendant to be his separate property was in fact community property. Notwithstanding her doubts and suspicions her attorney in the divorce action procured her final decree of divorce in the usual form adjudging that wherein the interlocutory decree relates to the property of the parties such property is assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto. Since there are other grounds on which the judgment must be affirmed we need not decide whether this action on plaintiff's part, at a time when she had grave doubts as to the fairness of the agreement to her, estops her from maintaining this action although it would be important if it were a decisive point in the case.

[1-3] In Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439, 440, the circumstances are so similar to those in the instant case that the several rules of law stated by the court, supported by ample authority, must be taken as decisive in the case at bar: (1) "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case." In the Howard case the defendant husband, who was seeking to be relieved of the burden of the property settlement agreement, must be deemed to have been the unsuccessful party in the divorce action, since his wife procured the decree of divorce and the court's approval of the agreement, while in the instant case the plaintiff wife, who is attempting to set aside the judgment approving the agreement, was the successful party in that she obtained the divorce and the judicial approval of the agreement on her own evidence that its terms were satisfactory to her. (2) "A party who has been given proper notice of an action * * * and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary." (Followed in Hosner v. Skelly, 72 Cal.App.2d 457, 461, 164 P.2d 573.) Howard had notice of the action and appeared therein through his attorney. Plaintiff in the case at bar was the moving party. Neither Howard nor plaintiff here was prevented from presenting their respective cases to the court or from protesting against fraud of the adversative party.

(3) "Fraud perpetrated under such circumstances is intrinsic * * *. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack." If fraud had been committed by defendant, which is denied, it is intrinsic and the decree is immune from attack on that ground. (4) As in the Howard case, the property settlement agreement here in question was offered in the divorce case "as a voluntary agreement of the parties with respect to their property rights * * *. The issue as to its fairness was thus tendered in that proceeding." In each case the agreement was presented to the court for approval by the plaintiff wife. In the Howard case the unsuccessful husband attacked the agreement and the successful wife sought to and did sustain her rights under the agreement while here the unsuccessful husband is standing on the agreement and the successful wife is attempting to annul it. (5) "The alleged fraud went to the merits of an important part of the * * * proceeding and should have been guarded against by [plaintiff wife] at that time." She was represented and advised by counsel in the negotiations leading up to the execution of the agreement. Opportunity was then available to ascertain whether defendant's statements as to community and separate property were true. An accountant could have been employed then as well as nine months later to examine defendant's books and records. (6) "Having adopted the property settlement agreement and made it a part of the [interlocutory and] final decree[s] of divorce, the * * court adjudicated its fairness and approved its terms, and [those] judgment[s are] therefore immune from attack in the present case." It is the duty of the court to apportion and assign the community property to the respective parties. Civ.Code, secs. 146, 147; Majors v. Majors, 70 Cal.App.2d 619, 625, 161 P.2d 494. We have already noted that plaintiff testified at the trial of her divorce action that the agreement was satisfactory to her. The judgment was in accord with the agreement and with plaintiff's desire as expressed in her testimony. In the Majors case it is said (70 Cal.App.2d at page 626, 161 P.2d at page 497) that the best evidence that the agreement was not unfair to the plaintiff was her own testimony that she was satisfied.

[4] Plaintiff contends that the issue as to the separate or community nature of the shares of corporate stock brought into question in this action was not submitted for decision in the divorce action and was not decided therein, and that she is seeking to litigate in this action a question that has not heretofore been submitted for decision or decided. In the Howard case the defendant sought to relitigate the wife's right to alimony. In the instant case plaintiff seeks to relitigate the issue as to whether certain corporate stock is separate or community property—an issue determined by the judgment approving the agreement and virtually adjudicating that all property not divided as community was the husband's separate estate.

In her complaint for divorce she alleged that plaintiff and defendant had "entered into an agreement settling as between themselves all of their property rights and claims, past, present, and future." This was a representation to the court that *all* property interests of the parties had been adjusted by them. In the prayer of the complaint the court was asked to approve the agreement and to incorporate "said agreement and all of the terms and conditions thereof in any decree that may be entered herein." The agreement was presented to the court with her testimony that she was satisfied with its terms and the court approved it as prayed in the complaint. There was no reservation in her allegation, in her testimony, or in the judgment of approval, of any rights to be litigated or determined in the future. Plaintiff submitted the agreement to the court voluntarily. There is a provision in it that it *may* be incorporated in the decree of divorce—not as required in some property settlement agreements that it *must* be approved by the court before becoming effective.

Implicit in the entire proceeding was an agreement as to what was community property and what was the separate property of defendant, her satisfaction with and her acquiescence in the agreement, and the judicial approval of its terms whereby all community rights or interests were finally adjudicated. Nothing remained for future decision.

The approval of the agreement in the decree was a judicial determination that it was fair and just to both parties, not to defendant alone. The adjudication was not one sided and could not be considered so in view of plaintiff's procurement of its approval and of her expressed satisfaction with its provisions.

Plaintiff relies on Milekovich v. Quinn, 1919, 40 Cal.App. 537, 181 P. 256; Boullester v. Superior Court, 1934, 137 Cal.App. 193, 30 P.2d 59 (both cited in 14 So.Cal. Law Review, (1941) 384, 385) and Taylor v. Taylor, 1923, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, as authority for her contention that although a property settlement agreement has been approved by the court in a divorce action it may be set aside in a subsequent proceeding on the ground of fraud or misrepresentation as to the character of the property. That those cases are in direct opposition to the Howard case there can be no doubt. The Howard case was decided in 1945. The Milekovich case was repeatedly cited to the court (22 times we are told in respondent's brief) in the various briefs, petitions for hearing and for rehearing and answers to petitions, and was cited in the opinion of the District Court of Appeal (157 P.2d 874, 877) which was set aside by the granting of the petition for hearing in the Supreme Court. Notwithstanding the fact that the Milekovich citation was thus before the Supreme Court the case is not referred to in its opinion. The effect of the Howard decision is to overrule the Milekovich case, although the court strangely did not expressly so declare. The Boullester and Taylor cases are likewise unmentioned in the Howard opinion and they must also be deemed to be overruled by the antithetical rulings in the latter case.

[5] The fraudulent or mistaken statements alleged to have been made by defendant constitute, if they were made, intrinsic fraud and cannot be made the basis for setting aside decrees in the divorce action that have become final. Pico v. Cohn, 91 Cal. 129, 134, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; United States v. Throckmorton, 98 U.S. 61, 66, 25 L.Ed. 93, 95.

[6] Since the matters pleaded in the complaint are res judicata the trial court did not err in refusing the admission of evidence.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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82 Cal.App.2d 991

FAUCHER v. STATE et al.

Civ. 16139.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1947.

Hearing Denied Feb. 16, 1948.

1. Courts 🔑189(3)

Municipal court of Los Angeles was proper forum for action by bank for nonpayment of debt of less than $2,000 and payable in Los Angeles, notwithstanding defendant resided outside city of Los Angeles at time of service of summons. Code Civ.Proc. § 395.

2. Courts 🔑486

If municipal court of Los Angeles does not have jurisdiction of case involving less than $2,000, defendant's remedy is to move for transfer to proper justice's court. Code Civ.Proc. §§ 395, 396.

3. Execution 🔑301

Where realty had been sold on execution sale, evidence sustained finding that former owner had not been prevented from redeeming the property by deceptive conduct of purchaser. Code Civ.Proc. § 705.

4. Execution 🔑250

In the absence of material irregularities or lack of proof of want of a jurisdiction of court which entered judgment under which execution sale was made, mere inadequacy of price was not a sufficient cause for annulling sale consummated with strict observance of the prescribed statutory forms.

5. Execution ⚷251(1)

If besides proving the inequality between the value of property sold and price received at execution sale, some proof is made of fraud or oppression on the part of the execution purchaser, then a judgment setting aside the sale may be awarded.

6. Execution ⚷256(2)

Where realty was sold at execution sale, evidence sustained finding that deputy making levy posted a notice of sale upon house on realty. Code Civ.Proc. § 705.

7. Quieting title ⚷14

In suit to quiet title to realty purchased by plaintiff at execution sale, statements made at trial by defendant who was the former owner and by defendant's counsel that they had sufficient money with which they could reimburse plaintiff for all outlays in connection with plaintiff's purchase and ownership of the realty were of no avail to defendant where defendant neither tendered the money or proved that defendant was entitled to a judgment upon payment of the money.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by H. M. Faucher against State of California, California Stabilization Commission, successor to California Employment Commission, Helen E. Scheffler, also known as Helen Scheffler, also known as Helen E. Dyer, also known as Helen Scheffler Dyer, William Scheffler, Bert Q. Scheffler, G. R. Dyer, Doe One and Doe Two to quiet title to realty. From a judgment quieting title in plaintiff, Helen E. Scheffler, also known as Helen Scheffler, also known as Helen E. Dyer, William Scheffler, Bert Q. Scheffler, and G. R. Dyer, also known as Guy Dyer, appeal.

Judgment affirmed. Appeal from order denying new trial dismissed.

Emmett A. Tompkins, of Los Angeles, for appellant Helen E. Dyer.

Charles A. Sunderlin, of Los Angeles for respondent.

MOORE, Presiding Justice.

From a decree quieting title in respondent, defendants appealed. The background of the judgment consists of the following recitals taken from the supported findings. At some time prior to July 26, 1944, defendant Mrs. Dyer, hereinafter referred to as appellant, became indebted to the Security First National Bank of Los Angeles, and by reason of nonpayment of her debt the bank sued in the municipal court of Los Angeles and caused judgment for the sum $68.69 to be entered against her on August 12, 1944, and an abstract thereof to be recorded in the official records of Los Angeles county. On April 4, 1945, execution was issued upon the judgment and pursuant thereto on the following day the sheriff levied upon the property of appellant, to-wit: lot 86 of tract 5100 in the same county, known and numbered as 1348 South Duncan avenue, Los Angeles 22. On May 7, 1945, the sheriff sold lot 86 and all the interest and title of appellant therein to respondent, the highest bidder, for the sum of $83.59 and delivered to the latter a certificate of such sale; and on the eighth day of May, 1946, he delivered to her a deed under execution whereby she acquired all of the interest of appellant in lot 86 as of April 5, 1945. At the times of the entry of the bank's judgment, the sale by the sheriff and his issuance of the deed in favor of respondent, appellant was the owner of the lot. While appellant's codefendants other than the Schefflers claimed to hold a judgment lien against the lot by virtue of a judgment of the superior court of Sacramento county, yet such judgment is without any right as affecting the interest, estate and title of respondent.

Upon finding such facts the court concluded and decreed that respondent is the owner in fee simple and entitled to possession of lot 86 as against defendants all and severally and all persons claiming under them any interest in or to the premises. A motion for a new trial having been denied the defendants other than the state and its stabilization commission brought this appeal. However, no appellant other than Mrs. Dyer has filed a brief.

Her contentions are: (1) That the municipal court did not have jurisdiction of either the subject matter or of the person of appellant in the action of the bank against her: (2) that she was prevented from redeeming the property by the deceptive conduct of respondent; (3) that the sum bid and paid by respondent at the sheriff's sale was inadequate; (4) that the court abused its discretion in denying a new trial.

[1, 2] The bank's demand was less than $2,000 and was payable at Los Angeles. Although appellant resided outside the city at the time of the service of the summons, her contract to perform her obligation within the city made the municipal court the proper forum for the trial of the bank's action. Code Civ.Proc., sec. 395. Having failed to appear, appellant's default was duly entered and proof was made of the bank's claim. The case of Schuler-Knox Company v. Smith, 62 Cal.App.2d 86, 144 P.2d 47, cited by appellant to establish that the burden was upon the bank to make proof of the municipal court's jurisdiction, is not apropos. The record of that cause discloses that no valid judgment had been entered against the Smiths in the justice's court to which the matter was presented, nor was proof made that such justice's court had jurisdiction of either the subject matter or of the persons of the defendants. In the instant cause, however, it was established that appellant's debt was payable in Los Angeles. If appellant had appeared in the municipal court and had persuaded the judge that such court did not have jurisdiction of the matter, a transfer of the cause to the proper justice's court would have been made. Code Civ.Proc., secs. 395, 396; Roos v. Jansen, 30 Cal.App. 2d Supp. 773, 776, 78 P.2d 476.

[3] Appellant's inattention or indifference did not cease with the service of summons. When levy was made upon lot 86 a notice of sale was posted upon the front of the house. She took it off and threw it away after respondent had seen it on the occasion of her call to inspect the premises. After the execution sale appellant discovered that the lot had been assessed to respondent and called upon her to inquire. Thereafter, pursuant to her promise respondent attempted three times by telephone to reach appellant for the purpose of advising her that the tax receipts were in respondent's possession, and left her message with appellant's neighbor. However, appellant made no further attempts to contact respondent or to redeem the property pursuant to the statutory procedure. Code Civ.Proc., sec. 705.

[4, 5] The lot here involved was reasonably worth in excess of $4,000. It is pathetic and oftentimes oppressive that an investor can under such circumstances as those here involved acquire title to a valuable property by purchasing it at a tax, execution, or foreclosure sale for a bare pittance, with no relief to the judgment debtor. But in the absence of material irregularities or lack of proof of a want of jurisdiction of the court which entered the judgment under which the sale was made, mere inadequacy of price is not a sufficient cause for annulling a sale consummated with strict observance of the prescribed statutory forms. (Rauer v. Hertweck, 175 Cal. 278, 281, 165 P. 946; Odell v. Cox, 151 Cal. 70, 74, 90 P. 194.) Of course, if besides proving the inequality between the value of the property sold and the price received at the foreclosure sale some proof is made of fraud or oppression on the part of the execution purchaser, then a judgment setting aside the sale my be awarded. (Ibid; Bock v. Losekamp, 179 Cal. 674, 676, 179 P. 516; Baldwin v. Brown, 193 Cal. 345, 349, 224 P. 462.) In the Rauer case the 20 acres sold for $46 was worth $700; in the Baldwin case the land sold for $480 was worth $4800. But for want of irregularities in the sale and of proof of fraud on the part of the purchaser the judgments confirming those sales were affirmed.

[6] In passing upon the motion for a new trial there was no room for the exercise of discretion. With respect to the notices of sale, while appellant testified that she did not see a notice the deputy who made the levy testified that he posted the notices, and the files of the sheriff's office relating to the sale corroborated him. Also, the legal secretary of the bank confuted the testimony of appellant who had deposed that she had seen no notice.

[7] While appellant and her counsel did state at the trial that they had sufficient money with which they could reimburse respondent for all outlays in connection with the latter's purchase and ownership of lot 86, such statements do not avail her. She neither tendered the money nor proved that she was entitled to a judgment upon payment thereof.

Judgment affirmed. Appeal from the order denying a new trial is dismissed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

82 Cal.App.2d 965

CURTIS v. CURTIS.

Civ. 13341.

District Court of Appeal, First District, Division 1, California.
Dec. 19, 1947.

1. Judgment 🔑161

Under the statute requiring that application for relief from a default judgment be accompanied by answer or other pleading, where defendant, seeking to set aside an annulment of a marriage granted on default, filed notice of motion to vacate accompanied only by affidavit of her attorney, denial of her motion was proper. Code Civ.Proc. § 473.

2. Marriage 🔑57

An action for annulment of marriage is purely statutory. Civ.Code, § 82.

3. Marriage 🔑59

A husband was not entitled to annulment of a marriage for fraud where he voluntarily cohabited with his wife for four and one-half months following full discovery of wife's mental illness allegedly concealed before marriage. Civ.Code, § 82, subd. 4.

Appeal from Superior Court, San Francisco County; James Foley, Judge.

Action by John F. Curtis against Joan Curtis for annulment of a marriage. From an order denying her motion to vacate the judgment and from the judgment, defendant appeals.

Reversed.

Harriet Averill Haas, of San Francisco, for appellant.

Andrew Bodisco, of San Francisco, for respondent.

FINLEY, Justice pro tem.

Defendant appeals from a default judgment in favor of her husband granting him an annulment of the marriage. Two notices concerning appeal were given. The first was filed May 28, 1946, and recites that defendant "desires and intends to present her appeal from the order * * * denying her motion to vacate and set aside the judgment of annulment of marriage * * * wholly on a settled statement." The second notice filed May 31, 1946, recites that "defendant * * * hereby appeals * * * from the judgment * * * entered * * * and from the whole thereof." A subsequent notice, filed June 8, 1946, gives notice of defendant's election "to set forth the oral proceedings had in the above entitled court and cause by a settled statement, on her appeal from the judgment rendered and entered therein, in lieu of a reporter's transcript."

Plaintiff's complaint is in two counts. The first count is directed toward a judgment of annulment and reads as follows: "That plaintiff and defendant were purportedly married in the City of San Rafael, County of Marin, State of California, on or about the 22nd day of March, 1945; that there were no children nor was there any child born the issue of said purported marriage; that there is no community property of the parties hereto; that plaintiff and defendant separated on or about November 15, 1945, at which time plaintiff had fully ascertained the true facts as hereinafter set forth.

"That at the time of said purported marriage and when plaintiff's consent thereto was given, defendant represented to plaintiff, directly and by implication, that defendant was a normal woman in all respects as generally understood between normal persons; that at said time, defendant well knew that defendant was not normal person mentally; that said defendant, was further, at one time confined to a mental institution; that defendant was not generally sound mentally or physically; that said condition of defendant was unknown to plaintiff at the time of said purported marriage; that plaintiff relied on said direct and implied representations of defendant and entered into said purported marriage upon said implied and direct representations of defendant as aforesaid; that shortly after said purported marriage, defendant indicated to plaintiff by conduct the said unsound condition of defendant; that plaintiff, upon investigation, found the true situation as to defendant's present and past mental condition; had plaintiff known the facts as hereinbefore stated, that plaintiff would not have entered into said purported marriage, and that upon learning said true facts, plaintiff separated from defendant, and brought this action."

In the second count plaintiff sets forth the jurisdictional facts; alleges that the parties were married in San Rafael, Marin County, California; that there were no children and there is no community property, and charges defendant in general terms with extreme cruelty. The prayer is that the "marriage be declared null and void; or that the bonds of matrimony between plaintiff and defendant be dissolved."

No appearance was made by defendant and the action came on for trial as a default matter. Plaintiff and one other witness testified, whereupon the court, on March 7, 1946, granted plaintiff judgment annulling the marriage. After the judgment was filed and recorded, defendant filed a notice of motion to vacate and set aside her default and the judgment on three grounds: "(1) that said default and judgment, and each of them, was obtained and entered contrary to and against an express statement, stipulation and agreement made by plaintiff's attorney; (2) the complaint does not state facts sufficient to constitute a cause of action for annulment of marriage; and (3) the judgment is unsupported by any competent, satisfactory evidence and is opposed to reason and the evidence."

[1] This notice of motion was accompanied by an affidavit sworn to by defendant's attorney, but it was not accompanied by an answer or any other pleading sought to be filed. Inasmuch as there was raised no question of jurisdiction predicated upon lack of or irregularity in service of summons, the motion must be considered as having been made pursuant to the provisions of sec. 473, Code of Civil Procedure. That section provides that if an application for relief pursuant to its provisions is not accompanied by an answer or other pleading to be filed, the application shall not be granted. Since here no answer or pleading accompanied defendant's application, her motion was properly denied.

Defendant raises two further points: (1) That the complaint is insufficient in that it contains only the allegation that the parties were *purportedly* married, and (2) that the evidence is insufficient to sustain a judgment of annulment. The second point will be considered first.

[2] In this state an action for annulment of a marriage is purely statutory. The grounds upon which such relief may be granted are contained in sec. 82 of the Civil Code. The portion of that section relevant here reads as follows: "A marriage may be annulled for any of the following causes, existing at the time of the marriage: * * * That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife."

[3] As stated above, at the trial of this action only plaintiff and one other witness took the stand. According to the settled statement plaintiff testified as follows: "I am a resident of the City and County of San Francisco, and have been a resident of said city and county for four years. The defendant and I were married at San Rafael, Marin County, State of California, on March 22nd, 1945. I separated from her about September 18th, 1945. I knew the defendant for three months prior to the marriage. During that time I did

not observe anything unusual about her behavior. After I married her, I took her on a six weeks' honeymoon to New York and other eastern cities and points. On the second night out she began to act funny and talked in her sleep and made murmurings and giggling, and funny laughing. She would get into these fits of hysteria, every night, just before she would awaken. During the daytime on this trip she exhibited unusual behavior. Whenever she would go to buy anything it would be in pairs. If she was going to buy a girdle, it would be two girdles, if it was a dress it would be two dresses. On one occasion, in New York, while there was a shortage of Kleenex, the man told her she could have one and she wanted two. During this course of hysteria she told me that she forgot to tell me before we were married that she escaped from an institution in Dallas, Texas. She was there under her maiden name but she did not say what kind of an institution it was. Outside of these fits of hysteria she would deny that she was ever hospitalized. If I asked her in a normal conversation whether she was ever in that condition she would say it was not true. I continued to live with Mrs. Curtis after we returned to San Francisco. She had two children—girls—by a prior marriage. One is 17 and the other is 14 years of age. I rented a nice apartment in the city here and took the two girls into my home. About a week afterwards, the two girls started fighting with each other, and one day they just tore each other almost apart and knocked each other out, and they came down to my place of business—that happened continuously. They are now wards of the Juvenile Court. They voluntarily surrendered themselves to the Juvenile Court authorities to escape their mother. In the Juvenile Court they said they hated each other. After I returned from the honeymoon and these things took place I endeavored to ascertain which institution my wife was hospitalized in. The girls told me on several occasions that her mother was taken away from her when she was a youngster. She did not know definitely because a negro maid took care of her for sometime. I was unable to find out that my wife had been hospitalized under her married name. My wife's hysterical fits continued after I began living with her in San Francisco. She did other unusual things. Sometimes when I would have a hard day at the office I would come home, and want to lie down for a while, and she would start singing hysterically, and to pass remarks about me being too old, and so forth. Her hysteria continued almost every night. Most of the time I would go out and walk around the block. I did not try to have her treated by a physician. She is a Christian Scientist and I had a practitioner work on her for three months who then gave up the case. Eventually I moved away from my wife. She is a musician—pianist and organist, and is supporting herself now. After I moved away I sold some property for $750 and gave her one-half of it. I discussed my wife's case with a Mrs. Clark of the Juvenile Court and she asked my opinions to whether or not Mrs. Curtis should be committed. I told her possibly she was not bad enough to be committed, but that I would try and see that some friend or some one would have her placed in a private institution, or in some home, where she may recover. I did not know anything about my wife's physical condition, prior to my marriage. If I had known that I would not have married her."

By reason of the provisions of the Civil Code above quoted, it becomes unnecessary to consider the adequacy of this evidence to support plaintiff's allegation of fraud, which is the ground upon which the annulment was granted. Plaintiff by his own testimony has established the fact that after the marriage the parties lived together for approximately six months, and that he discovered the alleged fraud during a six weeks honeymoon just after the marriage. This means that he lived with defendant at least four and a half months after the discovery. Such conduct on plaintiff's part brings the case clearly within the vitiating provision of subdivision Four of section 82, Civil Code. There is nothing in his testimony to indicate that he made any new discoveries concerning defendant's alleged fraud after the honeymoon was over. It must therefore be assumed that he lived with her for the four and a half months with full knowledge, and there is no evidence that this cohabitation was not free and voluntary. Since the statute places no limitations on the time this free cohabitation must endure, we hold that a period of four and a half months falls within the purview thereof.

Inasmuch as the judgment must be reversed for the reasons just stated, it becomes unnecessary to discuss the point raised by defendant pertaining to the sufficiency of the complaint.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

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82 Cal.App.2d 913

PEOPLE v. FOX.

Cr. 4167.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1947.

1. Criminal law 🔑1023(10)

Where defendant was found guilty of assault with force likely to produce great bodily injury, but defendant was placed on probation and judgment was not entered, defendant's purported appeal, from judgment which was not entered, was abortive and was required to be dismissed.

2. Criminal law 🔑1144(13)

On appeal from order denying defendant's motion for a new trial, evidence was viewed in the light most favorable to the people.

3. Automobiles 🔑355(14)

Evidence sustained conviction of assault with an automobile with force likely to produce great bodily injury.

4. Criminal law 🔑1144(13)

On appeal from order denying defendant's motion for a new trial, District Court of Appeal was required to disregard testimony of defendant's witnesses which was in conflict with the testimony of police officer who testified for the poeple.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Floyd V. Fox was found guilty of assault with force likely to produce great bodily injury, and, from judgment which was not entered and from order denying his motion for a new trial, the defendant appeals.

Appeal from judgment which was not entered, dismissed, and order denying motion for a new trial affirmed.

C. C. Dillavou, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

[1] After trial before the court without a jury defendant was found guilty of assault with force likely to produce great bodily injury. A motion for a new trial was made and denied, whereupon further proceedings were suspended and defendant was placed on probation. His purported appeal from the judgment which was not entered is abortive and must be dismissed. (People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253.) He has appealed from the order denying his motion for a new trial.

[2] The evidence being viewed in the light most favorable to the People (respondent) (People v. Pianezzi, 42 Cal.App.2d 265, 108 P.2d 732), the essential facts are these:

On the night of July 13, 1943, a police officer of the city of Los Angeles, who had received an injured foot and was off duty and in civilian clothes, was telephoning from a telephone booth located on a lot at the northeast corner of Pico Boulevard and Vermont Avenue in the city of Los Angeles. While he was telephoning the officer observed a man entering an adjacent telephone booth. Shortly thereafter the officer heard the sound of water and felt his right pant leg getting wet. He then observed that the man in the adjacent booth was urinating. The officer stepped out of his booth and went to the door of the adjacent one and asked the man "what the devil he was doing." The man replied in substance "what the hell is it to you?" The officer then asked the man if he was drunk and the man swore and struck at him. A struggle ensued during which the officer's revolver fell out of his pocket and while he was retrieving it the man left. The officer then returned to his telephone conversation.

A few minutes later the man returned with defendant and after trying to force open the door of the telephone booth where the police officer was they kicked in the glass door which was reinforced by wire, whereupon the police officer called the police station asking for a radio car. In the meantime a woman came up to the two men and told them that they had better get out of there. The three then returned to their automobile parked approximately twenty-five feet distant. The police officer went over to them and informed them that he was a police officer and that they were under arrest. A woman in the car said, "Let's get out of here." The police officer grabbed the man who had been in the booth and tried to hold him, then defendant began to strike the officer. The two men succeeded in slipping away from the officer and got into the automobile, defendant sitting in the driver's seat. In the meantime the officer threw up the hood of the car and attempted to disconnect the ignition. As he stepped in front of the automobile the starter began turning the engine over and the officer stepped onto the front bumper of the car.

The car was accelerated forward at a high speed. The brakes were then put on and the car skidded. The officer's foot slipped off the bumper and he received a four inch cut on his arm which struck the unfinished edge of the inside of the hood. As the car stopped the officer scrambled back on the bumper and as the engine started again to speed up he jerked out the distributor wires and the engine died. He then slid off the bumper and watched defendant as he tried to start the automobile. Missing his watch and gun he observed that they had been thrown out of his pocket and onto the parking lot. Defendant started his car and drove away from the scene. As the automobile pulled away the officer obtained the license number which identified the car as belonging to defendant.

Defendant went to Oklahoma on the following day and did not return to Los Angeles until March of 1944, where he remained until August of the same year. Then he again returned to Oklahoma and did not return to Los Angeles until January, 1947. In March of 1947 he was arrested and thereafter tried on an information filed by the district attorney of Los Angeles county.

Defendant urges that his motion for a new trial should have been granted *because the evidence is insufficient to sustain the trial court's implied finding that defendant was driving the car at the time the police officer was injured.*

This proposition is untenable. The police officer, Mr. Offutt, gave direct testimony as to each of the facts set forth above. In addition, defendant at the time of his arrest gave a signed statement in which he stated that he was the driver of his automobile on the night in question and that no one else drove it.

[3, 4] Clearly such evidence is substantial and sufficient to sustain the trial court's finding of each and every fact set forth above and that defendant was guilty of assault with force likely to produce great bodily injury. Conflicting testimony of other witnesses must of course be disregarded by us.

For the foregoing reasons the purported appeal from the judgment is dismissed and the order denying the motion for a new trial is affirmed.

MOORE, P. J., and WILSON, J., concur.

CALIFORNIA REPORTER

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SECOND SERIES

SIMMONS v. CALIFORNIA INSTITUTE OF TECHNOLOGY et al. *

L. A. 19484.

Supreme Court of California, in Bank.
Dec. 29, 1947.
Rehearing Granted Jan. 26, 1948.

1. Contracts 🔑40, 164

An agreement may consist of several writings, substantially part of one transaction, which are to be taken together. Civ. Code, § 1642.

2. Contracts 🔑164
Patents 🔑211(1)

An agreement by research assistant with technological institute for payment of royalties to institute in consideration of employment and license agreement with producer containing provision for payment of royalties to institute were to be considered together, and validity of provision in license agreement dependent on validity of prior agreement. Civ.Code, § 1642.

3. Master and servant 🔑62

"Employment" within agreement by research assistant with technological institute for payment of royalties to institute in consideration of "employment" admitted of more than one interpretation, thus presenting a case for examination and discovery of the sense to be ascribed to it. Civ.Code, §§ 1642, 1647, 1649; Code Civ.Proc. § 1860.

4. Evidence 🔑419(11)

The true consideration of a contract may be shown by extrinsic evidence.

5. Evidence 🔑455, 461(1), 462

In action to set aside agreements by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment, extrinsic evidence concerning assistant's inventions, situation of parties in relation thereto, their conversations regarding their object and intent, and their subsequent conduct was admissible, not to establish a promise at variance with agreement, but to ascertain meaning of word "employment" as used in agreement.

6. Master and servant 🔑62

An agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of "employment" contemplated permanent employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

7. Master and servant 🔑62

Agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment constituted a continuing offer by assistant to perform so long as institute provided permanent employment, and agreement was supported by partial consideration to the extent of performance by institute, but institute was not entitled to benefits beyond that, and failure of institute to re-employ assistant for successive academic years terminated assistant's promise, since further payments would be unsupported by consideration. Civ.Code, § 1605.

8. Master and servant 🔑62
Patents 🔑196

Any "moral obligation" arising from the circumstances preceding and accompanying agreements by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment and license agreement by assistant with producer containing provision for payment of royalties to institute would not constitute consideration for agreements beyond period of receipt by assistant of the concomitant benefit of employment. Civ.Code, § 1606.

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* Subsequent opinion 194 P.2d 521.

9. Contracts ⚿187(2)

Agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment and license agreement by assistant with producer containing provision for payment of royalties to institute, construed together, did not contemplate that receipt of royalties by institute thereunder should be without consideration running to assistant from institute, and where employment was terminated, provision in license agreement could not be enforced by institute on the ground that license agreement was for benefit of institute, supported by consideration running between the parties thereto.

10. Master and servant ⚿20

Receipt of consideration by employer under a contract for permanent employment prevents termination of employment except for good cause.

11. Master and servant ⚿62

Agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment could be set aside upon failure of institute to provide continued employment regardless of whether assistant's notices of rescission were ineffectual, since assistant was bound only to the extent that institute performed by providing continued employment.

EDMONDS, J., dissenting in part.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Edward E. Simmons, Jr., against the California Institute of Technology and another, to have certain royalty agreements declared void. Judgment for plaintiff, and defendants appeal.

Modified and affirmed as modified.

Prior opinion, 174 P.2d 653.

O'Melveny & Myers, Louis W. Myers, Pierce Works, John Whyte and Lyon & Lyon, all of Los Angeles, for appellants.

S. L. Kurland and A. Arnold Klein, both of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff commenced an action to have certain agreements whereby royalties under a patent license were to be paid to the defendant California Institute of Technology (hereinafter referred to as the defendant) declared void. Two grounds of invalidity were charged. A first cause of action alleged lack of consideration for the assignment of royalties to the defendant. A second cause of action alleged that the inducement for the agreements were certain promises made by the defendant Dr. Donald S. Clark without the intention of performing them. The trial court found for the plaintiff on both grounds. This appeal by the defendants followed.

The following facts are undisputed:

Prior to 1934 the plaintiff attended the Institute as a student, was graduated in 1934 and received his Master's degree in 1936. He assisted himself financially by working for various departments and persons. In 1936 Dr. Clark was a member of the faculty in the mechanical engineering department, was the department's personal director, and had charge of Impact Research—a project organized to study and determine the performance of materials under rapidly applied loads. The project was in part sustained by contributions to the Institute from commercial firms who were interested in the results of the experiments. A paid assistant in the department was Dr. Datwyler who, with Dr. Clark, was working at the time on the problem of devising a method of measuring and determining the force of time relations which occurred to metals during impact loading. For this purpose they utilized a known device—an impact dynamometer—for translating instantaneous forces into electrical impulses to be recorded by means of an oscillograph. Their problem was the procurement of some strain sensitive element which would make the device workable in the measurement of impacts. In the latter part of August, 1936, they took their problem to the plaintiff, who by this time had acquired a reputation for ingenuity, was frequently consulted by both teachers and students, and gave freely of his advice without charge or pay. Sometime before September 10th the plaintiff went to Dr. Datwyler with his suggestion for a strain sensitive element and instructions for use of a particular bonding material and process of construction which he believed would transmit the strain from the dynamic bar to the strain sensitive element. Dr. Datwyler constructed a machine embodying the plaintiff's suggestions and instructions for the dynamometer, starting from a crude and progressing to a suggested improved type, with the desired success in high speed impact testing. The plaintiff was not in the employ of the defendant at the time and his services in this connection were given without compensation.

The department continued the use of the plaintiff's ideas in Impact Research. Beginning December 11, 1936, the plaintiff was employed by the defendant as a part-time paid worker in Impact Research at 75 cents an hour. His duties were to construct equipment according to specifications furnished by Dr. Datwyler. In June, 1938, he received appointment by the defendant to an "assistantship" for the academic year 1938–39 at $1.00 per hour, forty hours per month, with the same duties. He was reappointed to perform the same duties in the academic year 1939–40 for sixty hours per month at $1.00 per hour.

In the autumn of 1939 a representative of Baldwin Locomotive Works went to the defendant's Impact Research Laboratory to negotiate for the issuance of a patent and the procurement of an exclusive license to utilize the plaintiff's invention. Baldwin's representative had observed the invention in use at Massachusetts Institute of Technology and had traced its origin to California and the plaintiff. He expressed the opinion that the little gauge, hardly larger than a postage stamp, would "be stuck to practically everything" in order to know what was going on; that it was the "safety pin" in its field insofar as invention was concerned. Aircraft companies were already applying the gauge to airframes and structures to discover distribution of pressures, thus leading to improvements in strength and lightness, and it appeared that the use of the gauge would spread to every form of industry where dynamic application of forces was involved.

By this time the plaintiff had become interested in the work conducted in Impact Research, in continuing to have an active part therein, and in having possible income from the invention devoted thereto. After some weeks of negotiation with Dr. Clark and with Baldwin, whose attorney prepared and prosecuted the application for the issuance of the patent to the plaintiff, the plaintiff on February 21, 1940, signed an instrument designated as Exhibit A, which reads in part: "In consideration of my employment by the California Institute of Technology I agree that as to my inventions involving an electrical strain gauge wire secured throughout its length to the surface of a member adapted to be subject to strain, and also my inventions relating to the measurements and indications of various conditions including impact testing, * * * I will not grant any license to make, use or sell apparatus or methods embodying any of said inventions unless such licenses are approved by" the defendant. "The royalty on said inventions shall be paid to" the defendant "unless at my option I shall request in writing * * * that up to and including forty per cent (40%) of the total royalty paid by any licensee shall be paid to me * * *" (This option was added at the plaintiff's request to apply in the event income from royalties exceeded the needs of Impact Research.) Dr. Clark's signature appears on this instrument under the word "Witness".

On March 3, 1940, the plaintiff and Baldwin Locomotive Works executed an agreement (Exhibit B) whereby the plaintiff (in consideration of $1.00 and other good and valuable consideration), granted an exclusive license to Baldwin Locomotive Works with specified reservations, to make for use, rental and sale the inventions covered by the patent for a royalty of five per cent of the sales price or income from rentals of that portion of apparatus embodying the inventions. The entire royalty was provided to be paid to the defendant unless the plaintiff exercised the stated option. The defendant's president signed an approval of the license "in accordance with an agreement [Exhibit A] between Edward E. Simmons, Jr., and the California Institute of Technology dated February 21, 1940." By action of the executive council of the defendant, Exhibit B was approved; but there was no action by the executive council ratifying the president's approval of Exhibit A.

About July 1, 1940, the plaintiff was reappointed to the assistantship on the same terms for the ensuing academic year. Toward the close of that year, in June, 1941, he was informed by Dr. Clark that his employment would not be renewed because Impact's funds were running low. The plaintiff for the first time learned that royalties received by the defendant pursuant to Exhibit B were not turned over to Impact Research. He was not thereafter re-employed by the Institute, although there is testimony that the work in Impact Research continued and evidence that royalties under the license would support the plaintiff's employment. The plaintiff did not exercise the contract option nor did he receive any royalties. He sought from but was denied relief by the defendant and in January, 1942, served notices of rescission, notifying Baldwin Locomotive Works thereof which thereupon withheld further payments of royalties pending the outcome of the controversy. This action was commenced on August 17, 1943, to have it declared that the plaintiff was entitled to recover some $2,000 theretofore received as royalties by the defendant, and to obtain a declaration of the invalidity of any claim of the defendant to future royalties.

The trial court found that the instrument Exhibit A, and the instrument Exhibit B insofar as it purported to confer rights upon the defendant, were unsupported by any consideration (the basis of the first cause of action), and were to that extent invalid. The court also made a general finding that the allegations of the second cause of action (relating to the representations of Dr. Clark) were true. It was concluded that the Instrument Exhibit A, and that part of Exhibit B conferring rights upon the defendant, were void. The judgment provided that the plaintiff recover from the defendant royalties paid in the sum of $2,004.94, and that the defendant had no right, title or interest in the accrued and unpaid royalties or any future royalties under Exhibit B.

The defendant asserts that the evidence is insufficient to support the findings and the judgment on either ground; and that the court erroneously admitted evidence over objection the effect of which was to vary the terms of a written contract.

The invalidity asserted in the first cause of action was alleged in general terms, that is, that Exhibit A was "without any consideration", and that Exhibit B, insofar as it purported to confer rights upon the defendant was "without consideration" on the part of the defendant. Likewise the findings as to this cause of action were in general terms, that is, that there was no consideration for Exhibit A, and that the plaintiff received no consideration for the licensing agreement Exhibit B insofar as it purported to confer rights upon the defendant.

[1, 2] An agreement may consist of several writings, substantially part of one transaction, which are to be taken together. Section 1642, Civil Code; Daniels v. Daniels, 3 Cal.App. 294, 297, 85 P. 134; Patterson-Ballagh Corporation v. Byron Jackson Co., 9 Cir., 145 F.2d 786. That Exhibits A and B must be so considered may not be gainsaid. Obviously Exhibit B, insofar as it provided for payment of royalties to the defendant, depended upon Exhibit A to show the consideration moving to the plaintiff. Therefore if for any reason Exhibit A falls, Exhibit B in its relation to the defendant falls with it.

[3, 4] "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Section 1647, Civil Code. "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Section 1649, Civil Code. The word "employment" in Exhibit A admits of more than one inter-

pretation, according to the subject matter and the belief and understanding of the parties in relation thereto. The appearance of the word in Exhibit A, which constitutes the plaintiff's promise, presents a case for examination and discovery of the sense to be ascribed to it. Wachs v. Wachs, 11 Cal. 2d 322, and authorities cited at page 326, 79 P.2d 1085. Therefore the circumstances under which the agreement was made, including the situation of the subject matter and the parties, may be shown in order that the court be placed in the position of those whose language is to be interpreted. Section 1860, Code of Civil Procedure; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785; Patterson–Ballagh Corporation v. Byron Jackson Co., 9 Cir., supra, 145 F.2d at page 790. The true consideration of a contract may be shown by extrinsic evidence. Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4; Johnston v. Courtial, 216 Cal. 506, 14 P.2d 771.

[5, 6] The purpose of the admission of extrinsic evidence in this case was not to establish a promise at variance with the promise expressed in the instrument Exhibit A, or even a different consideration. Regardless of any other issue in the case, the testimony concerning the plaintiff's inventions, the situation of the parties in relation thereto, their conversations regarding their object and intent, and their subsequent conduct, was eminently proper for the purpose of ascertaining the meaning of the word "employment" as used in that instrument. The court made but one finding regarding the meaning of that word. That finding is implicit in the general finding of the truth of the allegations of the second cause of action and is that the plaintiff expected and intended permanent employment. The conclusion followed that since permanent employment was the consideration contemplated in the execution of Exhibit A, and since the plaintiff did not receive permanent employment, there was no consideration for either Exhibit A or Exhibit B. The record supports the finding that by "employment" permanent employment was meant, and that the defendant so understood the expression. The plaintiff was in the employ of the defendant at the time. After execution of the instruments his employment continued and was renewed for an additional year. That he did not receive permanent employment can not seriously be disputed.

[7] It does not follow, however, that the judgment is in all respects correct. It is significant that the instrument Exhibit A was not executed by nor does it contain any express promise of the defendant. This factor may not be, and indeed is not, questioned. What is here material is the effect thereof under the undisputed facts. Obviously neither the evidence nor the findings lend force to the defendant's contention that the plaintiff's promise was for a future act which has been fully performed by the defendant, nor to the plaintiff's suggestion that his promise was for a past consideration which in law would not support it. Section 1605, Civil Code; Williston, Contracts, Rev.Ed., sec. 142, p. 508 et seq.; Anson, Contracts, Patterson Ed. 1939, sec. 174, pp. 204, 205; Royer v. Kelly, 174 Cal. 70, 161 P. 1148; Chaffee v. Browne, 109 Cal. 211, 41 P. 1028. In essence the plaintiff's Exhibit A was a continuing offer to perform so long as the defendant performed the act or series of acts specified and intended, namely, permanent employment fulfilled by reemployment in successive academic years. That there has been some performance by the defendant and a partial consideration given therefor, that is, consideration to the extent of the benefits received by the defendant, is inescapable. Insofar therefore as the defendant has performed, it would be entitled to the benefits received, but it would not be entitled to anything beyond that. In other words, the failure of the defendant to re-employ the plaintiff for successive academic years terminated the plaintiff's promise to subject the granting of licenses concerning his inventions and the terms and conditions thereof to the approval of the defendant. Included in the terms and conditions was the nomination of the recipient of the royalties under the license. The defendant's failure further to perform the condition for payment of the consideration stipulated in Exhibit A would render further payments

under the license unsupported by consideration.

The notices served by the plaintiff and the action for declaration of the parties' rights and for relief from the defendant's failure to continue performance amounted to a withdrawal of the plaintiff's continuing offer contained in Exhibit A, and therefore a termination of any rights of the defendant under Exhibit B. However, pursuant to this legal effect of those instruments in the light of the facts found by the trial court and supported by the record, the plaintiff is not entitled to be relieved of the binding force of his promise to the extent that the defendant has complied with the conditions thereof. The result is that insofar as the defendant has actually performed the condition stated in Exhibit A, to that extent there is a contract between the parties pursuant to which the defendant is entitled to the consideration, viz., the royalties received to the time of the termination of Exhibit A. That is to say, the findings do not support the conclusion that the defendant's performance to that extent is not consideration for the royalties received. That part of the judgment which provides that the plaintiff recover from the defendant the royalties so far paid is therefore without support. Any other conclusion as to the legal effect of the instruments in view of the findings and the record would be to sacrifice substance to form.

[8] If we consider a claimed "moral obligation" on the part of the plaintiff, pressed by the defendant as a good consideration for Exhibit B, we would arrive at the same result, since such a consideration is good only "to an extent corresponding with the extent of the obligation, but no further or otherwise." Section 1606, Civil Code. The plaintiff was not employed by the defendant at the time of conceiving the invention and reducing it to practice, although some of the facilities and personnel of the defendant were involved in the reduction to practice. But if that factor and the subsequent employment be considered as giving rise to any moral obligation of the plaintiff, it could not be said to extend beyond the period of receipt by him of concomitant benefits, namely, employment by the defendant.

[9] Nor is there merit in the contention that the licensing agreement, Exhibit B, was one for the benefit of a third party (defendant), supported by the consideration running between the parties thereto, which may be enforced by the defendant at any time before rescission. Taking the instruments together, as we must, it was not contemplated that the defendant's receipt of royalties thereunder should be without consideration running to the plaintiff from the defendant. Also considering the determined legal effect of those instruments, it must be deemed that the contract has been terminated as it related to future benefits which otherwise might have inured to the defendant.

[10] Cases holding that a contract between employer and employee for permanent employment, in the absence of anything further, means a hiring at will or for a reasonable time (see Edwards v. Kentucky Utilities Co., 286 Ky. 341, 150 S.W.2d 916, 135 A.L.R. 642, at page 646 et seq. and cases cited; Davidson v. Laughlin, 6 Cal. Unrep. 865, 68 P. 101), furnish no obstacle to recognizing the contract actually made by the parties. Those cases do not indicate that where the intent is discoverable pursuant to applicable rules it will not be given effect accordingly. Furthermore receipt of consideration by the employer under such a contract is deemed to prevent the termination of the employment except for good cause. Brown v. National Electric Works, 168 Cal. 336, 143 P. 606; Seifert v. Arnold Bros., Inc., 138 Cal.App. 324, 31 P.2d 1059; Carnig v. Carr, 167 Mass. 544, 46 N.E. 117, 35 L.R.A. 512, 57 Am.St.Rep. 488; Evans v. Cincinnati, S. & M. Ry. Co., 78 Ala. 341; Mt. Pleasant Coal Co. v. Watts, 91 Ind. App. 501, 151 N.E. 7. In Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 15 Am.St.Rep. 82, the employee did not bring it in the promised consideration for the promised employment and it was held to be terminable at will; but in Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579, it was held that failure to furnish the prom-

ised permanent employment released the employee from the promised consideration. That case is support for our conclusions herein.

[11] The foregoing disposes of the contentions raised on the appeal, including the contention that plaintiff's notices of rescission were ineffectual because of his failure to return or offer to return benefits (employment) received by him. Since under Exhibit A the plaintiff was bound only to the extent of the defendant's performance rescission is no longer a matter of concern. Also in view of the foregoing there is no necessity for discussing the charges of fraud. It is sufficient to note only that the various declarations of Dr. Clark in conversations with the plaintiff, giving them the required intendments in support of the findings, do not amount to binding promises as to which there was no intent to perform. Their utmost effect was to constitute them statements of estimates and probabilities for the future, on which the plaintiff based the condition of his performance of Exhibit A. They are important only as interpretive of the consideration for the plaintiff's performance, and as such are deminative of the appeal herein. A modification of the judgment will effect the proper result.

The judgment is modified by striking therefrom the provision that the plaintiff recover from the defendant the amount of royalties received by the defendant under Exhibit B. As so modified, the judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting in part and concurring in part).

I concur in the conclusion as to Simmons' rights to recover future royalties. However, in my opinion, he is also entitled to the royalties which have heretofore been paid. The judgment in his favor is based upon a finding of fact that he executed the two contracts with the California Institute of Technology because of the fraud of Dr. Clarke. Regardless of the question as to whether Simmons received any consideration for either of these contracts, the finding of fraud, which is supported by substantial evidence, entitles him to an affirmance of the judgment rendered by the trial court.

31 Cal.2d 246

Ex parte McMONIGLE.

Cr. 4808.

Supreme Court of California, in Bank.

Dec. 29, 1947.

1. Habeas corpus 🔑30(1)

Where petitioner admitted prior to his trial on charge of murder of 14 year old schoolgirl that he had dropped girl's body over 300-foot cliff into ocean, and discovery of girl's socks on face of cliff at designated point corroborated his admission, petitioner's boastful claims regarding murder of other girls and disposition of their bodies could have no bearing upon any issue which would be material in habeas corpus proceeding.

2. Habeas corpus 🔑85(1)

In habeas corpus proceeding by one convicted of murder of 14 year old schoolgirl, evidence supported findings of referee appointed by court that petitioner's claims as to occurrences precluding him from having fair trial were wholly unfounded, so that writ would be denied.

Proceeding in the matter of the application of Thomas Henry McMonigle for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

Harmon D. Skillin, of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Petitioner was found guilty of the murder of Thora Chamberlain, a fourteen-year-old school girl. He is confined in the State Prison of San Quentin under a sentence of death following the jury's return of its verdict without recommendation. Upon automatic appeal to this court (Pen.Code, sec. 1239 (b)), the judgment of conviction was affirmed. People v. McMonigle, 29 Cal.2d 730, 177 P.2d 745. The cited opinion sets forth in considerable detail the facts surrounding the commission of the offense charged, and it would serve no purpose to narrate those matters again here. At petitioner's request, the trial court appointed counsel to conduct petitioner's defense there, and this court appointed other counsel to represent petitioner on the appeal.

Petitioner now attacks the propriety of the judgment of conviction in this proceeding on habeas corpus. This is the third of a series of such petitions filed by petitioner in propria persona in the state and federal courts since this court's affirmance of the judgment against him on February 18, 1947. People v. McMonigle, supra, 29 Cal.2d 730, 177 P.2d 745. The first petition (Crim.No.4787), which was made on March 5, 1947, and which was brief, was concerned in the main with a re-argument of the evidence and with an attack upon the procedure of respective appointed counsel in representing petitioner both at the trial and upon the appeal. After due consideration, that petition was denied by this court on March 17, 1947. Petitioner then filed a second, and a considerably more lengthy, petition for a writ of habeas corpus, choosing for his forum the United States District Court for the Northern District of California, Southern Division (No.27145-R). That petition was denied on May 28, 1947, with the court stating: "There are no exceptional circumstances presented here which would justify a departure from the settled rule and practice that even where a defendant has exhausted his state remedies, the United States District Court will ordinarily not interfere by habeas corpus, but will leave him to take his case direct to the United States Supreme Court." Petitioner has now returned to this court with the present petition. It contains the same allegations presented in the petition to the federal court, including some of the same allegations and argument found in the prior petition to this court. While such third petition is replete with matters which have no relevancy or materiality in a proceeding for habeas corpus, nevertheless a writ of habeas corpus was issued by this court on June 9, 1947, in order to give petitioner full opportunity to present any matters which might possibly entitle him to any relief in this proceeding. The following day this court, at petitioner's request, appointed counsel in the person of Mr. Harmon D. Skillin to represent petitioner. On the day designated for the return to the writ before this court, June 17, 1947, petitioner was present at the hearing; and he then stipulated, through his counsel, that the following issues were the sole matters which he wished this court to consider, and that in the event a referee were appointed, the evidence to be taken might be limited to those disputed points:

"1. Whether petitioner was held incommunicado for seven or more days by agents of the Federal Bureau of Investigation during which time he was beaten by one of said agents, and during which time and at other times he was informed by another of said agents that 'it would be better for him to confess.'

"2. Whether petitioner informed E. J. Connelley [an F. B. I. agent] that the body at the precipice in San Mateo was that of a colored girl and whether on January 3, 1946, petitioner pointed out and showed said body to the Sheriff of Santa Cruz County and to his chief deputy. Also, as to whether said chief deputy sheriff testified at the trial of petitioner that he found no body on said date at said place.

"3. Whether during the trial of said petitioner witnesses were called to testify by the prosecution who were not sworn.

"4. Whether petitioner ever received a copy of the indictment or whether petitioner was arraigned prior to the return of said indictment; also, whether the official records of the court and clerk of said court were at any time altered or tampered with.

"5. Whether petitioner was (a) deliberately and knowingly misadvised as to the law by his counsel, appointed to represent him; (b) threatened with bodily injury by said counsel; and (c) whether said counsel wilfully refused to subpoena witnesses suggested by petitioner to testify in his behalf.

"6. Whether the trial court tolerated and allowed a serious disturbance in the nature of constant gun fire directly outside of the courtroom during said trial."

While this court had doubt concerning the materiality of some of the issues which petitioner desired to have heard before a referee, this doubt was resolved in petitioner's favor, and Superior Court Judge Samuel F. Finley was appointed as referee to take evidence on all designated matters. Hearings were held on eight separate days, three of which were devoted exclusively to taking the testimony of petitioner. Toward the end of his testimony on the third day, petitioner submitted a list of some 166 persons whom he proposed to call as witnesses, including persons of prominence such as Governor Earl Warren, Attorney General Frederick N. Howser, United States District Judge George B. Harris, San Francisco District Attorney Edmund Gerald Brown, Eleanor Roosevelt, James Roosevelt, Herbert Hoover, and certain Hollywood motion picture actresses. Following petitioner's outline of what he expected to prove by the presentation of such witnesses, it was determined that but 29 of the 166 named persons could give any testimony which would have any possible bearing upon the issues involved, and accordingly all of said 29 persons were called to testify. At the conclusion of the eighth day of the hearing, petitioner was asked whether he had any further testimony, and his counsel answered, "Nothing further." The referee then allowed time to opposing counsel to submit memoranda in connection with the proposed findings to be made. Such memoranda were filed, and the referee thereupon made the following findings:

As to Issue No. 1, supra:

"The petitioner was not held incommunicado for seven or more days by agents of the Federal Bureau of Investigation; during no time was he beaten by any one of said agents; during no time was he informed by another of said agents that 'it would be better for him to confess.'

"That petitioner was taken into custody by agents of the Federal Bureau of Investigation about 2:30 A.M. on December 6, 1945, and remained in custody of the Bureau until 4:55 P.M. December 15, 1945, at which time he was delivered into the custody of Sheriff William J. Emig of Santa Clara County. That on December 6, 1945, when taken into custody he was in a semiconscious condition brought about by an overdose of sleeping pills. Tr. p. 25, lines 19 to 24. He was first taken to the Bureau headquarters at 111 Sutter Street in San Francisco where at 3:30 A.M. he was examined by Dr. Edmund Butler, a licensed physician and surgeon practicing in San Francisco. Upon Dr. Butler's advice petitioner was taken to the Franklin Hospital in San Francisco where he was given treatment for his condition. He was kept at the Franklin Hospital until 1:20 P.M. on December 8, 1945, when he was returned, as recovered, to the Bureau headquarters at 111 Sutter Street. That by four written documents voluntarily signed by petitioner on December 9, 10, 12 and 14, respectively, he voluntarily agreed and consented to remain in physical custody of agents of the Bureau from December 8, 1945, to and including December 17, 1945. That during the time he remained in custody of said Bureau he was not beaten nor was he informed that 'it would be better for him to confess.' He was not held incommunicado. He made no attempt to communicate with his wife, relatives, friends, or any attorney. He did not request the Assistant Director of the Bureau or any agent thereof to contact anyone on the outside for him nor did he request any facility for this purpose."

As to Issue No. 2, supra:

"That petitioner did inform E. J. Connelley [an F. B. I. agent] that a body at a precipice in San Mateo was that of a colored girl; that petitioner did not on January 3, 1946, or at any other time point out and show said body or any body to the Sheriff of Santa Cruz and to his chief deputy; that the name of said deputy was and is Lowell M. Rountree; that at the trial of petitioner said deputy Rountree did testify that he found no body on said date at said place. Trial Tr. p. 673, lines 12 to 15. The date appears. Trial Tr. p. 670, lines 14 to 17. That said deputy was referring to the body of Thora Chamberlain and not to the body of a colored girl or any other body (Trial Tr. p. 673, lines 12 to 14); that said deputy did not testify at the trial with regard to the body of a colored girl or any other body excepting that of Thora Chamberlain."

As to Issue No. 3, supra:

"That during the trial of petitioner no witnesses were called to testify by the prosecutor or otherwise who were not sworn."

As to Issue No. 4, supra:

"That petitioner did receive a copy of the indictment by delivery thereof to his counsel at the time of petitioner's arraignment; that petitioner was not arraigned prior to the return of said indictment; that the indictment was returned by the Grand Jury of Santa Cruz County to the court on Wednesday, December 19, 1945, at 3:45 o'clock P.M.; that at the time of the return of said indictment a bench warrant was issued by the court for the arrest of defendant; that on Friday, December 21, 1945, at 10:00 o'clock a. m., petitioner was brought into court for arraignment in pursuance thereof and counsel were appointed by the court to represent him; that the arraignment was thereupon continued to Friday, December 21, 1945, at 2:00 o'clock p. m., at which time petitioner received a true copy of said indictment by delivery thereof to his counsel and was arraigned up to the point of plea; that thereupon the arraignment was continued to Friday, December 28, 1945, at 10:00 o'clock a. m.; that at said time and upon request of petitioner's counsel the matter was continued until January 4, 1946, at 10:00 o'clock a. m., at which time petitioner's pleas were entered.

"It is further found that the official records of the court and clerk of said court were not at any time altered or tampered with."

As to Issue No. 5, supra:

"That petitioner was not deliberately and knowingly misadvised as to the law by counsel appointed to represent him; that he was not threatened with bodily injury by his said counsel; that said counsel did not wilfully refuse to subpoena witnesses suggested by petitioner to testify in his behalf."

As to Issue No. 6, supra:

"That the court did not tolerate and allow any serious disturbance in the nature of constant gun fire directly outside of the courtroom during the trial."

The report and findings of the referee were filed in this court on December 2, 1947. Thereupon the cause was calendared for oral argument on December 17, 1947. Petitioner's appointed counsel appeared at the scheduled hearing and urged that despite the conflict in the evidence upon all the issues presented to the referee for determination, petitioner's testimony should be accredited rather than that of the numerous opposing witnesses. With that point of challenge on petitioner's behalf, the matter was then submitted for decision by this court.

An examination of the referee's findings shows them to be adverse to petitioner on every issue which might be deemed material in this proceeding; and a reading of the record of the testimony taken before the referee discloses that all of said findings are sustained by overwhelming evidence. It appears unnecessary to summarize in detail the testimony of the numerous witnesses who were called, as that testimony is adequately reviewed in the referee's report and findings. In the main it need only be said that the sole evidence tending to support any of petitioner's claims was his own testimony, which in every essential aspect was directly contrary to the testimony of all other witnesses.

[1] However, there is one phase of petitioner's claims which requires some additional comment, and that is the relevancy of "Issue No. 2," relating to petitioner's alleged statement to E. J. Connelley, an

F. B. I. agent, that "a body * * * of a colored girl" was at the bottom of a precipice in San Mateo County, and that on the occasion of examination of that locale on January 3, 1946, for trace of the body of Thora Chamberlain, petitioner "pointed out" the body of the colored girl to the accompanying police officers. As above recited, the referee found that petitioner had so informed E. J. Connelley as to the colored girl's body—the date being January 18, 1946, according to the testimony of both petitioner and Mr. Connelley—but that neither "on January 3, 1946, or at any other time" did petitioner "point out and show said body or any body to" certain specified officers in charge of petitioner's custody. Here again the evidence sustains the findings, but the materiality of petitioner's claims under "Issue No. 2" is not apparent. Petitioner testified that on January 3, 1946, while on a trip with several officers to a point in San Mateo County near Point Montara, he pointed out to the officers the body of Dorothy Rose Jones, a colored girl. All officers present on that occasion testified to the contrary. It appears, however, that some days after the trip of January 3, 1946, petitioner made the boast that he had killed two colored girls and another white girl besides Thora Chamberlain; that he offered to show the officers where these other girls were killed and "where one of these girls was placed by me"; that he directed the officers to various points where he claimed the killings took place and stated that he had thrown the body of one of the colored girls over a cliff in San Mateo County. It further appears that despite an intensive search of difficult terrain on the cliffs in San Mateo County, neither the body of Thora Chamberlain nor the body of any other girl, colored or white, was found until after the trial, when in April, 1946, the body of a colored girl was found. But as petitioner had admitted prior to his trial that he had dropped the body of Thora Chamberlain over a 300-foot cliff into the ocean at Devil's Slide in San Mateo County, and as the discovery of Thora Chamberlain's socks on the face of the cliff at that point corroborated his admission, petitioner's boastful claims regarding the murder of other girls and the disposition of their bodies can have no bearing upon any issue which would be material to this discussion.

[2] In the light of these observations, the findings of the referee are adopted as the findings of this court upon the issues designated by petitioner. Before concluding, it appears appropriate to state that an examination of the record upon the appeal and of the record in this proceeding confirms our view expressed in the decision on appeal (People v. McMonigle, supra, 29 Cal.2d 730, 732, 177 P.2d 745) that petitioner "was given a fair trial"; and it further appears that petitioner's rights have been fully protected by able counsel throughout all proceedings, including the trial, the appeal and this proceeding on habeas corpus. The fact remains, however, that petitioner's guilt of the murder of Thora Chamberlain has been proved beyond all reasonable doubt, and we can only conclude that petitioner's successive applications for writs of habeas corpus based upon wholly unfounded claims, constitute a studied attempt by petitioner, through the use of false allegations, to abuse the processes of the courts in order to obtain an unwarranted delay in the execution of the sentence imposed.

The writ is discharged and petitioner is remanded to custody.

GIBSON, C. J., and SHENK, J., EDMONDS, J., CARTER, J., TRAYNOR and SCHAUER, JJ., concur.

31 Cal.2d 290

DIERMAN v. PROVIDENCE HOSPITAL et al.

S. F. 17573.

Supreme Court of California, in Bank.

Dec. 30, 1947.

Rehearing Denied Jan. 26, 1948.

1. Hospitals 🔑8
Physicians and surgeons 🔑18(6)

In action against hospital and physician for injuries sustained by patient when explosion occurred within her oral and nasal passages during removal of wart from her nose with hot electric needle after patient had been given nitrous oxide, a non-explosive anesthetic, and allegedly before patient was given any ether, an explosive anesthetic, for purpose of removal of tonsils, doctrine of "res ipsa loquitur" applied.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Evidence 🔑78
Negligence 🔑136(6)

In a res ipsa loquitur case where, in addition to prima facie showing of negligence, it is admitted or appears without dispute that defendant has it in his power to produce substantial evidence material to issue of negligence, but fails to do so, it must be presumed that such evidence, if produced, would have been adverse to defendant, and under such circumstances, evidence is insufficient to support a verdict for defendant, and plaintiff is entitled to a directed verdict.

3. Negligence 🔑121(2)

Where res ipsa loquitur doctrine is applicable, defendant will not be held blameless, except on a showing either of satisfactory explanation of accident, in which there is no element of negligence of defendant, or of such care in all possible respects by defendant as necessarily to lead to conclusion that accident could not have happened from want of care, but must have been due to some unpreventable cause.

4. Hospitals 🔑8
Physicians and surgeons 🔑18(8)

In action under res ipsa loquitur doctrine against hospital and physician for injuries sustained by patient when explosion occurred within her oral and nasal passages during removal of wart from her nose with hot electric needle after patient had been given nitrous oxide, a nonexplosive anesthetic, and allegedly before patient was given any ether, an explosive anesthetic, for purpose of removal of tonsils, evidence was insufficient, as a matter of law, to sustain verdict for defendants.

TRAYNOR, EDMONDS and SPENCE, JJ., dissenting.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Mabel Dierman against the Providence Hospital, a corporation, and others for injuries allegedly caused by negligence of defendants when explosion occurred while plaintiff was undergoing an operation. From a judgment for the defendants, the plaintiff appeals.

Judgment reversed and cause remanded for a new trial.

Prior opinion, 179 P.2d 603.

Gladstein, Andersen, Resner, Sawyer & Edises, George R. Andersen and Gladstein, Andersen, Resner & Sawyer, all of San Francisco, for appellant.

Hoge, Pelton & Gunther and Franklin C. Latchan, all of San Francisco, and Johnson, Ricksen & Johnson, Johnson & Ricksen and Stanley C. Smallwood, all of Oakland, for respondents.

SCHAUER, Justice.

[1] This is an action for personal injuries allegedly caused by the negligence of defendants. Plaintiff entered defendant hospital for the purpose of having a wart on her nose removed and her tonsils excised; she was completely anesthetized by defendant Treadway; and defendant Libby, a physician and surgeon, used a hot electric needle to remove the wart. After the wart had been taken off and as Dr. Libby was cauterizing the wound, there was an explosion, described as a "flash" and a "pop," above the face (and apparently within the oral and nasal passages) of

the unconscious plaintiff and she sustained contusions and hemorrhages. The case was properly tried on the theory that the doctrine of res ipsa loquitur applies. (Ybarra v. Spangard (1944), 25 Cal.2d 486, 489, 494, 154 P.2d 687, 162 A.L.R. 1258.) A jury found for defendants and plaintiff appeals from the ensuing judgment in their favor. She contends that upon the record the jury should have been directed to find for her and that the evidence, as a matter of law, is insufficient to sustain the verdict. We have concluded that this contention is sound.

Defendant Libby arranged for plaintiff's admission into defendant hospital and planned the double-procedure operation. It was Dr. Libby's plan that plaintiff be initially anesthetized with nitrous oxide; that the administration of such gas be interrupted and with the anesthetizing apparatus completely shut off that the wart be removed by use of the hot electric needle; that plaintiff then, without regaining consciousness, be immediately anesthetized with ether; and that her tonsils be removed while she was under the influence of the ether. In accord with this plan defendant Treadway, a nurse employed as an anesthetist, completely anesthetized plaintiff with nitrous oxide, then turned off the anesthetic, and Dr. Libby removed the wart. After the wart removal was complete Dr. Libby proceeded to "cauterize" the wound with the same hot electric needle and it was then that the visible "flash" and audible "pop" of the explosion occurred. The "flash" assertedly appeared about six inches from plaintiff's face and an equal distance from the face of Dr. Libby. Dr. Libby was not injured; he, of course, had not been anesthetized and his respiratory organs were not filled with either nitrous oxide or ether or a combination of the two. He did not remove plaintiff's tonsils, but at once attended to the injuries which she received as a result of the explosion. Both Dr. Libby and the anesthetist testified that they could not account for the "flash."

Upon any view of the evidence, however, it appears that the "flash" resulted from the electric needle igniting some combustible gas: either ether (which is highly combustible) or nitrous oxide (which assertedly is not combustible when pure, but may become so when contaminated by foreign substances). More specifically, the evidence shows four, and only four, possible causes of the "flash" and explosion: the needle may have ignited (1) ether, or (2) nitrous oxide contaminated by unclean anesthetizing apparatus, or (3) nitrous oxide contaminated by the hospital, through an unidentified agency or dereliction, at some time after it was received from the manufacturer, or (4) nitrous oxide which was contaminated at the time it was purchased from the manufacturer. (It appears that the hospital purchased its anesthetics, including cans of ether and tanks of nitrous oxide, from an independent manufacturer.)

As to possible cause (1), defendants Libby and Treadway testified that the ether was not turned on at any time during the operation. As to possible cause (2), the nurse in charge of surgery testified that it is proper and customary procedure, in order to avoid contamination, for the anesthetist to wash out the breathing tube (which leads from the container of anesthetic to the patient's face) with soap and water immediately before its use. This nurse further testified that she saw defendant Treadway properly wash the tube used in anesthetizing plaintiff. Her testimony in this regard is exceedingly vague and self-contradictory. Defendant Treadway, who best knew whether she had washed the tube with due care (and, perhaps, whether the ether had been turned on too soon), was not present at the trial, having, it was said, permanently removed her residence to Texas. Her testimony was by deposition taken in California at a time when she expected to change her residence. The deposition contains no reference to the washing of the tube.

Regardless, however, of the weight to which the testimony of the nurse or that of the defendant Treadway may be entitled (see Code Civ.Proc. § 1963, subds. 5, 6), defendants did not produce in evidence the tank of nitrous oxide which was used to anesthetize plaintiff, did not explain why they did not produce it and did not even attempt to show by chemical analysis, which would have been the highest form of proof as to this fact, whether the gas was pure or was contaminated. Contamination of the nitrous oxide, as a possible cause of the explosion, was suggested by an expert witness for defendants, a doctor who had no personal knowledge of the accident, but who was an anesthetist and who stated his opinion that such cause was a "possibility" or "probability." This doctor further testified that the nitrous oxide in a tank could be analyzed to determine whether it was chemically pure; that a "spot test" would be reasonably determinative as to the purity of the contents of a tank of the gas; that it would be necessary to analyze the entire contents of a tank in order to be "absolutely certain it is entirely pure"; that such a complete anaylsis would be a "long process"; that the length of time required for such analysis would depend upon the character of the apparatus used. Whether the defendants, after the accident, actually made any test whatsoever of the contents of the tank from which the nitrous oxide had been administered to plaintiff does not appear. At the trial defendants made no attempt to show that the tank, with its remaining contents, was not even then available for tests; nor did they show whether the remaining contents, after the accident to plaintiff, had been discarded or used on other patients.

As to possible cause (3)—that the nitrous oxide was contaminated by the hospital through the acts or neglects of its agents at some time after it was purchased and before it was administered to plaintiff—there is no testimony as to whether the hospital did or did not use due or any care to keep the gas pure after it was received from the manufacturer. It is not shown whether the gas would deteriorate from age; or from the type of container in which it was kept; or from the condition of the particular container or the circumstances under which it was stored or under which portions of its contents may have been extracted for use. The above mentioned nurse in charge of surgery testified that she did not know whether the tanks of gas remained in the operating rooms for a day, a month, or a year after they were received from the manufacturer. The chief engineer of defendant hospital, who had charge of the purchasing of the anesthetics, gave no evidence as to the manner in which the tanks of gas were kept by the hospital. As stated above, defendants apparently made no effort to ascertain whether the tank of gas was contaminated when it came into their hands. All this explanatory—and perhaps exculpatory, perhaps incriminatory—evidence as to the condition of the nitrous oxide was either in the possession of or available to defendants and was not in the possession of or available to plaintiff.

[2] The showing here goes farther than the establishment of a mere prima facie case under the doctrine of res ipsa loquitur. Not only is there a prima facie showing that the accident is one which in the ordinary course of events would not have happened if defendants had used due care but the defendants themselves have established the "possibility" or "probability" that they used an impure and, under the circumstances, dangerous anesthetizing agent. That agent, the nitrous oxide, was at all times concerned in the exclusive possession and control of defendants. If such nitrous oxide was not impure, it was in the power of defendants to prove the fact; if it was impure, as their evidence suggests, then the burden was on them to account for the impurity. The defendants offered to prove neither that the gas was pure nor that they were not responsible for its impurity. We are constrained to the conclusion that in a res ipsa loquitur case where, in addition to the prima facie showing of negligence, it is admitted or appears without dispute that the defendant has it in his power to produce substantial evidence material to the issue of negligence but fails to do so, it must be presumed that such evidence, if produced, would have been adverse to defendant, and under such circumstances the evidence is insufficient to support a verdict for the defendant and plaintiff is entitled to a directed verdict.

[3] This is not to say that a defendant in a res ipsa loquitur case has the burden of proving himself free from negligence. It is not to say that a defendant must in every such case produce evidence of the actual cause of the accident. It is not to say that the question of the sufficiency of a de-

fendant's explanation—or, if he cannot explain, the sufficiency of his evidence of due care and of impossibility of explanation—is not ordinarily for the jury. The general principle is, as stated by this court in 1919 (in denying a hearing in Bourguignon v. Peninsular Ry. Co., 40 Cal.App. 689, 694, 695, 181 P. 669, 671) "that, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented."

[4] The defendants have not met either test above stated. They did not show "a definite cause for the accident" unless it was the use by them of an impure or contaminated anesthetizing agent. Such "definite cause" is not shown to possess "no element of negligence" on their part, although evidence material to this issue was available to them. And in respect to an exclusionary showing, as has been pointed out above, the evidence fails in several respects to support a conclusion "that the accident could not have happened from want of care"; it fails in this regard not because of any showing of impossibility of proof but, rather, because defendants having the ability to produce it chose not to do so. It is therefore apparent that upon any reasonable view of the record, and giving effect to the rules of law hereinabove discussed, the verdict for the defendants cannot be sustained.

For the reasons above stated the judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice.

I dissent.

I cannot agree that the evidence is insufficient to sustain the verdict. In Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, this court held that it was error to enter a judgment of nonsuit against a plaintiff who, because he was unconscious during an operation, is unable to specify which of several doctors and nurses in attendance during the operation were negligent. It was held that such a plaintiff can rely on the doctrine of res ipsa loquitur to avoid a judgment of nonsuit, and that at the trial those in attendance during the operation have the burden of giving an "initial explanation" of the accident and their conduct. "We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." 25 Cal.2d 494, 154 P.2d 691, 162 A.L.R. 1258. In the present case the court proceeded to a trial on the issue of defendants' negligence. The evidence showed without conflict that the accident was caused by an explosion during the operation, and that the explosion might have resulted from causes other than negligent conduct of any person in attendance during the operation. There was also evidence explaining the conduct of defendants, which convinced the jury that they exercised due care in performing their duties. Since defendants sustained the burden imposed upon them under the doctrine of res ipsa loquitur as applied in the Ybarra case, the jury was free to return a verdict for defendants.

The applicability of the doctrine of res ipsa loquitur cannot be determined in the abstract; it depends upon the evidence in each case. "The doctrine * * * requires evidence which shows at least the probability that a particular accident could not have occurred without legal wrong by the defendant." Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 459, 150 P.2d 436, 439. Such a probability may be dispelled when the facts become known. Maryland Casualty Co. v. Matson Navigation Co., 177 Cal. 610, 613, 171 P. 427; Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53; Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436; Ybarra v. Spangard, 25 Cal.2d 486, 492, 494, 154 P.2d 687, 162 A.L.R. 1258; Manuel v. Pacific Gas and Electric Co., 134 Cal.App. 512, 517, 25 P.2d 509; see Klein v. Fraser, 169 App.Div. 812, 155 N.Y.S. 848; 1 Shearman and Redfield, Negligence, sec. 56, p. 154. "When the defendant * * * offers evidence to show that the event was not due to his negligence, there is the * * * question of the extent to which the principle of res ipsa loquitur will survive in the face of such proof. It is generally agreed, except in two or three jurisdictions, that the burden of proof is not upon the defendant, and that he is required to do no more than to introduce evidence which, if believed, will permit the jury to say that it is as probable that he was not negligent as that he was." Prosser, Torts, 308. Two of the four possible causes of the explosion discussed in the majority opinion do not involve negligent conduct of any persons who were in attendance during the operation. If the nitrous oxide was contaminated when the manufacturer delivered it to the hospital, the explosion might have been caused by that anesthetic without fault on the part of any of the defendants. If the nitrous oxide became contaminated at the hospital before it was used on plaintiff, the hospital may be responsible for the negligence of an employee who kept the anesthetic, but none of the persons who were in the operating room during the operation would be at fault. In the Escola case, supra, where the explosion of a bottle filled by the defendant could have been caused by excessive pressure of the carbonated beverage in the bottle or by a defect in the bottle, this court said: "The question is whether under the evidence there was a probability that defendant was negligent in any of these respects. If so, the doctrine of res ipsa loquitur applies. * * * Although it is not clear in this case whether the explosion was caused by an excessive charge or defect in the glass, there is a sufficient showing that neither cause would ordinarily have been present if due care had been used." 24 Cal.2d 459, 461, 150 P.2d 439. The holding in that case rests on the conclusion that due care required the defendant to examine the bottles delivered by the manufacturer. By applying proper methods of examination, the defendant could have discovered defects in the bottle. A doctor, hospital, or anesthetist may accept an anesthetic prepared by a manufacturer as being what it purports to be in the absence of circumstances indicating that the anesthetic might be impure. To require them to test anesthetics before use in the absence of such circumstances would involve the danger of contamination incident to the opening of the containers and the testing of their contents. Hence, when it was proved that plaintiff's accident resulted from an explosion during the operation and that the explosion might have causes other than the negligent conduct of any person who was in attendance during the operation, it could no longer be said that the accident probably could not have occurred without legal wrong by one of the persons attending the operation.

Under the evidence the jury could determine not merely that negligent conduct of the doctor and the anesthetist was not proved, but that it was proved that they were not negligent. Both testified that no ether was used during the operation. Their testimony eliminated the use of ether as a possible cause of the explosion. There was evidence that the nurse who acted as an anesthetist had twenty-four years' experience in administering anesthetics, that she was a graduate of a nursing college and had received post-graduate training in anesthesia, and that in the cleaning of the apparatus she was supervised by the nurse in charge of the operating rooms in the hospital. The latter testified that she saw the anesthetist clean the tube in the approved manner before it was used in the operation. The credibility of the witness was for the determination of the jury. It was also for the jury to determine whether an inference should be drawn from the fact that when her deposition was taken the anesthetist did not testify as to whether or not she cleaned the tube. At that time plaintiff proceeded on the theory that the ignition of ether by the electric needle caused the explosion; her counsel therefore did not ask the anesthetist if she cleaned the tube. Again, it was for the jury to determine whether an inference should be drawn from the fact that defendants did not produce the container used at the operation to prove that the nitrous oxide in the container was contaminated. Even if the nitrous oxide that remained in the container after the operation was not contaminated, it would not necessarily follow that the nitrous oxide released from the container during the operation was not contaminated. If only part of the nitrous oxide was contaminated, that part could have been released from the container during the operation, while the pure oxide remained in the container. Even if the nitrous oxide in such a container is contaminated at the time of trial, it does not follow that it was contaminated at the time of the operation. The theory that contamination of the nitrous oxide in the container might be responsible for the explosion was not so obvious when the accident occurred as it may seem now, after an expert witness has explained that possibility. If liability of defendants followed as a matter of law from their failure to preserve such a container or to account for its absence, they would be penalized for failing to anticipate a law suit and to prepare their defense thereto.

In any event it was for the jury to draw inferences from the failure to produce the container or to account for it and to weigh them with the other evidence in the case. It is not for this court to reject the conclusions of the jury, since there is ample evidence to support them. By doing so, it not only substitutes its own judgment for that of the jury, but makes the possibility of such a substitution one to be reckoned with in future cases, and thereby enlarges that uncertainty in the law which in the long run causes more hardship than it alleviates.

Under the doctrine of res ipsa loquitur the majority opinion in effect imposes upon a defendant even more than the burden of proving that he was not negligent. It imposes the burden of proving the actual cause of the accident, for that is the only practical way under the opinion that defendants can show that they were free from fault. The imposition of such a burden necessarily involves the adoption of a rule on grounds of policy that persons in attendance during an operation must explain not only their own conduct, but the conduct of any other person, such as a manufacturer of anesthetics, who might conceivably be responsible for the accident, as well as the forces of nature that brought it about. Such a rule would impose upon doctors, nurses, and members of hospital staffs absolute liability for unusual accidents that they cannot explain and might discourage their attending operations. A person about to undergo an operation is generally aware that there may be unforeseeable dangers incident thereto. He is entitled to an explanation of the conduct of the persons attending the operation, but he cannot reasonably expect them to be insurers of his safety.

EDMONDS and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

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31 Cal.2d 254

CITY OF LONG BEACH v. MORSE.

L. A. 19873.

Supreme Court of California, in Bank.

Dec. 30, 1947.

Rehearing Denied Jan. 26, 1948.

1. Navigable waters 🔑37(8)

Under grant by state to City of Long Beach of tide lands in trust for specified uses, the city as trustee assumed the same burdens and is subject to the same regulations that appertain to other trustees of charitable trusts. St.1911, p. 1304; Gen. Laws, Act 4401.

2. Navigable waters 🔑37(8)

Under grant by state to City of Long Beach of tide lands in trust for specified uses, the income as well as the corpus is subject to the trust, and in absence of the legislative provisions to the contrary, proceeds from sale of oil and gas could not be appropriated by city as trustee to its own uses, contrary to terms of trust regardless whether proceeds were regarded as corpus or as income from trust property. Public Resources Code, § 6875; St.1911, p. 1304; Gen.Laws, Act 4401, 4402; Const. art. 11, § 8; St.1946, 2d Ex.Sess. p. 366, § 229x; Civ. Code, § 2229.

3. Navigable waters ⚷37(8)

Under original grant by state to City of Long Beach of tide lands in trust for specified purposes, clause authorizing city to lease lands for limited periods for purposes consistent with trust upon which the lands are held by state, even if authorizing city to enter into oil and gas leases, did not authorize city to dispose of proceeds of oil leases for municipal purposes unconnected with general purposes of trust. St.1911, p. 1304; Gen.Laws, Act 4401.

4. Navigable waters ⚷37(8)

Where state held title to tide lands within corporate limits of City of Long Beach in trust for all people of the state, whatever right the state had to enter into oil and gas leases with respect to production of oil and gas from land was subject to trust, and under grant of land in trust for specified purposes to City of Long Beach which limited extent of right of city to enter into leases by the trusts upon which lands were held by state, city could not use proceeds from oil and gas leases for local purposes contemplated by charter amendment. St.1911, p. 1304; Gen.Laws, Act 4401; St.1946, 2d Ex.Sess. p. 366, § 229x.

SCHAUER and SPENCE JJ., dissenting.

Petition for writ of mandate by City of Long Beach, a municipal corporation, against H. C. Morse, as City Treasurer of the City of Long Beach, to compel the treasurer to transfer certain revenue from the city's harbor revenue fund to its public improvement fund.

Alternative writ discharged and petition for peremtory writ denied.

Irving M. Smith, City Atty., Nowland M. Reid, Ass't. City Atty., and Atlee S. Arnold, Deputy City Atty., all of Long Beach, for petitioner.

Roy J. Brown, of Long Beach, for respondent.

TRAYNOR, Justice.

The City of Long Beach seeks a peremptory writ of mandamus to compel its Treasurer to transfer certain revenue from the city's "Harbor Revenue Fund" to its "Public Improvement Fund." The revenue in question was derived from the production of oil and gas from the tide lands and submerged lands within the corporate limits of the City of Long Beach, claimed by the city under legislative grants from the State of California.

Before 1946, under the terms of the Charter of the City of Long Beach, the revenue from the production of oil and gas from these lands was devoted to the improvement and maintenance of the harbor of the City of Long Beach and to the payment of principal and interest on bonds issued by the City for harbor purposes. (Long Beach City Charter, sec. 229x, Stats. 1937, p. 2939, as amended by Stats. 1943, p. 3097.) The City Charter was amended in 1946 to provide for the transfer of twenty-five per cent of the fund in question to the "Public Improvement Fund." This amendment provides, however, that the "transfer shall be made only in the event that such moneys may be used and expended for the purposes hereinafter stated without violating the provisions of grants by which the City acquired title to all tide and submerged lands from the State of California, to wit, 1911 Statutes, page 1304, 1925 Statutes, page 235, and 1935 Statutes, page 794. * * * the moneys transferred to and placed in the 'Public Improvement Fund' shall be used exclusively for the payment of costs and expenses for construction, reconstruction, repair and maintenance of public improvements, * * * as shall have been provided for in the official budget of the City adopted by the City Council." (City Charter of Long Beach, sec. 229x, Stats. 2nd Ex. Sess. 1946, Resolutions, Ch. 6, p. 366.)

Respondent refused to make the transfer on the ground that it would be a violation of the charter provision for him to do so, because the revenue transferred to the "Public Improvement Fund" would be used for general municipal improvements unconnected with the purposes and uses provided in the grants of the tide lands and submerged lands to the city. The City of Long Beach concedes that if the transfer is made, the money would be used for general municipal improvements not limited to the purposes specified in the legislative grants under which the city claims title to the lands. It is contended, however, that these grants restrict, not the use of any revenue derived from the lands, but only the physical uses to which the lands may be put. The issue in this case, therefore, is whether the use of money derived from the development of oil and gas on these lands for general municipal improvements would violate the terms of the grants under which the City of Long Beach claims title.

In 1911 the State of California transferred whatever title it may have had to the tide lands and submerged lands within the boundaries of the City of Long Beach[1] to that city in trust for certain uses and purposes connected with the development of Long Beach Harbor. (Stats.1911, p. 1304.) The terms of the original grant were amended by the Legislature in 1925 (Stats.1925, p. 235) and in 1935. (Stats. 1935, p. 793; 2 Deering's Gen.Laws, 1944, Act 4401.) The present provisions of the trust are as follows:

"There is hereby granted to the city of Long Beach, a municipal corporation of the State of California, and to its successors, all of the right, title and interest of the State of California, held by said State by virtue of its sovereignty, in and to all of the tide lands and submerged lands, whether filled or unfilled, bordering upon, under and situated below the mean high tide line of the Pacific Ocean, or of any harbor, estuary, bay or inlet, which are within the corporate limits of said city, to be forever held by said city, and by its successors, *in trust for the uses and purposes and upon the express conditions following, to wit:*

"(a) *That none of said lands shall be used or devoted to any purposes other than* public park, parkway, highway, playground, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation; and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, however, that nothing herein contained shall be so construed as to prevent the granting or use of easements, franchises or leases for limited periods, or rights of way in, under, over or across said tidelands or submerged lands for power, telephone, telegraph or cable lines or landings, sewage disposal conduits, wharves and other public uses and purposes consistent with the trusts upon which said lands are held, or the leasing or use of such tidelands or submerged lands for limited periods for the construction, maintenance, and operation of nonprofit benevolent and charitable institutions organized and conducted for the promotion of the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor and commerce, fishery, and navigation." (Italics added.)

(b) That the lands shall always be devoted to the conduct of a public harbor, without expense to the state.

(c) That there shall be no discrimination in connection with the operation of the harbor.

(d) The right to fish in the harbor is "expressly reserved to the people of the State of California."

[1,2] This statute clearly provides that

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[1] The United States is not a party to this proceeding and the extent to which the State of California could validly grant to the City of Long Beach any right in the lands in question under the decision of the United States Supreme Court in United States v. California, 332 U.S. 19, 67 S.Ct. 1658, 1664, is not in issue.

the state's interest in the lands is transferred in trust for certain uses and purposes. The city is a trustee and as such "assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts." (3 McQuillin, Municipal Corporations, 2d Ed. sec. 1230, referring to charitable trusts.) The City of Long Beach contends that the proceeds from the production of oil and gas is merely income from the land and as such is not covered by any provisions of the trust, on the ground that the trust expressly applies only to the physical uses of the land. Whether the fund should be regarded as part of the corpus of the trust or merely as a part of the rents and profits of the land, the city as trustee has no right to devote the proceeds to general municipal improvements unconnected with the trust purposes. If the proceeds from the sale of oil and gas are regarded as corpus (see, Rest. Trusts, sec. 238; 4 Bogert, Trusts and Trustees, §§ 789, 828), they must be used for the purposes set forth in the legislative grants in trust, for the City, as trustee, clearly has no authority to appropriate the corpus to its own uses contrary to the terms of the trust. If the proceeds are regarded as income from trust property, the trustee, in the absence of a legislative provision to the contrary, has no more right to them than it has to the corpus. (Civil Code, sec. 2229; Provident Land Corporation v. Zumwalt, 12 Cal.2d 365, 375, 85 P.2d 116; Lamb v. Lamb, 171 Cal. 577, 580–582, 153 P. 913; Purdy v. Johnson, 174 Cal. 521, 529, 163 P. 893; see, Methodist Benev. Ass'n v. Bank of Sweet Spring, 227 Mo.App. 566, 573, 54 S.W.2d 474, 478.)

Thus, in Provident Land Corporation v. Zumwalt, supra, this court held that an irrigation district acquired certain land in trust for the purposes of the California Irrigation District Act (sec. 29, Stats.1897, p. 263) and that the rents and profits from such property were likewise subject to the trust. The act provided that such property was held "in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this Act." Although there was no express provision for the disposition of the rents from such land, the opinion stated that [12 Cal.2d 365, 85 P.2d 120]. "Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes. On this point, namely, that the land is trust property, held for the 'uses and purposes' of the act, and that the proceeds are stamped with the character of the property from which they flow, the statute, read in the light of elementary principles, leaves no room for debate."

Similarly, since the "right, title and interest" of the State of California in the lands involved in the present case was granted to the City of Long Beach "in trust for the uses and purposes" set forth in the grants, it necessarily follows that the proceeds from the oil drilled from these lands can be used only in furtherance of the trust purpose. The City cites no authority contrary to this principle. It relies on the case of City of Long Beach v. Marshall, 11 Cal. 2d 609, 620, 82 P.2d 362, 367, in which this court held that the City had a right to drill oil from the lands so long as such drilling did not interfere with the trust purposes. The court there stated: "Nothing in the grant purports to reserve to the state or to deny to the municipality the minerals or the right to extract them. * * * It is, of course, true that the operations must not be conducted in such manner as to impede the use of the harbor, but there is nothing before us to suggest that drilling will have any such effect." The City interprets this statement to mean that the only restriction on the City's right to oil is that the extraction thereof must not interfere with the harbor. In that case, however, this court was not concerned with the disposition of the proceeds from such operations, for at that time the proceeds were allocated entirely to "Improvement and maintenance of the harbor and servicing and redemption of outstanding harbor improvement bonds." (11 Cal.2d at page 612, 82 P.2d at page 363, supra.) There was therefore no reason for the court to assume that the City would attempt to appropriate the proceeds for general municipal improvements, and it was unnecessary to consider a limitation implicit in the grant.

There is nothing in the case of City of Long Beach v. Marshall to indicate that the City owns these lands clear of any trust. The court held that the City took title to the lands in fee, but it impliedly recognized, in recognizing the limitation on the right of the City to drill, that the title was held subject to the express trust imposed in the legislative acts of conveyance. Moreover, the court did not purport to overrule City of Long Beach v. Lisenby, 175 Cal. 575, 579, 166 P. 333, which held that the City acquired title to these lands in trust. That case is cited with approval in the Marshall case, supra, 11 Cal.2d at page 619, 82 P.2d at page 367.

In the Marshall case, the court referred to the fact that the Legislature had approved the charter amendment under which the City was authorized to conduct drilling operations on this land. It is notable that subsequent to that case, the Legislature has again referred to the fact that the lands in question were "conveyed ***in trust*** to the City of Long Beach." (Stats.1943, p. 2577, Gen.Laws, Act 4402.)

Legislative approval of the present charter amendment cannot be relied on as indicative of a legislative purpose to enlarge the grant or as a legislative construction of its former grants. The amendment was approved in a joint resolution of the Legislature as required by Article XI section 8 of the California Constitution, but the resolution and the charter amendment expressly provide that "said transfer shall be made only in the event that such moneys may be used and expended for the purposes * * * stated without violating the provisions of grants by which the City acquired title to all tide and submerged lands from the State of California * * *." (Stats. 2d Ex. Sess.1946, Resolutions Ch. 6, p. 366.)

If a Legislative interpretation of the meaning of this and similar grants is necessary, it may be found in section 6875 of the Public Resources Code with respect to agreements between the State Lands Commission and cities holding title to tide lands under such grants. This section provides that "If the Legislature has transferred to any city or county the administration of the trust, whether or not limited, under which tide or submerged lands are held by the State, the commission, * * * may enter into agreements upon behalf of the State to compensate any such city or county for the use of surface drilling and operating sites upon such lands from the royalty or revenue to be derived by the State from oil and gas taken from such lands by lessees of the State. * * * All money paid to any city or county under this section shall be used by it solely in furtherance of the trust under which the administration of tide and submerged lands has been transferred to such city or county and for the purposes expressed in the act so transferring administration of such lands."

It is contended that even if the grant as amended in 1925 and 1935 does not authorize the use of revenue from the land for local municipal purposes, the original terms of the grant contain such authorization and the Legislature was without power to deprive the city of this right by subsequent legislation. By the terms of the original grant the city was granted the land in question for the following uses and purposes: "That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city * * * shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any puropse whatsoever; *provided, that said city * * * may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor * * *.*" (Italics added, Stats.1911 p. 1304.)

It is suggested that the italicised clause authorized the city to enter into oil leases and to dispose of the proceeds thereof for municipal purposes unconnected with the general purposes of the trust. This clause was amended in 1925 and 1935 so that it now provides "that nothing herein contained shall be so construed as to prevent the granting or use of easements, franchises or leases for limited periods, or rights of way in, under, over or across said tidelands or submerged lands for power, telephone, telegraph or cable lines or landings, sewage disposal conduits, wharves and *other public uses and purposes* consistent with the trusts upon which said lands are held * * *." (Italics added.)

The 1925 and 1935 amendments have heretofore been regarded as enlargements rather than as restrictions on the terms of the original grant. (See City of Long Beach v. Marshall, supra, 11 Cal.2d at page 618, 82 P.2d at page 366.) The only express change in the lease provision that might be regarded as a limitation not previously contained in the grant is the express requirement that the lease be for "public uses and purposes consistent with the trusts upon which said lands are held."

[3] The original grant has been interpreted as providing for a trust for public purposes and as not creating a "trust to carry on a commercial enterprise, unaffected by any public use." (City of Long Beach v. Lisenby, supra, 175 Cal. at page 579, 166 P. at page 336; see also City of Oakland v. Williams, 206 Cal. 315, 322–328, 274 P. 328, construing an identical provision of a contemporary trust. [Stats.1911, p. 1258].) By these amendments the Legislature may have sought merely to clarify the meaning of this clause of the grant. Even if it be assumed, however, that the proviso in the original grant authorized the City to enter into commercial leases and that this authorization extended to oil and gas leases, it does not follow that the City of Long Beach may use the proceeds from the production of oil and gas from these lands for general municipal purposes unconnected with the expressed purposes of the trust.

[4] Under the terms of the original grant, the extent of the right of the City to enter into any type of lease is clearly limited by the "trusts upon which said lands are held by the State of California." The State of California has claimed title to these lands in trust for all the people of the state and whatever right the state may have to enter into oil and gas leases with respect to the production of oil and gas from these lands is subject to this trust. (Boone v. Kingsbury, 206 Cal. 148, 187–188, 273 P. 797, relying on Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 452, 13 S.Ct. 110, 36 L.Ed. 1018; cf. United States v. California, 332 U.S. 19, 67 S.Ct. 1658, 1664.) Since the lands were held by the state in trust for all the people, and the city holds the lands subject at least to the same trusts, it may not use the proceeds for the local purposes contemplated by the charter amendment.

The development of the harbor, on the other hand, is expressly authorized by the grants as a public purpose in the interest of all the people of the state. (See, City of Oakland v. Williams, supra, 206 Cal. at page 328, 274 P. at page 333).

It follows that the proceeds from the sale of oil and gas from the lands in question may not be used for any purposes other than those specified in the trust conveyances under which the City claims title to the lands. The Legislature specified purposes relating to the harbor that it deemed beneficial to the state as a whole and did not authorize the City of Long Beach to use the corpus or the income of the trust for strictly local improvements.

The alternative writ is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

EDMONDS, Justice.

I concur in the conclusion that the revenue which is here in controversy may not be used for general municipal purposes. But I again call attention to the impropriety of a "friendly suit" by which only the city and one of its officers litigate a question of great public interest. (Paso Robles Etc. Hospital Dist. v. Negley, 29 Cal.2d 203, 173 P.2d 813; City of Whittier v. Dixon, 24 Cal.2d 664, 668, 151 P.2d 5, 153 A.L.R. 656; City and County of San Francisco v. Boyd, 22 Cal.2d 685, 707, 140 P.2d 666; City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 369.

SCHAUER, Justice.

I dissent. Two questions are presented for decision: (1) Does the proposed use by the city of Long Beach of revenue from oil production on the tidelands granted it by the state violate the "trusts upon which said lands are held by the State of California?" (2) Does such proposed use violate any other trust or condition imposed by the grant from the state?

The original grant from the state to the city of Long Beach (Stats.1911, p. 1304) conveyed "all the right, title and interest of the State * * * in and to all the tide lands and submerged lands * * * within the present boundaries of said city, * * * to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to wit:

"(a) That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves * * * and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city * * * shall not * * * grant, convey, give or alien said lands * * * to any individual, firm or corporation for any purpose whatsoever; *provided,* that said city, or its successors, * * * *may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California* and with the requirements of commerce or navigation at said harbor; * * * Reserving, however, in the people of the State of California the absolute right to fish in the waters of said harbor, with the right of convenient access to said waters over said lands for said purpose." (Italics added.)

1. The trusts upon which the involved lands are or were held by the State do not preclude the city of Long Beach from arranging for the extraction of oil from such lands or from devoting the revenues of such lands to general municipal purposes.

It has already been decisively established in this state that the drilling for oil on state tidelands, pursuant to permit from the state, *is* a purpose "consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation," provided only that no substantial interference with navigation, fishing or commerce results. The specialized nature and limits of the trusts involved were extensively examined and explained in Boone v. Kingsbury (1928), 206 Cal. 148, 273 P. 797. In considering the power of the state to permit drilling operations on portions of its tidelands, this court declared (page 186 of 206 Cal. page 814 of 273 P.), "It may be said of the situation that the coast line at the point in question is an unnavigable portion of a vast body of navigable water, and the use to which the state proposes to devote the soil, from a practical point of view, would not be incompatible with, or in 'derogation of its governmental trust to preserve needed navigable waters for the benefit of the people.' [Citation.] * * *

"No uncertainty can exist as to the rights of the state to absolutely alienate its tide and submerged lands when they are unfit for navigation, are useless as aids of commerce and possess no substantial value as fishing grounds. The policy of this state is and has always been to encourage its citizens to devote waste and unused lands to some useful purpose. The power of the state to absolutely alienate lands perpetually covered by water has been upheld by all courts of the nation, state and federal, where the land so covered was severed from the main body by harbor and other improvements in such manner as to leave the remaining waters of no substantial use to navigation or commerce. It is only in those cases where the reduction of the water area amounts to a substantial interference with navigation and commerce or the fisheries that the absolute power of alienation by the sovereign and its control and dominion over said lands can be questioned. * * *

"[206 Cal. at page 187, 273 P. at page 814]. The rule to be kept in mind and which is recognized by every case bearing on the subject * * * is that the state has the unquestionable right to alienate its tide and submerged lands subject to the 'trust in which they are held for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties.' * * *

"[206 Cal. at page 189, 273 P. at page 815]. The state cannot abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the case of parcels used in promoting the interest of the public therein, or when parcels can be disposed of without impairment of the public interest in what remains. * * *

"The trust in which tide and submerged lands are held does not prevent the state from reclaiming tide and submerged lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses. As said in Ward v. Mulford, 32 Cal. 365:

" 'There are large tracts of salt marsh lands, of which the land in suit is an example, which are covered and uncovered by the flow and ebb of the neap tides, and therefore belong to the state by virtue of her sovereignty, which are of no possible use for the purposes of navigation, but may be valuable for agricultural or other purposes if reclaimed from the tides. Such lands the state may undoubtedly grant in private ownership for the purposes of reclamation and use, for by such a course no right of the public to their use for the purposes of navigation would be prejudiced. On the contrary, the right of navigation, in many cases, might be subserved by such reclamation.' " The court further pointed out that (206 Cal. at page 184, 273 P. at page 813) "should said permittees [in drilling operations] offer any substantial interference *incompatible* with navigation, fishing, or commerce, the state and federal government would have the unquestionable right to abate it." (Italics added.)

Among the definitions given by Webster for consistent is "compatible," and among those for compatible is "consistent." Since the means of producing the funds here in question is consistent with "the trusts upon which said lands are held by the State," (as expressly held in City of Long Beach v. Marshall (1938), 11 Cal.2d 609, 620, 82 P.2d 362) then it follows that the use of the funds for any purpose other than such as would cause positive physical interference with such trusts is also consistent therewith. The opinion of Justice Traynor cites City of Long Beach v. Lisenby (1917), 175 Cal. 575, 579, 166 P. 333, as authority for the statement that "The original grant has been interpreted as providing for a trust for public purposes and as not creating a 'trust to carry on a commercial enterprise unaffected by a public use.' " The discussion in the Lisenby case is directed to the point that since a "trust" in tidelands is for a public purpose rather than a private commercial purpose the city may accept and administer it. The case contains nothing contrary to my views here. Certainly the production of oil and gas from tidelands and the use of proceeds therefrom for general municipal purposes is "affected by a public use."

It should be noted that from a holding that the city must devote the proceeds from the oil and gas production solely to purposes of navigation and commerce or be held to be acting in violation of "the trusts upon which" the *state* holds the lands for the people it would also inescapably follow that the state (and presumably the federal government) must likewise devote its entire income from tidelands oil and gas production as well as from other uses or dispositions which might be made of tidelands not needed for navigation, commerce, or fishing, to the same limited purposes or itself violate such trusts. Is a majority of this court prepared to so hold? In that case, any excess of oil and gas income over expenditures for navigation purposes will seemingly be required to be held unused in the respective governmental treasuries. It is unequivocally held in City of Long

Beach v. Marshall (1938), supra, 11 Cal. 2d 609, 612, 620, 82 P.2d 362, and Miller v. Stockburger (1938), 12 Cal.2d 440, 444, 85 P.2d 132, that as between city and state the proceeds of oil production here involved belong to the city.

2. The grant from the State to the city, reasonably construed, does not preclude the allocation which the city proposes to make of revenue from the conveyed lands.

Firstly, in granting lands to the city "in trust for the uses and purposes, and upon the express conditions" that they be used solely for harbor and navigation purposes and reserving fishing rights to the people of the state, it seems apparent that the state employed the word "trust" in the same specialized sense which the word carries when the "trusts" upon which the state itself holds tidelands are considered; i. e., that navigation, commerce and fishing purposes are of paramount concern, but that other uses may be made of the lands if such paramount purposes remain substantially unimpaired. Therefore cases having to do with the power and duties of trustees of privately owned property are not controlling here. Nor are the grounds for the decision in Provident Land Corporation v. Zumwalt (1938), 12 Cal.2d 365, 85 P.2d 116, present here. Both the nature of the trust upon which the lands there concerned were granted for irrigation purposes and the rights of the bondholder "beneficiaries" differ from those involved in this action. Under the terms of the grant here it appears that the city is limited only by the limitations applicable to the state in the use to be made of income from tidelands.

Secondly, the proviso that the city "may lease said lands * * * for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor" certainly is a broad enough exception to the limitations otherwise imposed to authorize the leasing of the lands for oil extraction; surely the word "lease" imports a consideration to be paid to the lessor; and, equally surely, the omission of any limitation upon application of the revenues to be received by the lessor leaves it free to devote such revenues to the best public use as it may determine from time to time. As seen above, nothing in "the trusts upon which said lands are held by the State of California" or in "the requirements of commerce or navigation at said harbor" precludes the leasing of the lands for oil development and operation so long as the fishing rights of the people and the harbor uses are not interfered with. The leasing of such lands for oil operations, under conditions protecting the harbor usages and "the absolute right [of the people] to fish in the waters of said harbor, with the right of convenient access to said waters over said lands for said purpose" (Stats.1911, p. 1305) is entirely consistent "with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor." Consequently oil production on the lands under lease with use of the proceeds thereof for general municipal purposes does not violate the terms of the grant from the state. It would seem that, except as limited by the city charter, even revenues from harbor operation could be devoted by the city to such purposes as it chooses. It must use the land solely for the purposes specified in the grant, subject to the exceptions provided therein, but there is no direction in the grant as to the source of revenue to be devoted to carrying out such purposes and no limitation upon the use of revenues derived from the lands. On the contrary the grant provides that "said harbor shall be improved by said city without expense to the state * * * and the State * * * shall have, at all times, the right to use, without charge" all facilities thereof. The subsequent amendments to the grant of 1911, whatever their purpose, certainly cannot have the effect of divesting rights conveyed by the original grant.

Furthermore, if any doubt might otherwise exist as to the right of the city to effect the inter-fund transfer of moneys in question, it seems to me that it is dispelled by the act of the state in consenting to the Long Beach city charter amendment of 1946. (Chap. 6, Stats. 2d Extra Session 1946, p. 366.) Section 229x of the charter, as amended, provides: "In addition to all other powers with which the Board of Harbor Commissioners is now or may hereafter be invested, and notwithstanding anything in this Charter to the contrary, said board shall have the power to drill for, develop, extract * * * and dispose of, oil * * * from * * * any and all lands, including all tidelands, submerged and overflowed lands. * * * Provided * * * that before such power may be exercised as to tidelands, submerged and overflowed lands * * * said Board shall first determine, by resolution, that such lands * * * intended to be so used are not required * * * for the promotion or development of commerce, navigation or fishery. * * * Any and all moneys derived by the City * * * from the development of oil * * * shall be apportioned as follows: * * * The City Treasurer shall * * * at least once each calendar month transfer twenty-five per centum (25%) of all moneys hereafter derived by the City * * * from the development of oil * * * from beneath the lands constituting the Harbor District * * * which by the provisions of this subdivision are required to be paid into the 'Harbor Revenue Fund', from said 'Harbor Revenue Fund' to the 'Public Improvement Fund', which said fund is hereby created and established; provided said transfer shall be made only in the event that such moneys may be used and expended for the purposes hereinafter stated without violating the provisions of grants by which the City acquired title to all tide and submerged lands from the State of California * * *. The moneys * * * in the 'Public Improvement Fund' shall be used exclusively for the payment of costs and expenses for construction, reconstruction, repair and maintenance of public improvements, including the purchase of such land, rights and properties as may be necessary therefor, as shall have been provided for in the official budget of the City * * *."

As shown above there is nothing in the authorized uses of funds above provided for which is inconsistent with "the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor." It is already established by City of Long Beach v. Marshall (1938), supra, 11 Cal.2d 609, 620, 82 P.2d 362, 367, that "the city has the right to drill for and extract the oil from these lands which it owns," and that, as noted above (11 Cal.2d at page 612, 616, 82 P.2d at page 363, 365) "the mineral rights" as between state and city "are owned by the municipality." Furthermore, the defendant city treasurer is in no position to claim a breach (either actual or potential) of the grant from the state. The state, by approving the charter provisions above quoted, must be understood to have consented to the specified uses of the money provided that such uses would not, even though approved by the state, violate "the provisions of grants by which the City acquired title to all tide and submerged lands from the State." That the legislature so qualified its approval of the designated uses of the funds is but consistent with the request of the city and with the terms of the original grant (Stats.1911, p. 1304), which required that any leasing of the lands be "for purposes consistent with the trusts upon which said lands are held by the *State of California* and with the requirements of commerce or navigation at said harbor." (Italics added.) It appears to me that, subject to those trusts and priorities, the state, by approving the charter provisions above quoted, must be understood to have consented to the allocation and use of the moneys as specified. No other purpose was served by its action, which is not to be deemed meaningless. Having so consented it should not be permitted, in the absence of a showing of actual or potential breach of those conditions, to prevent the use of the moneys for the very purpose authorized. Certainly a Public Resources Code section (§ 6875) adopted in 1941 (based on Stats. of 1938) and quoted in the majority opinion cannot supply an interpretation of a 1946 legislative approval of a city charter amendment —and, surely, in the face of the Marshall Case, (11 Cal.2d 609, 82 P.2d 362) and the Stockburger case, supra, (12 Cal.2d 440, 85 P.2d 132), the legislature may not (as seems to be suggested by the opinion of Justice Traynor, it intends to do) "interpret" to itself or its agents the right to drill on Long Beach tidelands. Of course no such attempt appears to have been made by the legislature; in section 6875 of the Public Resources Code it is doubtless referring to such tidelands grants as that to Santa Barbara, mentioned 11 Cal.2d at page 618, 82 P.2d at page 366 of the Marshall case, in which the state reserved the mineral rights in the lands. The state cannot and does not here attack the purpose for which the funds are proposed to be used and the defendant city treasurer manifestly is in no better position than the state to resist the city's action.

It is regrettable that the majority opinion by strained legalisms attains the ends of a wastage of public property and the wholly unnecessary imposition of additional taxes upon long suffering taxpayers.

Under the circumstances shown the plaintiff city is entitled to the writ.

SPENCE, J., concurs.

Rehearing denied; SCHAUER and SPENCE, JJ., dissenting.

31 Cal.2d 270

CALIFORNIA SHIPBUILDING CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 20140.

Supreme Court of California, in Bank.
Dec. 30, 1947.
Rehearing Denied Jan. 29, 1948.

1. Workmen's compensation 🔑1743

Finding of Industrial Accident Commission of the ultimate fact of serious and willful misconduct in the language of the statute is not fatally insufficient in form merely because of the generality of its language. Labor Code, §§ 4553, 6400–6403.

2. Workmen's compensation 🔑1674

Finding of Industrial Accident Commission of ultimate fact of "serious and willful misconduct" by employer in language of statute was supported by testimony, where a managing agent of employer was guilty of reckless disregard for the safety of employees by requiring them over a long period of time to work under obviously dangerous conditions which could have been guarded against. Labor Code, §§ 4553, 6400–6403.

3. Workmen's compensation 🔑1743

In workmen's compensation proceedings, though not necessary, the practice of Industrial Accident Commission of making specific findings will in many cases be fairer to parties who may wish to seek a review of final determination reached and be helpful to reviewing court in its effort to ascertain whether that determination may be sustained.

4. Workmen's compensation 🔑941

In proceeding for additional compensation for injuries caused by willful misconduct of employer operating cranes in proximity of high-voltage lines contrary to statute, a road, adjacent to employer's shipyard and regularly used by it and subject to its control as agent of the U. S. Maritime Commission, was, insofar as concerned knowledge of power lines above the road hazardous to operation of high-boom cranes, a part of the employer's "plant". Labor Code, §§ 4553, 6400–6403; Administrative Code, Tit. 8, § 2603(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Plant".

5. Workmen's compensation 🔑1674

In proceeding for additional compensation, serious and willful misconduct shown by the sending of improperly lighted high-boomed cranes at night to work in unlighted area of high-voltage lines was attributable to managing agents of employer under evidence that following contract of the power lines by a crane, in an incident known to the superintendent of transportation and foreman who dispatched cranes, nothing was done to eliminate the hazard and other cranes were continuously sent to the dangerous area. Labor Code, §§ 4553, 6400–6406; Administrative Code, Tit. 8, § 2603(b).

6. Workmen's compensation 🔑940

In proceeding for additional compensation, in the situation of a single instance of, or a temporary or new occurrence of, conditions amounting to serious misconduct, it is necessary in order to attribute such misconduct to corporate employer to show with reasonable particularity that reckless disregard for safety was on part of some particular person with general discretionary power of control of integral part of business wherein misconduct took place. Labor Code, § 4553.

7. Workmen's compensation ⟹1674

"Serious and willful misconduct" in violation of statute forbidding operation of equipment within six feet of high-voltage lines was properly found under uncontradicted evidence showing long-continued maintenance of conditions under which an improperly lighted locomotive crane struck a power line after being dispatched at night to an area not lighted as required by law and at which a similar accident known to the employer had happened one year previously. Labor Code, §§ 4553, 6400–6406; Administrative Code, Tit. 8, § 2603 (b).

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

EDMONDS, J., dissenting.

Proceeding by California Shipbuilding Corporation, a corporation employer, against the Industrial Accident Commission of the State of California and Cleo Rogers, employee, to review and annul an award of the Industrial Accident Commission granting additional compensation to the employee.

Award affirmed.

Thelen, Marrin, Johnson & Bridges, and Gardiner Johnson, all of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondents.

SCHAUER, Justice.

Petitioner, California Shipbuilding Corporation, seeks review and annulment of an award of increased compensation made by the Industrial Accident Commission in favor of petitioner's employe, Cleo Rogers. Such award was made pursuant to section 4553 of the Labor Code, which provides that "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following: * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof."

[1, 2] The commission found that Rogers' compensable injury "was proximately caused by the serious and wilful misconduct of the employer, consisting of a violation of Section 7—5050 of the Electrical Safety Orders of the Industrial Accident Commission [which forbids operation of equipment which can be brought within six feet of high-voltage lines] and Sections 6400 to 6403 inclusive of the Labor Code [which require that the employer furnish a safe place of employment] in that the * * * employer failed to exercise the necessary, or any care, to ascertain the location of the high-powered wires." Petitioner contends that there is no evidence to support such finding and that the finding is defective because it fails to specify the "executive, managing officer, or general superintendent" of petitioner who was guilty of serious and wilful misconduct. A finding of the ultimate fact of serious and wilful misconduct in the language of the statute is not fatally insufficient in form merely because of the generality of its language. (Ethel D. Co. v. Industrial Acc. Comm. (1934), 219 Cal. 699, 708, 28 P. 2d 919; Vega Aircraft v. Industrial Acc. Comm. (1946), 27 Cal.2d 529, 536, 165 P.2d 665; Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm. (1946), 29 Cal.2d 492, 499, 175 P.2d 823; Simpson v. Industrial Acc. Comm. (1927), 87 Cal.App. 652, 262 P. 469; Clarke v. Industrial Acc. Comm. (1927), 87 Cal.App. 766, 262 P. 471; General Petroleum Corporation v. Industrial Acc. Comm. (1928), 90 Cal.App. 101, 265 P. 508.) In the cited cases the evidence presented one or two sharply defined issues of fact (e.g., whether a given act or omission did or did not constitute serious misconduct; whether a supervisory employe did or did not have general discretionary power of direction and control constituting him a

managing agent), and the manner in which such issues were resolved was obvious from the general finding in favor of applicant. Similarly, in this case, the finding is readily made certain by reference to the record, for from uncontradicted testimony (hereinafter summarized) it can readily be inferred that a managing agent or agents of petitioner were guilty of reckless disregard for the safety of other employes, including Rogers, by requiring them over a long period of time to work under obviously dangerous conditions which could have been guarded against (Parkhurst v. Industrial Acc. Comm. (1942), 20 Cal.2d 826, 829, 129 P.2d 113). Therefore, the award of increased compensation was proper.

[3] However, as aptly stated in Western Indemnity Co. v. Pillsbury (1915), 170 Cal. 686, 705, 151 P. 398, 406, "the practice of making specific findings will in many cases not only be fairer to the parties who may wish to seek a review of the final determination reached, but will also be helpful to the reviewing court in its effort to ascertain whether that determination may be sustained." (For a situation in which the reviewing court is seriously hampered in the performance of its duty because neither the findings nor the evidence disclose the factual theory on which the commission based its award, see California Shipbuilding Corporation v. Industrial Acc. Comm. (Cal.Sup., 188 P.2d 32).

[4, 5] Petitioner's employe, Rogers, was burned by electricity when the boom of a locomotive crane (which reached about 59 feet above the ground when extended) came in contact with a high-voltage electric line (which ran about 44 feet above the ground). A part of the power in the line was used by petitioner. The accident occurred at night on an unlighted street which "had been taken over by the United States Maritime Commission, and the California Shipbuilding Corporation, as the agent for the Maritime Commission, controlled the traffic of that street. At that time it was not open to the public generally * * *." Such street was adjacent to a shipyard of petitioner and was regularly used by it in its operations. The "hoists were continually dropping their loads" on the "rough road". On the end of the boom was a light which shone down; it was impossible to see above the crane. The crane crew had been sent to pick up a load of material which, as had happened on numerous other occasions to other material, had been dropped on the road. Before the boom was raised members of the crew, including Rogers, looked with great care for high-voltage wires; none were visible.

The uncontradicted evidence disclosed the following circumstances: There were high-tension wires "all through the yard there at the start of Calship [more than three and one-half years before this accident] and they gradually took [some of] them down because they were running into them too often." Some of the remaining wires were lighted but "lots of places" they were not. The wire which ran above and across the road, and with which the crane came in contact on the occasion of petitioner's injury, fell in the latter category. Because of the lighting conditions and the location of wires, the operators of locomotive cranes, although they knew of Electrical Safety Order No. 7-5050 of the commission[1] and were instructed by the night superintendent in charge of transportation to obey it, often could not perform work assigned to them without bringing their equipment within six feet of high-tension wires. Locomotive cranes were frequently sent at night to work upon the road which was the scene of the accident. Such road, by reason of petitioner's right of control over it, its location, and the manner and frequency of its use, must be regarded, insofar as concerns knowledge of its condition and ensuing responsibility for using it in that condition, as being at least in effect a part of petitioner's plant. The type of job which was being performed when Rogers was burned was considered an "emergency" because "someone might run into the load."

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[1] "The operation * * * of any * * * equipment * * * near high-voltage lines, is hereby expressly prohibited, if at any time during such operation * * * it is possible to bring such equipment * * * or any part thereof

About a year before Rogers was injured a similar accident involving the same crane had happened at about the same place under similar conditions. The occurrence of the previous accident was known to the superintendent of transportation and to the foreman who dispatched the crane to the road.

The long continued maintenance of these conditions was properly found to constitute serious misconduct. Members of the crane crew were required to go into an unsafe place of employment in violation of statute. (Lab.Code, §§ 6400–6406.) The violation of the commission's Ship & Boat Building Safety Order No. 1842[2] made practically impossible the observance by the crane crew of section 7-5050 of the Electrical Safety Orders, although such employes knew of and attempted to obey the latter order.

[6, 7] It does not appear that either the foreman or the superintendent above-mentioned was responsible for or had authority to correct the physical conditions under which the crane crews were required to work. Nor does it appear that the foreman, who had the authority and duty to send "the cranes out to do the work wherever the job was to be done," also had discretion to refuse to order the picking up of an emergency load in the interest of the safety of the crews under him. Nevertheless, the necessarily implied finding that there was serious and wilful misconduct on the part of a managing agent or agents of petitioner corporation is not without adequate, and, under the circumstances shown, sufficiently specific, evidentiary support. For three and one-half years the physical arrangement of petitioner's shipyard was such that in the regular course of operations violations of section 7-5050 of the Electrical Safety Orders could not always be avoided and occurred "too often." From this state of affairs it is logical to infer that subservient employes were not responsible for the yard arrangement (including the adjacent street) and that the conditions of its maintenance became known to persons with authority to correct it. In fact the danger apparently was recognized, at least to some extent, by a person with such authority, who caused the removal of some of the offending wires and the lighting of some others.

In the situation of a single instance of, or a temporary or new occurrence of conditions amounting to, serious misconduct it is necessary, in order to attribute such misconduct to a corporate employer, to show with reasonable particularity that the reckless disregard for safety was on the part of some particular person with general discretionary power of direction and control of the integral part of the business wherein the misconduct took place. (Bechtel etc. Corporation v. Industrial Acc. Comm. (1944), 25 Cal.2d 171, 174–176, 153 P.2d 331; Vega Aircraft v. Industrial Acc. Comm. (1946), supra, 27 Cal.2d 529, 533, 165 P.2d 665; California Shipbuilding Corporation v. Industrial Acc. Comm. (1946), 27 Cal.2d 536, 546, 165 P.2d 669; California Shipbuilding Corporation v. Industrial Acc. Comm. (1944), 64 Cal.App.2d 622, 627, 149 P.2d 432.) But in a situation where there are obvious, fixed, long-maintained conditions of hazard, and where crews are repeatedly required to work thereunder, it can be inferred that such conditions must have been known to responsible managing agents. The conclusion of the commission that petitioner is responsible for the flagrant maintenance for years of unsafe places, including the dark, rough and power-line carrying or crossed street, in which cranes with inadequate (under such circumstances) lighting were frequently required to operate is not, in the circumstances of the case, unwarranted.

For the reasons above stated the award of increased compensation is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I fail to find any evidence which would reasonably support the conclusion, stated in the majority opinion, that the street upon which the accident to Rogers occurred, "by reason of petitioner's right of control over

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within six feet (6′) of such high-voltage lines." (Cal.Administrative Code, Title 8, § 2603, subd. (b).)

[2] "(f) Adequate lighting shall be provided in the areas where locomotive cranes are working after dark."

it, its location, and the manner and frequency of its use, must be regarded, in so far as concerns knowledge of its condition and ensuing responsibility for using it in that condition, as being at least in effect a part of petitioner's plant." In my opinion, the fact that the public street "had been taken over by the United States Maritime Commission, and the California Shipbuilding Corporation, as the agent for the Maritime Commission, controlled the traffic of that street," does not warrant the inference which has been drawn from it. So far as the record shows, the public street was used as it existed at the time; there was no "long continued maintenance [by the employer] of these conditions." Quite evidently, the traffic control was maintained to prevent persons who had no essential business at the war plant from visiting it and to allow the freest use of the street for the movement of material. But this use was not exclusive, and the situation was much different from that of the company's yards where the employer was free to lay out the facilities and control the working conditions.

Under these circumstances, the public street was not "a place of employment" within the meaning of section 6400 of the Labor Code. Every employer operating trucks or other automotive vehicles is confronted with the necessity of sending additional equipment to aid one which has become disabled on the road. He is not responsible for the condition of the street where the breakdown occurred, and he has no right to change the physical structures which he may find there. Moreover, so far as the present case is concerned, there is no evidence that any "executive, managing officer, or general superintendent" of the employer either knew of the location of the high power line or that one of its cranes had ever been operated in close proximity to the dangerous wires.

Accordingly, no factual basis whatever exists to affirm the award because "it is logical to infer" that the condition of the street "became known to persons with authority to correct it." The removal or relocation of wires on the company's premises justifies no inference in regard to the line of a public utility in the public street. There is no evidence that the employer could have removed the high voltage line from its then location; on the contrary, the shipyard was only one of the customers supplied by power from that source. It should also be noted that the power line did not parallel the street but crossed it, and at only one point could the boom have come in contact with the wires. Also, the testimony discloses no one higher in authority than the night supervisor of transportation and a rigger foreman who knew of the prior accident at the place where Rogers was injured, or that the locomotive crane had ever worked there. For these reasons, the commission's finding that the employer was guilty of serious and wilful misconduct consisting of a violation of the statutory requirement of a safe place to work is not supported by the record.

As to the operations in the street, the crane was in charge of Bagnard, a rigger foreman. He had no knowledge of high voltage wires "exactly at that location" but knew there was a line "down there somewhere". However, unless Bagnard was an "executive, managing officer or general superintendent" of the shipyard, the finding that the compensable injury of Rogers "was proximately caused by the serious and wilful misconduct of the employer, * * * in that the employer failed to exercise the necessary, or any care, to ascertain the location of the high powered wires" cannot be sustained for the case falls exactly within the rule stated in the majority opinion: "In the situation of a single instance of, or a temporary or new occurrence of conditions amounting to, serious misconduct it is necessary, in order to attribute such misconduct to a corporate employer, to show with reasonable particularity that the reckless disregard for safety was on the part of some particular person with general discretionary power of direction and control of the integral part of the business wherein the misconduct took place."

Paraphrasing and quoting in part the analysis made by Mr. Justice Schauer in annulling an award to an employee because of injury sustained when a crane being operated in a shipyard contacted a high voltage line (Bechtel etc. Corporation v. Industrial Acc. Comm., 25 Cal.2d 171, 153 P 2d 331), the rights of the parties may be stated as follows:

"In order to impose upon a corporate employer liability for increased compensation, the serious and wilful misconduct specified by the statute as justifying the additional award must be "on the part of an executive, managing officer, or general superintendent" of the corporation. In the present case, the foreman Bagnard was the only supervisory employee of petitioner guilty of violating the safety orders upon which the commission based its award. He and the members of the crew working under him were the only employees of petitioner present at the site where the steel was to be picked up by the crane. One Corder was the night supervisor of transportation and rigger foreman Wofford worked under his direction. Corder reported to the Superintendent of Transportation who was on duty only in the day time. Above all of these men was the general manager of the yard. Neither Corder nor Wofford gave any directions as to the placing of the truck crane nor did they examine the lighting conditions. Corder did not know that the crane had been sent out, and was unaware that any crane had been operating in close proximity to the power line. Wofford, the rigger foreman who dispatched the crane, did not know where the job was to be done but knew that the crane was going in the general direction of high voltage wires. His answer to the question "whether as a matter of practice cranes were working in close proximity to high voltage lines" was somewhat equivocal, but referred to what had been done in "the yard" before power lines were removed. Neither Corder or Wofford had "charge of a 'part or branch' of his employer's business comparable to the excavation of an entire gravel pit or the erection of an entire building. It cannot be said that a single truck crane, operating under the conditions related, was a 'department' over which * * * [either of them] had authority. Manifestly, * * * [each of these persons] was an employee occupying a relatively inferior and subservient position."

Upon the reasoning of the Bechtel case, I would annul the award of increased compensation.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting; SHENK, J., not participating.

31 Cal.2d 278

CALIFORNIA SHIPBUILDING CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 20142.

Supreme Court of California, in Bank.

Dec. 30, 1947.

Rehearing Denied Jan. 29, 1948.

1. Workmen's compensation ⟹1743

In proceeding for additional compensation, a finding by Industrial Accident Commission of ultimate fact of serious and willful misconduct of an employer by and through its managing officers in the language of the statute is not fatally defective merely because of its form. Labor Code, § 4553.

2. Workmen's compensation ⟹1743

In a proceeding for additional compensation where record discloses many supervisory employees with various degrees of authority, commission ought to disclose the particular effectual basis on which award rests in fairness to employer and employee and to reviewing court. Labor Code, § 4553.

3. Workmen's compensation ⟹1674

In proceeding for additional compensation where employee fell through temporary dark hole in ship's deck located in shadow with bright lights on each side and surrounded by guard rail inadequate to stop a stooping person, finding of "serious and willful misconduct" by responsible agent of the employer was not sustained under evidence showing that hole was unusual condition to which no statutory safety order applied, that no responsible officer knew of it in time to remedy defect, and that the guard was probably sufficient if lighting provided had been on and no proof established who turned the lights out. Labor Code, §§ 4553, 6400–6404.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

CARTER, J., dissenting.

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Proceeding by California Shipbuilding Corporation, a corporation employer, against Industrial Accident Commission of the State of California and Frank Cornier, employee, to review an award granting additional compensation to the employee.

Award annulled.

Thelen, Marrin, Johnson & Bridges and Gardiner Johnson, all of San Francisco, for petitioner.

R. C. McKellips, Edward A. Sarkisian, and John A. Rowe, Jr., all of San Francisco, for respondents.

SCHAUER, Justice.

Respondent Frank Cornier sustained compensable injuries while in the employ of petitioner California Shipbuilding Corporation. He claimed and respondent commission awarded the increased compensation provided by section 4553 of the Labor Code for an employe injured by reason of the serious and wilful misconduct of an employer. To sustain the extra compensation, it must be established that the employer's misconduct is both serious and wilful (27 Cal.Jur. 441, § 118) and, where the employer is a corporation, such misconduct, before it can be attributed to the corporation, must be proved to be that of "an executive, managing officer, or general superintendent thereof" (Labor Code, § 4553).

[1] The commission found that "Said injury was proximately caused by reason of the serious and wilful misconduct of the employer, by and through its managing officers, in violation of Labor Code Sections 6400–6404 inclusive, in that said employer cut a hole in the deck of a ship, and: (a) Failed to have proper or any lights illuminating or making visible the said hole and the deck immediately adjacent thereto; (b) Failed to guard the said hole with proper or sufficient guard rails; (c) Failed to notify or warn the applicant that said hole had been cut in said deck, with knowledge that applicant was working in the vicinity of and had occasion to be at or near the said hole; (d) Failed to take reasonable precautions and/or to adopt and use methods and processes reasonably adequate to render the employment and place of employment safe." Petitioner urges that there is no evidence that any of its "managing officers" created or knew of or wilfully maintained the hazardous condition described in the finding and that such finding is defective because it does not specify the agent or agents of petitioner to whom the commission attributed misconduct. Such a finding is not necessarily fatally defective merely because of its form (California Shipbuilding Corporation v. Industrial Acc. Comm. (Cal.Sup., 188 P.2d 27) but examination of the record in this case neither makes it adequately certain nor reveals any tenable factual theory of the commission which could support such general conclusionary finding.

[2] A number of supervisory employes* with various degrees of authority were referred to by name or job classification in the testimony adduced by the applicant for

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* Among the employes mentioned in the testimony who had, or possibly exercised, some supervisory authority, are Frank J. Beckner, "hull foreman" on the graveyard shift, who was Cornier's foreman; John Lenan, foreman of one Kennedy (Kennedy was an electrician on the graveyard shift whose duty was to "fix lights"); James L. Rollins, "safety inspector" on the graveyard shift, who did not know of the existence of the hole until after Cornier's accident and who, immediately after such accident, "had the hole covered with boards"; Mr. Cassell, "the 24-hour superintendent"; C. E. Daniels, who worked on the graveyard shift and who was variously described as "senior foreman," "ship foreman * * * over the entire boat and all the men on the boat," and "senior welding foreman" with "two foremen under him who had the jurisdiction over the welders"; Tom Meeks, welding foreman on the swing shift; A. T. Brant, "senior foreman on one of the ways" during the day shift; Mr. McGovern, chipper foreman on the day shift; Henry Forehand, who was a tacker and to whom Warterfield reported an earlier accident; M. L. Warterfield, a shipfitter, who "sent" Forehand to notify someone concerning the lighting conditions; and the following men whose names the witnesses could not recall: senior welder foreman and welder foreman on the day shift; burner foreman, fitter foremen, shipwright foreman and stage rigger foremen on the day and swing shifts; chipper foreman on the swing shift; senior fitter foreman on the day shift; burner leadman on the swing shift.

compensation. The applicant tried diligently to establish a basis for a finding that there was wilful misconduct by some one and to fix responsibility for such misconduct, if any, upon one or another of the mentioned employes. In such a case it is particularly unfair—both to the employer who seeks to attack the award and to the applicant who seeks to uphold it—for the commission not to disclose in its findings the particular factual basis on which the award rests. Nor should the reviewing court be expected to search the record and from a maze of uncertain, loose and conflicting testimony relative to various persons and events, evolve some factual theory of wilful misconduct by someone, perhaps unthought of by the parties in interest, which could possibly be supported by some evidence in order to sustain the award. (See Western Indemnity Co. v. Pillsbury (1915), 170 Cal. 686, 705, 151 P. 398).

[3] Cornier was injured while working at night (graveyard shift) on a ship under construction. He fell into a rectangular hole, four by twelve feet in size, in a part of a deck which, while there were lights on either side, was itself in a shadow and relatively dark. He testified, "There was light around but not where I fell, because there was no light right at that particular place, right at that particular place." Around three sides of the hole, about two feet from its edges, was a single guard rail, fastened to "uprights," about three and one-half feet above the deck. The fourth edge of the hole was immediately adjacent to and fully protected by a bulkhead, but between the bulkhead and the rail on either side were openings, one of which was about two to six inches wide and the other about twelve inches wide. (The size of the wider opening appears from a photograph showing a ruler held across the opening. The accuracy of such photograph was accepted by the referee and is not disputed.) Cornier, according to his testimony, fell into the hole without having seen or touched the rail. The referee in this connection stated, "It does not seem probable that applicant passed through the 12-inch aperture between guard rail and bulkhead, for he weighed approximately 190 pounds at the time of injury and had no recollection of touching anything just before falling; it is more likely that he was stooping, looking on the darkened deck for equipment, and passed underneath the rail * * *." There were lights installed in the galley beneath the hole and "There was lighting supposed to be in there," but the lights were not turned on until after the accident. They were turned on a few moments after the accident, by the electrician Kennedy, not because of knowledge of the accident or hazard (he then had none) but in regular course of duty on "a routine inspection." As for the occasion for Cornier's going to the part of the ship where he fell, he testified "I was up on the deck above from where I fell and the foreman sent me down to go aft and fur up a strong back and I was on the next deck and I was looking for material to work."

The hazardous condition appears to have been created by a concurrence of four elements: (1) The cutting of the temporary hole in the deck; (2) the fact that the hole was in a shadow with bright lights on either side; (3) the guard rail was inadequate to prevent a stooping person from passing under it; (4) the lights which had been installed in the galley below the hole were not turned on at the time in question.

The first element—the temporary hole—was created on a shift (day or swing) previous to the one (graveyard) during which Cornier was injured. There is no evidence that any managing agent of petitioner on the day or swing shift was responsible for or knew of such condition, or that the condition was one which in the regular course of operations over an extended period of time frequently recurred. On the contrary this was the first time, at least in the experience and procedure of the parties here concerned, that such a hole had ever been cut in a ship. It was cut through the deck above the galley in order to provide an aperture through which a stove could be moved for installation. As stated by the referee, "No Safety Order [in effect at the time of the accident] appears in terms to apply to the situation here presented, for the hole cut in the deck constituted an entirely new procedure, and the hole was temporary in its duration, being only for the purpose of access to the galley, and thereafter would be closed."

One Beckner, "hull foreman" of the graveyard shift, had authority over chippers, burners, riggers, shipfitters (including Cornier) and shipwrights. One Rollins was safety inspector on the graveyard shift. Neither of these men learned of the existence of the dangerous condition until after Cornier was injured and it does not appear that their failure to discover it was due to remissness in the performance of their duties. One Daniels was also a foreman on the graveyard shift. The evidence as to his title and the nature and extent of his duties and authority and his knowledge of pertinent circumstances is slight and conflicting and insufficient to establish a basis for the serious and wilful misconduct award. He is variously referred to as the "senior welding foreman" or "ship foreman * * * over the entire boat and all the men on the boat" or "senior foreman." At the times in question he was not on the ship but in his office, which was "off the boat altogether." At about 1:15 p. m. Daniels was told by a worker that another employe, one Billie, had fallen into the hole. Cornier's highly uncertain testimony as to the time of his fall was that he fell "I imagine about between two and three, somewhere around that, one-thirty, somewhere around that time." So far as the referee's report discloses it did not appear to the referee, and from the transcript it does not appear to us, that Daniels learned of the earlier accident or of the dangerous condition in time to have had such condition corrected, if he had authority to do so, or to notify one with such authority, if he did not, so as to have prevented the occurrence of the accident to Cornier; certainly it does not appear that the finding of "serious and wilful misconduct" is, or reasonably could have been, based on any act or dereliction of Daniels.

The second element going to make up the hazardous condition—the fact that the hole was in a shadow intensified by the bright lights on either side—would have been inconsequential here if the deck had been in its normal condition and would have been non-existent or overcome if the galley lights had been turned on. As to the relationship and significance of the guard rail and the lights in the galley—the third and fourth elements of the hazardous condition—the referee aptly stated that "if the area had been lighted, it is probable that the existing guard would have been sufficient."

The referee reported and the commission relies on the theories that some unknown and unidentified foreman or superintendent on the day or swing shift "must have known" of the dangerous condition and that hull foreman Beckner had a "duty" to discover it and that whatever managing officer in charge did know of it or was charged with knowledge of it, wilfully maintained it—theories unsupported by the evidence and entirely too uncertain and nebulous, in any event, to sustain the increased award. These views of the commission have no more support in the evidence than the equally possible surmises that the dangerous condition existed because some unidentified swing shift employe negligently failed to turn on the lights which the management had installed in the galley, or because some accidental vibration, without fault of anyone, caused such lights to go out. In basing its award on speculation rather than evidence the commission exceeded its jurisdiction.

The award of increased compensation is annulled.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

It is difficult to ascertain whether the majority opinion holds that the evidence is insufficient to establish serious and wilful misconduct or that such misconduct, although established, was not shown to be chargeable to a managing officer. In either event I am convinced the evidence is sufficient. Moreover, I wish to point out that the condemnation of the finding of such misconduct, for failure to designate the managing officer chargeable therewith, is erroneous and contrary to authority.

Turning first to the evidence, my review of the record reveals that the facts are much stronger in support of the commission's finding than those presented in the majority opinion. It must be remembered that if there is any evidence to support the findings of the commission its award must be affirmed, and only the evidence favorable to that result need be considered. Conflicts may be ignored.

The record discloses that a hole was cut in the deck of the ship immediately over the galley, to be used in placing a stove in the galley. The employee, Cornier, was working on the graveyard shift, that is, from 12:30 A.M. on. There is abundant evidence that the area around the hole was *dark*. There was no light in the galley below the hole. There was a *single* guard rail about 3½ feet high on three sides of the hole. It had no toe stop at its bottom. The fourth side of the hole faced the hull of the ship. There was no guard rail along that side. The two side guard rails failed by *2 feet* to reach the hull of the ship, thus leaving a 24 inch space where the hole was unguarded. There is evidence by several witnesses that the space was of that size. (The figures of 2 inches at one end and 12 inches at the other, given in the majority opinion are the result of choosing evidence less favorable to the finding.) *We have therefore a clearly dangerous and unsafe condition at the place of work of the employees.* The safety laws condemn such a condition. "Every employer shall furnish employment and a place of employment which are safe for the employees therein." Labor Code, sec. 6400. As I read the majority opinion it concedes that if that condition were known to a "managing officer" of a corporate employer, and nothing was done to rectify it, a case of serious and wilful misconduct is made out. This brings us to the question of whether such an officer was in that position in the case at bar.

That question must be answered in the affirmative for several reasons: First, some such officer *must have known of that condition*. The employer, although undoubtedly in a position to do so, offered no evidence as to when or under whose direction the hole was cut. Being able to produce such evidence, but failing to do so, it will be presumed that if it were produced it would have been unfavorable to it. The employer offered only one witness, the safety inspector for the graveyard shift on which the employee was injured. It offered no evidence as to who the various managing officers were, or the nature of their powers. No evidence was adduced by it as to who had charge of cutting the hole or placing guards around it. It made no showing as to the managing officers and their powers during the shifts preceding the accident. We may assume, therefore, that the hole had been cut *at least* at the time of the swing shift, immediately preceding the graveyard shift. That would mean that the darkened hole with an inadequate guard rail had existed during the hours of darkness from 6:00 P.M. to 12:30 A.M. and thereafter to the time Cornier was injured. The lights below the hole were ignited after the accident but they were not turned on at that time as stated in the majority opinion. They were then "hooked up" from which we may infer that they were totally disconnected during all the previous time. It is inconceivable that no managing officer would fail to discover the hazard before the accident. At least it is inferable that one did. It is not to be supposed that such officer or officers wilfully avoided the ship and failed to discover the danger or shut their eyes to it. If they did, then that in itself would be wilful misconduct by the appropriate person. Therefore we have a logical basis for saying that some such officer must have known of the condition and failed to correct it. This is not a theory, as expressed by the majority, as "uncertain," "nebulous" and "unsupported by the evidence."

There is an additional reason why a managing officer must have known that the hole was not properly guarded. Provision was made in the blue-prints for the hole, and we may assume that it was ordered cut by a managing officer, and that such person would also supervise or direct the placing of the guard rails. It is reasonable to infer, as conceded by the majority, that Cornier fell by reason of crawling under the guard rail. The guard rail failed to meet the safety rules on the subject. Such rules provide: "(a) All deck * * * openings eighteen (18) square feet or over in area shall be guarded by *standard guard railings* and six (6) inch toe boards until replaced by ships equipment." "Standard Guard Railing" means "a *two rail railing* having a top rail whose upper surface is from forty-two (42) to forty-five (45) inches above the upper surface of the staging, platform or runway being protected and whose second or mid-rail is located half way between the top-rail and the top surface of the staging, platform or runway." [Emphasis added.] Here the guard rail had *no middle* rail and *no toe board.* If there had been one, Cornier would not have fallen even if it were dark. The insufficient guard rail must have been installed or at least seen by a managing officer.

Second, another person (Billie Lovett), a woman, had fallen into the same hole before Cornier's mishap and that incident was known to Daniels, the ship foreman, who failed to take any action. It may first be noted that there is ample evidence showing Daniels to be a "managing officer." His headquarters was in a shack not on board the ship. Warterfield, an employee on the graveyard shift, testified: "Did you have any other supervisor or superintendent there? A. There was the *ship foreman, Mr. Daniels, over the entire boat and all the men on the boat.*" Certainly the ship was one separate project of the employer's work and the man in charge of it and *all* the men thereon, qualifies as a managing officer. At the time Billie Lovett fell into the hole the lighting conditions were the same as at the time of Cornier's fall—it was dark. The majority opinion states that she fell 20 to 30 minutes before Cornier did. (Again it is taking evidence unfavorable to the applicant to whom the award was made.) Forehand, an employee, testified that he went to work at 12:30 A.M. and Billie's fall occurred 30 minutes later, that is, 1:00 A.M. He immediately told Daniels of the incident. Cornier testified he fell between 2:00 A.M. and 3:00 A.M. Taking the later figure, as we must do, an hour and 45 minutes to 2 hours elapsed between the time Daniels knew of the condition and Cornier's fall. How can this court say, *as a matter of law,* that it was not wilful misconduct for Daniels to fail to rectify the dangerous condition during that time? The answer is, that we are bound by the commission's determination. Ethel D. Co. v. Industrial Accident Commission, 219 Cal. 699, 28 P.2d 919, is closely in point. There this court affirmed a finding of wilful misconduct where the employee fell from a ladder due to insecure handholds, stating at page 703 of 219 Cal., at page 921 of 28 P. 2d: " 'Serious misconduct' of an employer, within the meaning of the statute * * * was defined in E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 188, 193 P. 105, 108, 16 A.L.R. 611, to be 'Conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees.' In the same case it was said that, in order that serious misconduct should also be wilful misconduct within the meaning of the statute, the appearance of circumstances surrounding the act of commission or omission which 'evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of,' would amount to sufficient proof of knowledge by the employer of the unsafe condition of the premises to fulfill the requirement that the employer charged with wilful misconduct shall have knowledge that the act of commission or omission is wrongful. It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and wilful misconduct. In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act may properly be characterized as 'serious and wilful misconduct.' What would amount to no more than simple negligence in one situation may well be denominated serious and wilful misconduct in another. Hoffman v. Dept. of Indus. Relations, 209 Cal. 383, 390, 287 P. 974, 68 A.L.R. 294. In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post suporting a railing. At all events, the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted."

I have heretofore referred to the majority decision's criticism of the commission's findings for failure to name the managing officer chargeable with the wilful misconduct. I cannot agree with that criticism. A liberal construction should be given to the findings and the commission should not be required to speculate upon which person this court might decide was the managing officer under the evidence. The holding in the majority opinion is, in this respect, directly contrary to Ethel D. Co. v. Industrial Accident Commission, supra, (the facts involved in that case are stated above). In that case the finding was merely that the "injuries were caused by the serious and wilful misconduct of the employer, a corporation." The words managing officer, etc. were not even mentioned. In holding the finding sufficient this court said at page 709 of 219 Cal., at page 923 of 28 P.2d: "The statute which authorizes the recovery of additional compensation provides, as heretofore noted, that, where the employee is injured by reason of the serious and wilful misconduct of the employer, 'or if a corporation, on the part of an executive or managing officer or general superintendent,' additional compensation may be awarded. It is obvious that a corporation is incapable of willful misconduct. Willfulness presupposes mentality. A corporation is a purely legal fiction possessing neither the physical nor mental attributes of a human being. The record herein shows that H. F. Owen was general manager of the petitioner corporation at the time the accident occurred, and that from 1913 until 1929 he was superintendent of petitioner, and that all properties of petitioner were under his supervision as superintendent. It does not appear from the record that, at any time material to the inquiry herein, any person other than Owen exercised any control or supervision over the oil well where the accident occurred. It is thus apparent that the only individual who could be charged with serious and wilful misconduct was the man who had entire supervision and control of the oil well. *Since the commission's finding can so readily be rendered definite and certain by reference to the record, no difficulty is encountered in declaring that the finding is not fatally defective in the respect claimed by petitioner.*" [Emphasis added.] Likewise in the instant case the dangerous condition created by the hole must have been the result of action or lack of action by a managing officer. Merely because there were several persons who might be said to occupy that position cannot alter the result. The discussion in the majority opinion in effect overrules the Ethel Company case without so stating.

The majority opinion in effect disregards and nullifies the provision of the Labor Code relative to liberal construction. Section 3202 of that code provides: "The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their emplyoment." The provision here construed (sec. 4553) is found in Division IV of the Labor Code and is therefore subject to the provisions of section 3202 of that code above quoted.

I have heretofore had occasion to call attention to the practice of some of the members of this court giving lip service to the last cited provision of the Labor Code by making reference to it and then construing the provisions of the act so as not to extend but to deny their benefits to persons injured in the course of their employment. See, dissenting opinion, Ætna Cas. & Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 397, 182 P.2d 159. Such decisions render section 3202 meaningless and of no effect whatsoever.

The word "liberal" is defined in Webster International Dictionary, 2nd edition, as follows: "Not strict or rigorous; not confined or restricted to the literal sense; free; as, a liberal translation of a classic. Not narrow or contracted in mind; broad minded." While it is true that a provision for the liberal construction of a statute should not be interpreted to mean that a court should engraft upon a law something that has been omitted which the court believes ought to have been embraced therein, or to omit something therefrom which the court thinks should have been omitted, I think it is fair to state that such a provision is intended to expand the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used, and it resolves all reasonable doubts in favor of the applicability of the statute to the particular case.

Applying this interpretation to the case at bar, can there be any doubt that the conduct of those who left the hole in question insufficiently guarded and the area unlighted, knowing that other employees might traverse that area, were guilty of serious and wilful misconduct? I think this question must be answered in the negative; that is, that serious and wilful misconduct was established beyond doubt. This question being answered in accordance with the findings of the commission, the next question is, does the evidence show that an executive, managing officer, or general superintendent of the employer corporation is chargeable with leaving the hole in that condition? The answer to this question is found in the testimony of the witness Warterfield that Daniels, the ship foreman, who had supervision over the entire boat and all the men on the boat, had knowledge of this condition from the time Billie Lovett fell through the hole, which was about 1:00 A. M., and Cornier testified that he fell through the hole between 2:00 annd 3:00 A.M. Certainly, a liberal construction of section 4553 of the Labor Code with the purpose of extending its benefits for the protection of Cornier would lead to the inevitable conclusion that Daniels was a "managing officer" and that serious and wilful misconduct was chargeable to him in failing to comply with the safety rule after he learned that the rule had been violated by those who had placed an insufficient guard rail around the hole in question.

In my opinion it is not necessary to resort to the legislative mandate of liberal construction contained in section 3202 of the Labor Code to sustain the finding of the commission in this case, but I am simply calling attention to this provision so that its existence may not be entirely lost sight of by this court.

In my opinion the award should be affirmed.

Rehearing denied; CARTER, J., dissenting; SHENK, J., not participating.

31 Cal.2d 865

CALIFORNIA SHIPBUILDING CORPORATION, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Leo Sanchez, Respondents.

L. A. 20141.

Supreme Court of California, in Bank.
Dec. 30, 1947.

Rehearing Denied Jan. 29, 1948.

Thelen, Marrin, Johnson & Bridges and Gardiner Johnson, all of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondents.

SCHAUER, Justice.

California Shipbuilding Corporation petitions for review and annulment of an award of increased compensation in favor of its employe Sanchez. Sanchez was injured in the accident described in California Shipbuilding Corporation v. Industrial Acc. Comm. (Cal.Sup., 188 P.2d 27). The material facts and applicable law in this proceeding are the same as those of that case. For the reasons there stated the award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

For the reasons stated by me in California Shipbuilding Corporation v. Industrial Accident Commission and Rogers, Cal. Sup., 188 P.2d 27, I would annul the award of increased compensation.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting; SHENK, J., not participating.

83 Cal.App.2d 125

BLYTHE v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13316.

District Court of Appeal, First District, Division 1, California.

Dec. 26, 1947.

1. Appeal and error 🔑930(1)

Where plaintiff contends on appeal that implied findings of jury that defendant was not negligent or that plaintiff was contributorily negligent are totally unsupported, all conflicts must be resolved in favor of defendant, and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

2. Appeal and error 🔑989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support jury's conclusion.

3. Appeal and error 🔑996

Where two or more inferences can reasonably be deduced from the facts, reviewing court cannot substitute its deductions for those of trial court.

4. Appeal and error 🔑999(3)

The questions of negligence, contributory negligence and proximate causation, except in most unusual cases, are for the trial court and not for the appellate court.

5. Street railroads 🔑117(34)

In action for injuries and for damage to automobile which stalled on tracks at poorly lighted intersection at night and was hit by street car, whether accident was solely and proximately caused by negligence of street car motorman was for the jury.

6. Street railroads 🔑117(24)

In action for injuries and for damage to automobile which stalled on tracks at poorly lighted intersection at night and was hit by street car, where there was evidence among other things that automobile had no lights, and that motorist made no effort to leave automobile or signal street car motorman, issue of contributory negligence was properly submitted to jury.

7. Appeal and error 🔑928(4)

Where record did not disclose at whose request complained of instructions were given, it would be presumed that they were given at request of appellant.

8. Appeal and error 🔑882(12)

Plaintiff's request for several instructions, which were refused, on subject of contributory negligence, invited error, if any, in instructing jury on issue of contributory negligence, and plaintiff could not complain.

9. Street railroads 🔑85(1)

Free vehicles using highway must yield right of way to street cars running on fixed tracks but right of street car is not absolute.

10. Street railroads 🔑85(4)

Rights of street car and of free vehicle at intersection are reciprocal and each owes to the other duty of properly observing other's right to use public streets, keeping in mind that street car runs on fixed tracks.

11. Trial 🔑296(3)

Instruction that a street car has prior right in sense of preferential right to that portion of street upon which rails are laid and that street car has right to proceed in use of tracks upon assumption that approaching automobile will take heed of known hazards of such a place was not improper, particularly in view of other instructions, as a statement that street car had right of way and positive right to plow into stalled automobile.

12. Trial ⚷260(8)

In action for injuries and for damage to automobile which stalled on tracks and was hit by street car, where jury was fully and fairly instructed on duties of city and motorman in operation of street car, the fact that trial judge on voir dire examination asked whether prospective jurors had any general prejudice against city for failure to carry out certain promises of improvement in street car system did not require giving of the additional instruction that city had an absolute duty of operating with safe equipment.

13. Trial ⚷251(8)

In action for injuries and for damage to automobile which stalled on tracks and was hit by street car, where motorist's right to start across tracks as he did was not challenged and it was not contended that stalling of automobile was in any way due to fact that he was crossing tracks at right angles rather than at an angle of lesser degree, requested instruction embodying statutory rule and stating that motorist was required thereunder to cross center line of street before turning left was properly refused because inapplicable. Vehicle Code, § 540.

14. Street railroads ⚷90(2)

Instruction that motorman had duty in operating street car down hill toward intersection where accident occurred to keep street car in such control as would enable him to stop at any time to avoid injury to persons or property lawfully upon the highway was properly refused because not correctly stating the law.

15. Trial ⚷260(8)

Where jury was fully instructed that city had duty to use ordinary care in operation of its cars so as to avoid collisions with other vehicles, refusal to give more specific instruction that city had the duty to have and keep its street cars in a reasonably fit condition for use upon tracks and was negligent if it failed to do so at time and place and under the circumstances shown by the evidence was not error though there was some evidentiary support for such instruction.

16. Trial ⚷260(8)

Where instructions on doctrines of contributory negligence and imminent peril were given, instruction that if street car began to slow down as it approached intersection and that motorist believed that motorman was stopping the car and that a reasonably prudent man would have so believed, that then motorist would not be guilty of contributory negligence merely because he did not leave stalled automobile sooner was not improperly refused.

◆

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action by James A. Blythe against the City and County of San Francisco for injuries and for property damage sustained in collision of street car with automobile. Judgment for defendant and plaintiff appeals.

Affirmed.

Charles Reagh, of San Francisco, for appellant.

John J. O'Toole, City Atty., Sylvain D. Leipsic and A. Dal Thomson, Dep. City Attys., all of San Francisco, for respondent.

PETERS, Presiding Justice.

On the night of December 24, 1944, plaintiff was injured when the automobile then being driven by him stalled at the intersection of Coleridge Street and Cortland Avenue in San Francisco on the street car tracks of defendant city and was hit by a municipal street car. Plaintiff brought this action for his injuries and damage to his automobile, alleging that the accident occurred as the result of the negligence of the city. The defendant denied the material allegations of the complaint and affirmatively pleaded contributory negligence on the part of plaintiff. On these issues the cause proceeded to trial in April, 1946. The jury returned a verdict for defendant, and from the judgment entered on the verdict plaintiff prosecutes this appeal.

[1-4] The major contention of plaintiff is that the evidence demonstrates, as

a matter of law, that the sole proximate cause of the accident was the negligence of defendant, and that the implied findings of the jury that defendant was not negligent, or that plaintiff was guilty of contributory negligence, are totally unsupported. In considering this contention as applied to the evidence in this case it seems necessary to once again remind counsel of the rule stated in the frequently cited case of Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See, also, Davidson S. S. Co. v. United States, 205 U.S. 187, 192, 27 S.Ct. 480, 51 L.Ed. 764. This rule applies with equal vigor, of course, whether the appeal is by the plaintiff or the defendant. Under it the questions of negligence, contributory negligence and proximate causation, except in most unusual cases, are questions for the trial court and not for the appellate court. Tested by these standards it is quite apparent that the contention under consideration is without merit.

The record shows that the accident occurred about 8 p.m. at the intersection mentioned. Although the night was clear and the street light at the intersection was lit, there is substantial evidence produced by the plaintiff that the "intersection is not very well lighted," that is, that "that intersection is a rather dark intersection." Cortland Avenue runs generally east and west, while Coleridge Street runs generally north and south. Coleridge becomes a "blind street" at its intersection with Cortland. The street car runs on Cortland Avenue. The block on Cortland, before it intersects with Coleridge from the east, is a steep hill, admitted to have an 11½% grade.

Plaintiff, alone in his car, just prior to the accident was driving south on Coleridge Street, towards Cortland Avenue. He stopped at the stop sign that requires Coleridge Street traffic to stop, and then started up, intending to take a left turn into Cortland. The motor of his car died as he was crossing the tracks and his automobile stalled on, and at right angles to, the tracks. At that time the defendant's street car, then being driven by motorman Elmer Pearson, was approaching the intersection from the east—that is, was coming down the hill. There is no doubt that the street car hit the stalled machine and injured plaintiff and damaged the automobile.

The plaintiff testified as to the facts of the accident and produced three eyewitnesses of the accident, two of whom were his close friends. The defendant city produced only its motorman Pearson to testify concerning the facts of the accident.

The plaintiff testified that he is a machinist, but raises birds as a hobby; that at the time of the accident he had a bird store on Mission Street, about a half mile from the scene of the accident; that he does not drink; that his automobile was a 1929 Chevrolet; that on December 24, 1944, the car had been standing in front of his store nearly all day; that he had no trouble in starting his car at the store; that he proceeded towards Cortland Avenue at a normal speed and the motor "spurted" and "spitted" along; that he stopped at the Cortland Avenue stop sign, looked and saw no traffic approaching on Cortland; that he drove upon the car tracks and his motor stalled; that he then saw the street car approaching down the Cortland Avenue hill at "a normal speed"; that he tried to get his motor started, and watched the street car; that he thought the street car was going to stop; that it slowed down and then "tore" into him; that the street car hit him, bounced back and hit him again; that the impact forced his car 40 or 50 feet along the tracks; that his automobile was stalled before he saw the street car; that he made no attempt to get out of his machine as the street car approached; that he made no signal to the motorman; that he kept stepping on his starter and "choked" the motor, but it would not start; that his lights were on, but "dimmed a little" as he stepped on the starter; that shortly after the accident, and before the ambulance or police arrived, he drove the automobile to his home and called a doctor. The plaintiff's deposition was introduced into evidence and it appears therefrom that there are several substantial inconsistencies between the deposition and his court testimony as to the time of the accident and the circumstances under which it occurred.

Nadine Shotwell was called by the plaintiff. She was unknown to the plaintiff before the accident. At the moment of impact she was standing at the intersection in question. She testified that she saw plaintiff's automobile stall on the tracks while the street car was "a block away"; that she was unable to estimate the speed of the street car as it proceeded down the hill; that the headlights on both the street car and automobile were lit; that she stood beside the automobile as she gave her name to plaintiff after the accident and that she detected no liquor on his breath.

Mr. and Mrs. Honnen also testified for the plaintiff. They were close friends of the plaintiff, had visited his bird store on the afternoon in question, and Mrs. Honnen had remained at the store for several hours prior to the accident while her husband had their car repaired. Both testified that plaintiff had nothing intoxicating to drink prior to the accident; that they remained with the plaintiff at the store until about 8 p.m.; that they then accepted an invitation from plaintiff to have dinner with him at his home; that they agreed to follow plaintiff in their automobile, and did so; that the lights on plaintiff's car were lit; that plaintiff stopped at the stop sign, started up and then stalled on the street car tracks. Mrs. Honnen testified that at that time the street car was coming down the hill at a rather slow rate of speed; that when the street car almost reached the bottom of the hill "it started up with a spurt, and it hit him and then bounced back [and hit him] a second time"; that the street car pushed the automobile across the width of the street. The testimony of Mr. Honnen was substantially similar to that of his wife.

That fairly summarizes plaintiff's evidence as to the facts of the accident. As already pointed out, the only eyewitness produced by the defendant was the motorman of the street car who was not working for the city at the time of trial. His testimony materially contradicts that of plaintiff and his witnesses. He testified that he had operated a street car on the Cortland Avenue run for about two months prior too the accident; that on the night in question he proceeded down the Cortland hill at about ten miles per hour; that the headlight on his street car was lit; that he first saw the automobile on the tracks when the street car was about 30 or 40 feet from Coleridge; that he did not know when the automobile first got on the tracks, but that he was positive that the plaintiff's automobile had no lights lit; that he saw this object on the tracks and applied the brakes and then "slugged" (i.e., reversed) the car; that the wheels of the street car locked and the street car slid into plaintiff; that the intersection was dark; that when he first observed the automobile on the tracks he could not tell what it was; that the mechanism and brakes of the street car were working properly; that the force of the impact pushed the automobile about eight or ten feet; that the only damage to the street car was a bent fender which he removed; that after the accident he came over to where plaintiff was sitting in his automobile and spoke to him and plaintiff told him that he had hurt his shoulder; that he could "smell" alcohol on the breath of plaintiff; that shortly thereafter, and before the police or ambulance arrived, plaintiff drove away in his automobile.

[5] Appellant urges that this evidence, as a matter of law, and without conflict, demonstrates that the accident was solely and proximately caused by the negligence of the motorman. To so contend is to disregard the conflicts in the evidence. While the evidence of plaintiff and his witnesses places plaintiff's automobile with its lights lit on the tracks while the street car was a "block" away, and has the street car running into the stalled automobile after proceeding this most appreciable distance,

the evidence of defendant and the reasonable inferences therefrom is quite different. The motorman did not see the stalled car until he was but 30 or 40 feet from the intersection. That raises the permissible inference that the automobile was not there until the street car was that close. The motorman was most positive that the headlights on the automobile were not lit. He smelled alcohol on plaintiff's breath. Thus, if this testimony is to be believed, we have plaintiff approaching this admittedly dark intersection without lights at night, after having partaken of an alcoholic drink, and becoming stalled on the tracks while the street car was but 30 or 40 feet away. There was no evidence of excessive speed on the part of the street car. Its brakes were in good condition. It is a permissible inference that the motorman discovered the automobile as soon as reasonably could be expected, and did everything possible to avoid the accident. Under such circumstances the jury could have disbelieved plaintiff's witnesses and thus have found that plaintiff had failed to prove negligence on the part of defendant, or it could have found that defendant was not negligent, or, that, even if defendant were negligent, plaintiff was contributively negligent. All three theories are supported by the evidence.

[6-8] Plaintiff urges that it was error to have instructed the jury on the issue of contributory negligence, because, so it is urged, "there was no evidence from which it was possible to even infer neglect on the plaintiff's part." (App.Op.Br., p. 22.) From what has already been said, particularly about the evidence that the automobile had no lights, that plaintiff made no effort to leave the automobile or signal the motorman, and the evidence concerning the distances involved, it is quite clear that the issue of contributory negligence was properly submitted to the jury. It should also be pointed out that the record does not disclose at whose request the trial court gave the contributory negligence instructions. Under such circumstances it is presumed that they were given at the request of appellant. Deevy v. Tassi, 21 Cal.App.2d 109, 130 P.2d 389. Moreover, the record shows that plaintiff requested several instructions on that subject which were refused. This demonstrates that plaintiff invited the error (even if there were error, which there was not) and cannot complain. (See cases collected 2 Cal. Jur. p. 848, § 497.)

[9-11] Plaintiff devotes the balance of his brief to an attack on the instructions. He objects to an instruction that told the jury that "a street car operated upon rails has not the exclusive right to occupy the street for its own tracks, but it has a prior right in the sense of preferential right to that part or portion of a street upon which its rails are laid. It can only move on two rails and in a direct line. It cannot turn to either side to avoid a collision in front. It has a right to proceed in the use of its tracks upon the assumption that an approaching automobile will take heed of the known hazards of such a place."

It is the thought of plaintiff that even though this instruction "might be abstractly correct in a right of way intersection collision, it was inapplicable to the facts of this case. No one has a right of way over a disabled vehicle if he sees it in time to stop." (App.Op.Br., p. 18) It seems to be the thought of plaintiff that this instruction told the jury, that, even though plaintiff's automobile was clearly stalled on the tracks, the street car had the right of way and a positive right to plow into the stalled machine. The instruction cannot be so interpreted. It should be noted that the court also specifically instructed that: "Every person must exercise reasonable care," and that "it was the duty of the motorman in charge of the street car to be vigilant at all times in order to avoid colliding with persons or property in the path of the street car, and if the motorman failed to exercise such vigilance under the circumstances involved in this case then he was guilty of negligence." While, of course, free vehicles using the highway must yield the right of way to streetcars running on fixed tracks (O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809), that right of the street car is not absolute. The rights of a street car, and of a free vehicle at an intersection, are reciprocal, and each owes to the other the duty of properly observing the other's right to use the public streets, keeping in mind that the street car runs on fixed tracks. Primm v. Market Street R. Co., 56 Cal.App.2d 480, 132 P.2d 842; Reilly v. California Street Cable R. Co., 76 Cal.App.2d 620, 173 P.2d 872; Vincent v. Los Angeles Transit Lines, 81 Cal.App.2d 195, 183 P.2d 713. When the instructions are read as a whole, that is exactly what the jury was told.

[12] Plaintiff requested, and the trial court refused to give, the following instruction: "It is no defense to the City and County of San Francisco in this action that its officers were doing the best they could under the circumstances. The duty of operating with safe equipment and through properly trained and careful servants was an absolute duty which the City and County of San Francisco took upon itself, and the failure to discharge this duty cannot be excused merely because of difficulties due to war time conditions or otherwise."

The refusal to give this instruction is assigned as error for the reason that the trial judge, while generally examining the prospective jurors as to their qualifications, made the following general observation: "I spoke of the present discomforts that all of us endure at times as the result of necessity, in riding in our street cars. Would the fact that our street railway system—part of it at least has been only recently taken over by the City and County of San Francisco, and by reason of lack of funds and other possible obstructions, the City has been unable to bring the system to a state of approaching perfection. Would that fact influence your minds in deciding this case?"

Plaintiff contends that from this statement the jury could infer that the city, even if negligent, was not liable, if conditions of operation were difficult, and the city was doing the best it could and argues correctly that negligence may not thus be excused. For this reason, says plaintiff, the requested instruction should have been given to define properly the defendant's measure of responsibility. The language used by the trial judge on the voir dire examination is not reasonably susceptible of the construction contended for by plaintiff. It merely asked the prospective jurors if the fact that the city had been unable to bring the railroad "to a state of approaching perfection" would prejudice them—in other words, whether the prospective jurors had any general prejudice against the city for the failure to carry out certain promises of improvement. When it came to instructing the jury, the trial judge was most careful to define the proper measure of responsibility of defendant. The jury was told that the city and the motorman were required to exercise ordinary care; that the negligence of the motorman, if any, was the negligence of the city; that it was the duty of the motorman "to be vigilant at all times in order to avoid colliding with persons or property in the path of the streetcar"; and that if the motorman failed to exercise such vigilance he was guilty of negligence. It is quite clear that the jury was fully and fairly instructed on the issue, and that the jury could not have been misled by the general statement above quoted.

[13] Plaintiff complains of the refusal to give a requested instruction embodying the rule of law contained in § 540 of the Vehicle Code. That section requires a driver of an automobile intending to turn left at an intersection to drive to the center of the intersection unless otherwise directed by buttons, markers or signs. The proposed instruction, which in addition to setting forth the rule contained in this section, stated that plaintiff was required under this section to cross the center line of Cortland Avenue before turning left, while containing a correct statement of law, has no special applicability to the facts. No one at any time during the trial challenged plaintiff's right to start across the tracks as he did. It was never contended that the stalling of his automobile on the tracks was in any way due to the fact that he was crossing the tracks at right angles rather than at an angle of lesser degree. He had a legal right to turn left, and that required him to cross the street car tracks. The fact that he was proceeding in accordance with § 540 of the Vehicle Code was totally immaterial to the issues involved, and it was not error to refuse to instruct on such issue.

[14] Error is next assigned in that the trial court refused to give the following re-

quested instruction: "You are instructed that it was the duty of the motorman in operating the streetcar down the hill toward the corner where this accident occurred, to keep his streetcar in such control as would enable him to stop at any time to avoid injury to persons or property lawfully upon the highway, and if the motorman failed in this duty then the defendant, City and County of San Francisco, was guilty of negligence." Plaintiff maintains that the court's charge on negligence was general and that it should have been particularized enough to include plaintiff's theory that it was the duty of the motorman to stop when he discovered plaintiff's automobile stalled on the tracks. The proffered instruction was properly refused because it does not correctly state the law. It was not the legal duty of the motorman to operate and control his streetcar so as to "enable him to stop at any time to avoid injury to persons or property lawfully upon the highway." If such were the law it would be the duty of a motorman, proceeding carefully, to stop regardless of the time at which the person or property came upon the tracks. Negligence cannot be based upon such an exacting formula completely divorced from the variables of time, place and surrounding circumstances. The instruction, containing as it does an incorrect statement of law, was properly refused. Hart v. Farris, 218 Cal. 69, 21 P.2d 432; Paine v. Bank of Ceres, 59 Cal.App.2d 242, 138 P.2d 396; see cases collected 24 Cal. Jur. p. 802, § 77; 10 Cal.Jur., 10 Yr.Supp., p. 690, § 77.

[15] There is some merit in the next contention of plaintiff. He urges that it was error to have refused to give the following requested instruction: "You are instructed that it was the duty of the City and County of San Francisco to have and keep its streetcars in a reasonably fit condition for use upon the tracks, and if it failed to have and keep the streetcar involved in this accident in a reasonably fit and safe condition to be operated at the time and place and under the circumstances shown by the evidence, then it was guilty of negligence."

We agree with plaintiff that the jury could have inferred that the street car's braking system was defective, even though the only affirmative evidence in the record was that it was in good condition. The circumstances of the accident, as testified to by the plaintiff and his witnesses, raises the permissible inference that the braking system of the street car failed. There is, therefore, some evidentiary support for the giving of this instruction, and it could well have been given. However, the failure to give this instruction, under the circumstances, was not reversible error. The jury was fully and fairly instructed that it was the duty of the city to use ordinary care in the operation of its cars so as to avoid collisions with other vehicles. This instruction, while not as specific as the one requested, covered the field. Under such circumstances it was not error to refuse to give a more definite instruction. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann.Cas. 1230; De Fries v. Market Street R. Co., 31 Cal.App.2d 463, 88 P.2d 256.

[16] The last contention of plaintiff is that it was error to refuse to give the following requested instruction: "If you find from the evidence in this case that the streetcar was approaching the automobile of the plaintiff at a time when the automobile was stalled on the tracks and that the streetcar began to slow down as it approached the intersection, and that the plaintiff believed that the streetcar motorman was stopping the same and that a reasonably prudent man under the circumstances would have believed from the way in which the street car was being operated that the motorman was intending and able to stop it before it collided with the plaintiff's automobile, then the plaintiff would not be guilty of contributory negligence merely because he did not leave his stalled automobile sooner, if you believe that under the circumstances a reasonably prudent man would have acted as plaintiff did."

It will be noted that this instruction involves generally the doctrine of contributory negligence, on which doctrine the jury was fully, fairly and properly instructed. Moreover, the court gave a proper instruction on the so-called doctrine of imminent peril. These instructions properly and adequately covered the issue and plaintiff was not entitled to more specific instructions, particularly to one that amounted to a directed verdict on the issue involved.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

83 Cal.App.2d 137

In re MILLER'S ESTATE.

MILLER v. BERVEN.

Civ. 16046.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1947.

Executors and administrators 🔑358(4)

On appeal from order confirming administrator's sale of realty, District Court of Appeal was required to assume in support of order and of ruling overruling objections that evidence was sufficient to support ruling and order where record on appeal was insufficient to enable court to determine what evidence was presented.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Emma Mary Miller, deceased, wherein Edwin F. Miller, administrator, filed a petition for confirmation of sale of realty contested by K. J. Berven. From an order confirming the sale, contestant appeals.

Order affirmed.

K. J. Berven, in pro. per.

Donald K. Gault, of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

On December 6, 1946, the administrator of the estate of Emma Mary Miller, deceased, filed his petition for confirmation of sale of an undivided one-eighth interest in Lots 8 and 10 of Walnut Lawn Tract in Los Angeles County to Ralph C. Glidewell and wife for $600 cash. The property had been appraised at $400 on September 17, 1946. The hearing on the petition was set for January 8, 1947. On January 4, 1947, appellant filed a document entitled "Objection to Confirmation of Sale," wherein he stated that he objected to the confirmation for reasons set forth in an affidavit attached thereto. In the affidavit he stated that on October 10, 1946, he submitted a bid of $600 for said property, which bid was rejected in favor of a prior bid of the same amount; that on January 4, 1947, he filed an action in the Superior Court of Los Angeles County "for specific performance and demanding conveyance" of said property; and that on said date he filed a notice of lis pendens in the office of the Recorder of Los Angeles County "on the above said property." On January 8, 1947, the court found that all notices of said hearing had been given as required by law, and it overruled appellant's objections and made an order confirming the sale.

Appellant, appearing in propria persona, asserts in his brief that "this is a motion objecting to the confirmation * * * contrary to the terms of an equitable option given by the deceased during her lifetime to the appellant"; that the option agreement "is contingent upon the clause 'if, as and when all of the tenants in common could agree upon a sale price'"; that the "remaining tenants in common contracted for the sale of the premises without giving notice of * * * any agreed price according to the terms of the option to the appellant"; and that the option "impliedly provided for uninterrupted possession of the premises by appellant" until a sale should be made under the option. He asserts further that he "relies on the allegations in his complaint for specific performance which recited a good cause of action on which the respondent offered no evidence or denial at the time of confirmation of sale."

There is no reporter's transcript, or settled statement on appeal, of the proceedings had at the hearing. The only record on appeal is the clerk's transcript, which includes the following: return of sale and petition for confirmation; notice of hearing; affidavit of posting notice of hearing; affidavit of publication of notice of sale at private sale; notice of hearing and affidavit showing service on the purchaser; notice of hearing and affidavit showing service on appellant; the objections to confirmation and affidavit in support thereof; and the order confirming the sale.

The record on appeal is not sufficient to enable this court to determine what evidence was presented, and what proceedings were had, at the hearing. It does not appear that an option agreement or any agreement, or any complaint for specific performance or any complaint, was before the trial judge. This court cannot consider as evidence any assertions made by appellant in his brief regarding an option, and cannot consider the allegations of appellant's purported complaint regarding specific performance. It must be assumed in support of the ruling of the court overruling the objections, and in support of the order confirming the sale, that the evidence was sufficient to support the ruling and the order. See Mitchell v. Union Drilling etc. Co., 1 Cal.2d 56, 61, 32 P.2d 1069, and Fish v. Title Guarantee & Trust Co., 8 Cal.2d 7, 8, 63 P.2d 294.

Appellant also asserts that another undivided ⅛ interest in the said Lots 8 and 10, which lots are involved herein, is a part of an estate of another deceased person and that a sale of that ⅛ interest for $900 was also confirmed by the court on January 8th; and that another and further undivided ⅛ interest in said lots is a part of the estate of another deceased person and that a sale of that ⅛ interest for $900 was also confirmed on said day. He argues that the amount of $600 for which the ⅛ interest involved on this appeal was sold and the amount of $900 for which each of the other two ⅛ interests was sold are so disproportionate that this court would be justified in vacating the sale of the ⅛ interest here involved. There is no record on appeal, by reporter's transcript, or settled statement, or clerk's transcript, concerning a sale of any additional interest in said lots.

The order confirming the sale is affirmed.

VALLEE, J. pro. tem., concurs.

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83 Cal.App.2d 108

BERNSTEIN v. SMUTZ.

Civ. 15859.

District Court of Appeal, Second District, Division 3, California.

Dec. 24, 1947.

Hearing Denied Feb. 19, 1948.

1. **Administrative law and procedure 🔑229**
   Municipal corporations 🔑121

A party aggrieved by application of an ordinance must invoke and exhaust administrative remedies provided thereby before he may resort to courts for relief.

2. **Administrative law and procedure 🔑229**
   Municipal corporations 🔑121

A court will take jurisdiction of proceeding attacking validity of ordinance, without resort having been made to administrative remedies, only where no mode of attacking validity of ordinance is provided except by resort to courts.

3. **Administrative law and procedure 🔑211**
   Municipal corporations 🔑621

The zoning administrator and board of zoning appeals, not being law-making bodies, were without power to disregard or amend zoning ordinance under which they functioned.

4. **Administrative law and procedure 🔑234**
   Mandamus 🔑3(8)

Where ruling of zoning administrator denying application for variance was based on zoning ordinance, and board of zoning appeals was without power to amend ordinance, no administrative remedy was available to petitioner, and failure to appeal from zoning administrator's order did not preclude maintenance of proceeding for writ of mandate to compel administrator to grant a variance.

5. **Municipal corporations 🔑122(1)**

Allegations that area in which petitioner's property was located had been developed for production of oil and gas, and that variances had been liberally granted by city zoning authorities on basis of one well to each acre of area and of several oil wells in each block, were sufficient to entitle petitioner to make proof that ordinance prohibiting operation of more than one oil well in any city block was unreasonable and confiscatory as applied to petitioner's five-acre tract in a single block on which there was one well.

6. Constitutional law ⚿42

Interested parties may always contend that legislative body has gone beyond its constitutional power.

7. Constitutional law ⚿225(1), 296(2)

A city ordinance prohibiting operation of more than one oil well in any city block in specified districts within an oil field in city in which prior practice had been to permit one well to each acre, with several wells in a block, infringed constitutional guaranties of due process of law and equal protection of the law because of imposition of regulations upon certain areas not applicable to other areas in the oil field.

8. Municipal corporations ⚿121

Petitioner who had one oil well on a block consisting of five acres had right to have court in proceeding for writ of mandate determine whether city ordinance prohibiting operation of more than one oil well on a block was unconstitutional in view of the varying sizes of blocks in area comprising oil field in city.

9. Appeal and error ⚿917(1)

On appeal from judgment sustaining demurrer to petition for writ of mandate, reviewing court was required to assume that allegations of the petition were true.

◆

Appeal from Superior Court, Los Angeles County; Edward T. Bishop and Robert H. Scott, Judges.

Petition for a writ of mandate by Sam Bernstein against Huber E. Smutz, Zoning Administrator of the City of Los Angeles, to compel the respondent to grant a variance permitting the petitioner to drill an additional oil well on his property or to consider his application for a variance on the merits. From a judgment rendered upon the sustaining of a demurrer, the petitioner appeals.

Judgment reversed.

Boone & Satchell, of Long Beach, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Lester L. Lev, Deputy City Atty., all of Los Angeles, for respondent.

VALLÉE, Justice pro tem.

Appeal from a judgment rendered upon the sustaining of a demurrer to a petition for a writ of mandate. The order sustaining the demurrer gave petitioner leave to amend. He failed to do so within the time allowed. He appeals from the judgment which followed.

The facts alleged are these:

Respondent Smutz is Zoning Administrator of Los Angeles. On January 17, 1944, petitioner acquired oil leases on five acres of contiguous land in Los Angeles in what is known as the "Wilmington Oil Field." The five acres at all times have been "surrounded by public streets." Under his leases, petitioner is the owner of the exclusive right to drill for oil on the property and is obligated to drill three wells thereon. He drilled one producing well. On March 30, 1944, the City Council of Los Angeles adopted Ordinance No. 88,392, amending the then existing zoning ordinance (Ordinance No. 77,000, as amended), to create "an oil drilling district" of the property covered by petitioner's leases. The effect of this ordinance was to authorize the Zoning Administrator to grant variances "for the purpose of drilling for or producing oil, gas or other hydrocarbon substances" on the property covered by petitioner's leases, provided that "no variance shall be granted authorizing the drilling for oil or gas on any parcel of land in the City of Los Angeles which is less than one (1) net acre in area, and any such variance shall authorize only one well to be drilled to each acre." Ord. 77,000, as amended, sec. 12.22(a) (9); sec. 12.13(a) (8) (B).

On September 1, 1945, while the last mentioned ordinance was in force, petitioner applied to the Zoning Administrator for a variance for the purpose of drilling a second oil well on the leased property and complied with the necessary requisites in connection with such an application and the erection and maintenance of an oil well derrick, including payment of fees and posting of bond. It was the duty, it is alleged, of the Zoning Administrator under Ordinance No. 77,000, as amended, sec. 12.13(2) (8) (B), to grant petitioner a variance.

Four days later, on September 5, 1945, the City Council adopted Ordinance No. 89,616, purporting to be an emergency measure, amending Ordinance No. 77,000, as amended. This ordinance was approved by the Mayor the same day. Ordinance No. 89,616 prohibited the drilling, maintenance or operation of more than one oil well in any "city block" in the district in which petitioner's property is located, and contained a so-called "urgency" clause making it effective immediately. Ordinance No. 89,616 also prohibited the drilling or maintenance of more than one well in each "city block" in three other oil-well-drilling districts in the Wilmington Oil Field. The complaint does not disclose what areas were covered by these three districts except as they may be inferred from the notice of the Zoning Administrator next mentioned.

On September 20, 1945, the Zoning Administrator notified petitioner that his application had been dismissed "for lack of jurisdiction to grant a variance in the particular instance," and that the oil drilling district created by Ordinance No. 88,392 (the property covered by petitioner's leases only) "in common with all of the Oil Drilling Districts northerly of the Pacific Coast Highway between Frigate Ave. and Avalon Blvd. are limited by Ordinance No. 89616, approved September 5, 1945, among other things, contains the specific condition as follows: 'In any City block in said district there shall not be located, drilled, maintained or operated more than one oil well.' There now exists in the southerly portion of the block in question a producing oil well known as Sam Bernstein Terminal No. 1. In view of the presence of this existing oil well and the provisions of paragraph 15 of Sub-section 'a' Section 12.22 of the Los Angeles Municipal Code partially quoted above the Zoning Administrator is without authority to grant a variance permitting the drilling of an additional oil well in the block in question and request for Zone Variance is hereby *dismissed* for lack of jurisdiction."

Ordinance No. 77,000, as amended, and in force at all times mentioned, defines a "block" thus: "'Block' as used in this subsection shall mean that property entirely surrounded by public streets or by a public street or streets and a portion of the City Boundary Line and/or a portion of any subdivision tract boundary dividing subdivided land from unsubdivided acreage."

Violation of the above mentioned ordinance is a misdemeanor. If petitioner should drill a second or subsequent well he will be subjected to criminal prosecution. The zoning ordinance as amended, and in particular Ordinance No. 89,616, is unreasonable, confiscatory, and oppressive as against petitioner, his property and his lessors and deprives him of valuable property rights without due process of law, deprives him of the equal protection of the law in violation of the constitutions of the United States and of California, is void and of no effect. The enforcement and threatened enforcement against him and his property is unlawful and without right or authority in law and constitutes an unlawful and unconstitutional invasion of his rights.

The portion of the Wilmington section of Los Angeles in all directions from petitioner's property has been drilled and developed and is producing oil, gas and other hydrocarbon substances in paying quantities. The oil field is known as "Wilmington Oil Field." (Maps of the Wilmington Oil Field are attached to the petition indicating oil wells heretofore drilled and now producing and indicating petitioner's property thereon.) Subsequent to the drilling of the discovery well in Wilmington, the City Council of Los Angeles, by numerous and successive ordinances, established oil drilling districts extending from the boundaries of Wilmington on the east, in a general northwesterly direction, through the harbor and industrial area, through the town and business section and the residential section, to the westerly boundary of Wilmington. Throughout the area comprising approximately 140 blocks, oil wells have been drilled, placed on production and are now producing. Throughout the area variances were granted, and in nearly all of the city blocks in the area two or more oil wells were drilled, variances being granted on the basis of one well to each acre of area and each city block contained several acres in area. By reason thereof, property owners in the area have received their proportionate share of oil and gas produced as royalties from two or more oil wells in each block and the lessee, in turn, has received production and revenue from two or more oil wells in each block. Petitioner's property, a city block in area, is only partially developed, the easterly one-half thereof being improved with small homes. The westerly one-half, fronting on Wilmington Boulevard, is zoned for business, most of that portion of the block being unimproved. The southerly portion has an oil and gasoline filling station on it. The area of petitioner's property and the area surrounding it have been included in oil well districts, oil wells have been drilled and are producing therein. All of said area is a part of the Wilmington Oil Field. Prior to the adoption of Ordinance No. 89,616, variances have been liberally granted by the zoning authorities of Los Angeles on the basis of one well to each acre of area and on the basis of several oil wells in each block throughout Wilmington and in business and residential areas of greater value, more densely populated and containing more improvements than the area in which petitioner's property is located. The area in which his property is located comprises a small section of Wilmington in which oil wells have been drilled and are producing. Immediately to the north of said section and within a few blocks of petitioner's property an oil tank farm and oil refinery are located and in operation. The oil wells drilled in the Wilmington Oil Field, described in the petition, overlie the same field and oil structure, and by reason of drainage therefrom, and unless petitioner is permitted to drill additional oil wells on the leased property, he and his lessors will suffer great loss and irreparable damage.

The petition prays for a writ of mandate directed against the Zoning Administrator, commanding him to grant a variance permitting petitioner to drill an additional well on the property *or* to consider his application on the merits, in either case subject to the provisions of Ordinance No. 77,000, as amended, prior to the adoption of Ordinance No. 89,616.

The demurrer was general.

Petitioner contends that the complaint states facts sufficient to constitute a cause of action and to support the issuance of a writ of mandate.

The first question presented is whether the doctrine of exhaustion of administrative remedies is applicable on the facts. Respondent says that the petition does not state facts sufficient to support the issuance of mandate because there is no allegation that appellant appealed from the order of the Zoning Administrator.

The Charter of the City of Los Angeles, section 99, empowers the Board of Zoning Appeals to hear and determine appeals where it is alleged there is error or abuse of discretion in any determination of the Zoning Administrator in the enforcement of any zoning ordinance or ordinance regulating the use of property, and to hear and determine appeals from determinations of the Zoning Administrator granting or denying applications for variances.

[1, 2] It is now definitely established that a party aggrieved by the application of an ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. Metcalf v. County of Los Angeles, 24 Cal.2d 267, 269, 148 P.2d 645; Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433. The principle, by its terms, calls for the invocation and exhaustion of administrative remedies provided by the ordinance by which the party asserts that he is aggrieved. No administrative remedy was provided by the ordinance under attack. It specifically and definitely prohibited the drilling of more than one well within an area defined as a "block." Neither the Zoning Administrator nor the Board of Zoning Appeals had any power or authority under the ordinance to grant a variance or exception. Petitioner, having drilled one well upon his property, before the adoption of the ordinance, could secure relief only by repeal or amend-

ment of the ordinance or by resort to the courts. Neither the Zoning Administrator nor the Board of Zoning Appeals could give him any relief whatever. In all of the cases in this state in which it has been held that a party had not exhausted his administrative remedies and therefore was not entitled to relief by the court, provision was made in the governing law for a proceeding of some nature before an administrative body which the party had not pursued. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Metcalf v. County of Los Angeles, 24 Cal.2d 267, 269, 148 P.2d 645, and cases cited therein. It is only when no mode of attacking the validity of an ordinance is provided other than by resort to the courts, that a court will take jurisdiction. Where an ordinance contains provisions looking to the prevention of hardship upon owners in particular cases, resort to the administrative agency is required. We have not been cited to any case, and we have found none, holding that resort must be had to an administrative agency when the agency has no power to act. In a number of cases where an ordinance prohibited the doing of a particular act in a specific district, direct application to the courts for relief has been permitted and the ordinance held unconstitutional. Apparently in these cases there was no provision for a variance in the ordinance. The question whether an administrative remedy should have been exhausted was not urged or discussed. It seems clear, however, that it was not done because there was no administrative remedy to pursue. See Matter of Application of Throop, 169 Cal. 93, 145 P. 1029; In re White, 195 Cal. 516, 234 P. 396; Pacific P. Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; People v. Hawley, 207 Cal. 395, 408, 279 P. 136; Wickham v. Becker, 96 Cal.App. 443, 274 P. 397; Del Fanta v. Sherman, 107 Cal.App. 746, 290 P. 1087.

[3] Neither the Zoning Administrator nor the Board of Zoning Appeals is a law-making body and neither has power to disregard or amend the ordinance under which it functions. Lee v. Board of Adjustments, 226 N.C. 107, 37 S.E.2d 128, 168 A.L.R. 1, 6; State ex rel. Tingley v. Gurda, 209 Wis. 63, 243 N.W. 317; Gully v. Interstate Natural Gas Co., 5 Cir., 82 F.2d 145, 147, certiorari denied 298 U.S. 688, 56 S.Ct. 958, 80 L.Ed. 1407; Varney v. Warehime, 6 Cir., 147 F.2d 238, 243, certiorari denied 325 U.S. 882, 65 S.Ct. 1575, 89 L.Ed. 1997. The reasoning of Ware v. Retirement Board, 65 Cal.App.2d 781, 789, 151 P.2d 549, is applicable. That case was a proceeding in mandate to compel the Retirement Board of San Francisco to grant disability retirement benefits to the petitioner. The petitioner had made application to the board. The board had refused her a hearing. She did not apply for a rehearing. Relying on Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433, the city contended that mandate should not issue because the petitioner had not exhausted her administrative remedies. In an exceedingly well reasoned opinion by Mr. Presiding Justice Peters, the court held that the filing of a petition for a rehearing was "not an indispensable condition precedent to filing a petition for mandate to compel the board to act." [65 Cal.2d 781, 151 P.2d 554.] The court said that the rule of the Alexander case should not be extended to cases where no hearing at all has been granted by the board, the board simply refusing to act; that the board refused to grant the petitioner a hearing on the ground that she was barred as a matter of law; that where no hearing has been granted no petition for rehearing is required; that there was no "determination" of the board based on evidence, there was simply a ruling that, as a matter of law, the board did not act upon the petition because the applicant had no rights as a member of the retirement system; that non-action is not the same as action. The Court of Civil Appeals of Texas, referring to the rule of exhaustion of administrative remedies in James v. Consolidated Steel Corporation, 195 S.W.2d 955, 960, after stating the holding in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, said: "But such rule does not bar a resort to the courts, if such administrative agency or commission refuses to act, acts illegally or arbitrarily, or beyond the scope of its authority."

[4] Metcalf v. County of Los Angeles, 24 Cal.2d 267, 148 P.2d 645, upon which respondent counts heavily, is not analogous. As the court there repeatedly said, the ordinance authorized the zoning authorities to grant an exception or variance. Therefore, as the remedy had not been exhausted the court would not take jurisdiction. Here, the ordinance does not authorize the Zoning Administrator or the Board of Zoning Appeals to grant an exception or variance. It definitely and specifically prohibits the drilling of more than one oil well to a city "block." The Board of Zoning Appeals is without power to amend the ordinance or to ignore it altogether or to accomplish its repeal. As there was no administrative remedy available to appellant, the contention of respondent in that regard cannot be sustained.

[5, 6] Appellant contends that the petition alleges facts sufficient to entitle him to make proof that the ordinance is unconstitutional. We think it does. It is always open to interested parties to contend that the legislative body has gone beyond its constitutional power. The question is whether the police power can be stretched as far as was done in this case. In Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321, 1324, at page 1325, Justice Holmes said: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & W. R. Co., 208 U.S. 598, 605, 28 S.Ct. 331, 52 L.Ed. 637 [639], 13 Ann.Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

In Matter of Application of Throop, 169 Cal. 93, at page 99, 145 P. 1029, 1031, it was said: "As stated by the Supreme Court of the United States in Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, '* * * it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.'" To the same effect, People v. Hawley, 207 Cal. 395, 410, 411, 279 P. 136; Del Fanta v. Sherman, 107 Cal.App. 746, 749, 290 P. 1087; Bank of America v. Town of Atherton, 60 Cal.App.2d 268, 273, 140 P.2d 678; American Paint Co. v. McCune, 67 Cal.App.2d 583, 585, 155 P.2d 123. The court in Miller v. Board of Public Works, 195 Cal. 477, 489, 234 P. 381, 385, 38 A.L.R. 1479, made these pertinent observations: "It cannot be gainsaid, however, that many municipalities, evidently upon the theory that zoning is a panacea for civil ills, have, under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances. Some of these attempted regulations have been palpably for the exclusive and preferential benefit of particular localities. The duty, therefore, devolves upon the courts to determine in each instance whether or not the ordinance, either in whole or in part, is invalid."

In Del Fanta v. Sherman, 107 Cal.App. 746, at page 749, 290 P. 1087, 1088, the question before us is asked and answered as follows: "May a city deprive one of valuable property rights in an oil lease by enacting a zoning ordinance which prohibits him from sinking wells within specified residence districts, regardless of the population or conditions therein contained. This depends upon whether the ordinance is uniform and reasonable. * * * Assuming that the residence portion of a city may be so densely populated or the business portion so adapted as to warrant the adoption of an ordinance prohibiting the use of a motor engine therein, having a capacity of more than five horsepower, it became a question of fact to be determined by evidence in the present case as to whether the population or conditions surrounding the use of the respondents' property would warrant the enforcing of such an ordinance. The motion for judgment on the pleadings was therefore erroneously granted. As was said in the Pacific P. Ass'n case, supra [196 Cal. 211, 237 P. 538, 40 A.L.R. 782], in which the judgment was reversed for similar reasons: 'Appellant should be accorded the opportunity to establish, if it can, the unreasonableness and discriminatory character of the ordinance, which, it alleges, amounts to an unwarranted and arbitrary interference with its constitutional rights.'"

Pacific P. Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782, is controlling. In that case the complaint sought to enjoin the enforcement of a zoning ordinance which prohibited the drilling of an oil well in a business or residence district as described in the ordinance. The plaintiff's property was within a residence district. In asserting the unconstitutionality of the ordinance as applied to his property the plaintiff alleged facts no stronger, if as strong, than those alleged in the petition here. There, as here, a demurrer was sustained. Plaintiff did not amend and judgment for defendant followed. The court held 196 Cal. at page 216, 237 P. at page 539, 40 A.L.R. 782: "We are of the opinion that the appellant has stated a cause of action. The business of boring for and producing oil is a lawful enterprise. The effect of the ordinance, absolutely prohibiting the maintenance or operation of oil wells within certain designated limits of the City of Huntington Beach, is to deprive the owners of real property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. In re Kelso, 147 Cal. 609, 611, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178. It must be taken as very definitely settled in this state that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. Miller v. Board of Public Works [195 Cal. 477], 234 P. 381 [38 A.L.R. 1479]; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. In re White [195 Cal. 516], 234 P. 396. * * * It is apparent from the averments of the complaint that appellant has attempted to plead a situation analogous to those considered in the two decisions of this court last cited. It has been fairly successful, and presents a case in which a property owner is prohibited by the municipality from installing machinery and operating an oil well on its property, while in other districts of the city, more thickly populated and densely settled, and devoted to residence purposes, the conduct of like operations is permitted. In re Application of Throop, supra [169 Cal. 93, 145 P. 1029], and Curtis v. Los Angeles, supra [172 Cal. 230, 156 P. 462]. For these reasons, appellant should be accorded the opportunity to establish, if it can, the unreasonableness and discriminatory character of the ordinance, which, it alleges, amounts to an unwarranted and arbitrary interference with its constitutional rights. The outcome of the controversy will, of course, depend upon the findings of the trial court when the issues have been finally submitted and determined. The demurrer should have been overruled."

The Huntington Beach case was followed in the late case of Bernstein v. Bush, 29 Cal.2d 773, at page 777, 177 P.2d 913, 916, where it was contended that provisions of the Public Resources Code, relating to the spacing of oil wells, violated provisions of the United States and California Constitutions, the court saying:

"The present legislation, however, is not in that category. [Instances where the necessary result of the legislation is damnum absque injuria.] It contemplates that oil and gas wells will be drilled on the private property overlying the source of supply, and assumes to regulate the spacing of the wells thereon in the interests of the public safety and the conservation of natural resources. The face of the legislation may appear to be valid, and insofar as it can be complied with and applied without a denial of constitutional rights it will be held to be proper and lawful legislation. But a statute, innocuous and valid on its face, may become invalid in its application, in which event it is proper for the petitioner to show the facts by which he contends that as to him the law is unreasonable, oppressive and void. In re Smith, 143 Cal. 368, 370, 77 P. 180. In that case, 143 Cal. at page 371, 77 P. at page 180, it was said that when the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue the business or occupation; that it is always a judicial question whether the particular regulation of the right is a valid exercise of the police power, although the authority of the courts to declare a regulation invalid will be exercised with caution and only when it is clear that the law exceeds the limits of legislative power and infringes upon rights guaranteed by the Constitution. See, also, Dobbins v. Los Angeles, 195 U.S. 223, 237, 25 S.Ct. 18, 49 L.Ed. 169. In Skalko v. City of Sunnyvale, 14 Cal.2d 213, 216, 93 P.2d 93, this court recognized that a police regulation, valid when adopted, might become invalid in its operation in particular instances. The same principle was stated in Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 22, 52 S.Ct. 103, 108, 76 L.Ed. 136, 78 A.L.R. 826, where the Supreme Court upheld a California statute regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas as 'valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional right. * * *.'

"Here then we are more directly concerned with the contention of the petitioners that in its application to them the statute is discriminatory and therefore unconstitutional. They assert that such discrimination results from the fact that the enforcement of the regulations permits some owners of lands overlying the oil basin to exercise and enjoy their property right to take oil from the field, while the petitioners, who are property owners overlying the same oil supply, are deprived of the use and enjoyment of their coequal right. The mere assertion of the problem suggests the answer.

"Under the law of this state the landowner has a property right in oil and gas beneath the surface not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances. His unqualified and absolute title attaches after the substances have been reduced to possession. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 819, 129 P.2d 383; Bandini Petroleum Co. v. Superior Court, supra, 110 Cal.App. 123, 127, 293 P. 899. This is a right which is 'as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking "for constitutional purposes as appropriating or destroying it."' People v Associated Oil Co., supra, 211 Cal. [93], at pages 99, 100, 294 P. [717], at page 721, and cases cited.

"In Ohio Oil Co. v. Indiana, 177 U.S. 190, at page 209, 20 S.Ct. 576, 44 L.Ed. 729, involving an oil and gas conservation measure, the Supreme Court said that all (not some) of the surface proprietors within an oil and gas field have the right to reduce to possession the oil and gas beneath the surface, and that they could not be absolutely deprived of that right without a taking of private property. The court went on to consider the owners' coequal right to take from the common source of supply, observing that one owner should not be permitted to convert an undue proportion of the supply to the detriment of others; hence that from the peculiar nature of the property right, the legislative power might be exerted in the protection of all the collective owners by securing a just distribution among them. Thus the Supreme Court held that a statute designed to protect life and property or prevent waste, or both, must apply without discriminating against the coequal rights of the property owners; also that a police regulation otherwise reasonable which was designed to secure to each a just distribution from the common source of the supply of oil and gas, took proper cognizance of the property owners' rights. See, also, Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73. In the latter case it was said that the denial to one surface owner of his fair chance to recover in kind the oil and gas beneath the surface, or its equivalent, would be a confiscation of his property." The court then discusses Railroad Commission v. Magnolia Petroleum Co., Tex.Civ.App., 169 S.W.2d 253, and Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941, where similar conclusions were reached on like reasoning, and continued, 29 Cal.2d at page 780, 177 P.2d at page 918: "In the absence of statutory prohibition, the right to drill an offset well was commonly resorted to as a means of protection by an owner whose property was being drained by a well drilled on adjoining land. The wasteful use of offset wells was recognized as one of the evils sought to be minimized by the enactment of well spacing regulations. Croxton v. State, 186 Okl. 249, 97 P.2d 11, 19; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 99 A.L.R. 1107; Id., 126 Tex. 296, 87 S.W.2d 1069, 101 A.L.R. 1393. But since the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions, regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. Equal is so denied where, as here, the law, in its application at least, does not afford adequate means of protection as a substitute for the right to drill an offset well."

[7] Neither does the ordinance here "afford adequate means of protection as a substitute for the right to drill an offset well." As in the Bush case, so here, under the facts alleged, the ordinance attacked amounts to a deprivation of petitioner's right, coequal with the right of surrounding owners and lessees, to recover his fair share of the oil and gas from the common source of supply and, consequently, infringes upon the constitutional guarantees invoked. The discriminatory effect of the ordinance lies in its singling out for regulation a small area and imposing upon owners and lessees therein restrictions not applicable to other areas in the Wilmington Oil Field having, in many instances as shown by the maps attached to the petition, similar or even identical conditions. Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29; City of Covington v. Summe & Ratermann Co., 210 Ky. 520, 276 S.W. 534.

[8] The ordinance under consideration, as we have stated, defines a "block" as property entirely surrounded by public streets. An inspection of the maps attached to the petition discloses that the "blocks" surrounded by public streets in the Wilmington Oil Field consist of areas of varying sizes. Appellant's "block" consists of five acres. Many "blocks" appear to consist of much less acreage. Appellant has a right to have the court hear evidence and determine whether this feature of the ordinance renders it unreasonable, arbitrary and discriminatory and, therefore, unconstitutional. See Romar Realty Co. v. Board of Com'rs, 96 N.J.L. 117, 114 A. 248; Bjork v. Safford, 333 Ill. 355, 164 N.E. 699, 61 A.L.R. 561.

Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542, relied upon by respondent, is distinguishable on its facts. In that case, as the court stated, 29 Cal.2d at page 342, 175 P.2d at page 549, the plaintiff "does not occupy the position of one whose property is unduly restricted as to use in comparison with the surrounding territory." The allegations of the petition here are to the effect that petitioner does occupy the position of one whose property is unduly restricted as to use in comparison with the surrounding territory. In the Wilkins case the court said, 29 Cal. 2d at page 338, 175 P.2d at page 547: "A city cannot unfairly discriminate against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance.

Reynolds v. Barrett, 12 Cal.2d 244, 251, 83 P.2d 29. * * * An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. [Citing cases.] 2. Where the restrictions create a monopoly. [Citing cases.] 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. [Citing case.] 4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses. [Citing cases.]" The allegations of the petition bring the present case within the first and second categories, and perhaps within the third category.

[9] Many city blocks in the Wilmington Oil Field have more than one well to the block. Immediately across the street to the south of petitioner's property there are two wells in the block, one of them near the north line. Under the allegations of the petitioner he will have the right to prove and may prove that these and other wells are draining from below his property. He will also have the right to prove that the total production from a single well would be substantially less than the amount which would be recoverable if one or more additional wells should be drilled. The ordinance, in effect, grants a monopoly to owners and lessees having more than one well to a city block in the Field, especially where drainage from other property may take place. If the allegations of the petition are true (they must be assumed to be true on this appeal), it appears that Ordinance No. 89,616 has no relation to the ends for which the police power exists—to protect the public health, safety, morals or welfare.

In this connection it is a significant fact that at the time this emergency ordinance was adopted petitioner had an application pending with the Zoning Administrator. Petitioner made application to the Zoning Administrator on September 1, 1945. The amending ordinance was adopted by the Council and Signed by the Mayor on September 5, 1945. In Vine v. Zabriskie, 122 N.J.L. 4, 3 A.2d 886, it was held that where property was zoned for local business and apartment uses, an amendment to the zoning ordinance hastily adopted by the city commissioners after the owner had applied for a permit for the erection of apartment houses thereon, prohibiting the use of the property for that purpose, was an arbitrary interference with the lawful and legitimate use of private property. Cf. Dubow v. Ross, 175 Misc. 219, 22 N.Y.S.2d 610. It would appear from the record before us that the emergency seems to have been petitioner's pending application.

Petitioner is entitled to prove, as he alleges, the absence of a reasonable relationship with a substantial or definite public purpose in the imposition inherent in the prohibitive ordinance considered in the light of the result to him. Valid issues of fact are tendered. Whether only one well to a block in the area in question is reasonable is not something of which the courts may take judicial notice. The only way in which the validity of the ordinance can be determined is by a trial of the issues of fact tendered by the petition.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 910

PEARL v. KALINE.

Civ. 16078.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1947.

1. **Appeal and error** ⚷1015(1)

A reviewing court may not reverse an order granting a new trial when there is evidential support for a judgment in favor of losing party.

2. **Appeal and error** ⚷979(2)
New trial ⚷6

The matter of granting or refusing a new trial is largely within discretion of trial court, whose determination will not be set aside if there is any substantial evidence contradicted or uncontradicted which will support conclusions reached by trial court.

3. **Appeal and error** ⚷1015(1)

On pedestrian's motion for new trial after verdict for motorist in an action against motorist for injury, whether pedestrian was guilty of contributory negligence was a question of fact for trial court.

4. **Appeal and error** ⚷1015(1)
New trial ⚷68

Where evidence would have warranted finding that pedestrian acted as a reasonably prudent person in attempting to cross street, and motorist, who was looking elsewhere, struck pedestrian, pedestrian was not guilty of contributory negligence as a matter of law, and a new trial after verdict for motorist was authorized notwithstanding pedestrian's violation of statute requiring a pedestrian to yield right of way to vehicles when crossing where there is no crosswalk. Vehicle Code, § 562 (a).

5. **Automobiles** ⚷160(4)

Pedestrian's violation of statute requiring pedestrian to yield right of way when crossing a roadway where there is no crosswalk does not relieve motorist of duty of exercising due care not to injure pedestrian. Vehicle Code, § 562 (a, b).

6. **Appeal and error** ⚷1015(1)
New trial ⚷70

Where evidence would have supported a finding that defendant was negligent and that plaintiff was not contributorily negligent, trial court's order granting plaintiff's motion for a new trial after verdict for defendant found substantial support in evidence and was binding upon reviewing court.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Beverly Jean Pearl, a minor, by Clifford W. Pearl, her guardian ad litem, against John Kaline for injury sustained when plaintiff was struck by defendant's automobile. From an order granting plaintiff's motion for a new trial after a jury returned a verdict for defendant, defendant appeals.

Affirmed.

Hunter & Liljestrom, of Los Angeles, for appellant.

Alfred C. Ackerson, of Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from an order granting plaintiff's motion for a new trial after a jury returned a verdict in defendant's favor in an action to recover damages for personal injuries.

The record discloses evidence from which the trial judge could have found the following facts:

On August 18, 1945, at about 12:30 p.m. plaintiff was on the south side of Olympic Boulevard in Los Angeles. This boulevard runs in a general easterly and westerly direction. Plaintiff looked in both directions and saw an automobile driven by defendant approaching from the west approximately 276 feet from her. The car was being operated in the second traffic lane south of the double white center line in the middle of the street. Plaintiff stepped off the curb and walked briskly in a general northerly direction across Olympic Boulevard without again looking to the west. When she was about 26 feet north of the south curb of Olympic she was struck by the right front fender and headlight of defendant's car. At the time of the accident the car was in the lane of traffic next to the double center line. Defendant did not see plaintiff until an instant before his automobile struck her because he "was looking the other way."

This is the sole question presented for our determination:

May a reviewing court reverse an order granting a new trial when there is evidential support for a judgment in favor of the losing party?

[1,2] This question must be answered in the negative and is governed by this pertinent rule of law: the matter of granting or refusing to grant a motion for a new trial is largely within the discretion of the trial court whose determination will not be set aside if there is any substantial evidence contradicted or uncontradicted which will support the conclusions reached by the trial court. (See Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 306, 307, 163 P.2d 689; Grant v. Ryon, 11 Cal.App.2d 101, 103, 53 P.2d 170.)

[3-5] Applying the foregoing rule to the facts in the instant case it is apparent that the trial judge believed, supported by substantial evidence, that plaintiff was not guilty of contributory negligence. This was a question of fact for his determination which determination finds substantial support in the evidence. It cannot be said as a matter of law that plaintiff's conduct constituted contributory negligence. Since it did not, it was the function and the duty of the court on the motion for a new trial to review the evidence and determine therefrom whether the verdict was a fair and just response to the issue of defendant's negligence. In making such review the court was evidently impressed by plaintiff's conduct (1) in stopping before she stepped into the street and observing the approach of defendant's car in the lane adjacent to the curb on which she stood, and in estimating its distance at 276 feet from her; (2) in that she reasonably estimated that she had sufficient time to cross that lane before defendant could reach the path of her crossing; (3) in that she acted as a reasonably prudent person in believing that defendant would not change from one lane to another in proceeding along the boulevard and that if he should do so he would see her and give appropriate warning. It is true that plaintiff violated the provisions of subsection (a) of section 562 of the Vehicle Code requiring a pedestrian to yield to vehicles when crossing a roadway where there is no crosswalk. However such violation did not relieve defendant from the duty of exercising due care not to injure plaintiff, as provided by subsection (b) of the same section. (Fuentes v. Ling, 21 Cal.2d 59, 61, 130 P.2d 121; Mitrovitch v. Graves, 25 Cal.App.2d 649, 655, 78 P.2d 227.)

[6] Defendant concedes that the evidence would have supported a finding of negligence on his part had the jury so found. Therefore since the evidence would have supported a finding that defendant was negligent and plaintiff was not contributorily negligent, the trial court's order granting a motion for a new trial finds substantial support in the evidence and such order is binding upon this court.

Pirrone v. Nuccio, 78 Cal.App.2d 864, 179 P.2d 18, is not here in point for the reason that in such case the evidence was not in conflict as to plaintiff's conduct, and the only reasonable conclusion to be drawn therefrom was that plaintiff was contributorily negligent. We find the same situation in Weissman v. Seehusen, 55 Cal.App.2d 391, 131 P.2d 10, and Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65.

Bedell v. Duniven, 77 Cal.App.2d 145, 174 P.2d 666, is not applicable for the reason that in this case it was merely held that there was substantial evidence to sustain an implied finding that plaintiff was contributorily negligent. The case does not hold that plaintiff was contributorily negligent as a matter of law. Each of the other cases relied on by defendant are factually distinguishable from the present case.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

FRANKLIN et al. v. NAT C. GOLDSTONE AGENCY.*

Civ. 15881.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1947.

Hearing Granted Feb. 17, 1948.

1. Evidence 🔑318(7)

On petition for confirmation of award of arbitrators, affidavit on information and belief of attorney for parties opposing confirmation, that petitioners were not licensed contractors, could not be considered, since affidavit was hearsay. Business and Professions Code, §§ 7000, 7028, 7031, 7072, 7080.

2. Arbitration and award 🔑6

An agreement in writing to submit an existing controversy to arbitration pursuant to the Code of Civil Procedure is valid and irrevocable, save on such grounds as exist at law or in equity for revocation of any contract. Code Civ.Proc. §§ 1280, 1281.

3. Arbitration and award 🔑3

Two or more persons may submit in writing to arbitration any controversy existing between them at time of agreement to submit which arises out of a contract or the refusal to perform the whole or any part of a contract. Code Civ.Proc. § 1281.

4. Arbitration and award 🔑72

At any time within three months after award of arbitrators is made, unless the time is extended by the parties in writing, any party to the arbitration may apply to the superior court for an order confirming the award, and thereupon the court must grant such order unless award is vacated, modified, or corrected, as prescribed by statute. Code Civ.Proc. §§ 1287, 1288, 1289.

5. Arbitration and award 🔑84

A judgment entered in conformity with an order confirming an award of arbitrators has the same force and effect as if rendered in an action in the court in which the judgment is entered. Code Civ.Proc. § 1292.

6. Arbitration and award 🔑72, 76

The only grounds for vacating or refusing to confirm an award of arbitrators are those grounds set forth in statute. Code Civ.Proc. § 1288.

7. Arbitration and award 🔑29

An arbitrator, who is frequently not learned in the law, is not required to award on principles of dry law, but may decide on principles of equity and good conscience, and make an award in justice and fairness.

8. Arbitration and award 🔑73

The merits of a dispute between the parties to an arbitration proceeding are not subject to judicial review. Code Civ.Proc. §§ 1288, 1289.

9. Arbitration and award 🔑29

Unless reserved by the terms of submission, an arbitrator has full power to decide questions of law as well as fact which directly or indirectly arise in considering and deciding questions embraced in the submission. Code Civ.Proc. §§ 1280–1293.

10. Arbitration and award 🔑73, 82(1)

Where submission to arbitrator is unqualified, his findings on questions of law as well as on questions of fact are final and conclusive and may not be reviewed by the court except for fraud or similar misconduct or unless error appears on the face of the award. Code Civ.Proc. §§ 1288, 1289.

11. Arbitration and award 🔑1

The law favors arbitration. Code Civ. Proc. §§ 1280–1293.

12. Arbitration and award 🔑1

The object of arbitration is to avoid the formalities, delay, expense, and vexation of ordinary litigation, and it is a substitute for an action in court. Code Civ. Proc. §§ 1280–1293.

13. Arbitration and award 🔑72

Application to court for confirmation of award of arbitrators is not the bringing or maintaining of an "action for collection of compensation" within meaning of the Business and Professions Code, but is in the nature of a motion for an order enforcing an award of compensation already made by the arbitrators. Code Civ. Proc. §§ 1287, 1291; Business and Professions Code, § 7031.

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* Subsequent opinion 204 P.2d 37.

See Words and Phrases, Permanent Edition, for all other definitions of "Action for Collection of Compensation".

14. Arbitration and award ⚿73, 82(1)

Where parties agreed to an unrestricted submission to arbitrators of any controversy relating to decoration of office, question whether contractors were unlicensed contractors, as claimed in attorney's affidavit alleging that contractors were not licensed, could not be considered by court, and arbitrator's decision was final and conclusive. Code Civ.Proc. §§ 1280–1293; Business and Professions Code, § 7031.

◆

Appeal from the Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by Helen W. Franklin and Malcolm M. Roberts, petitioners, against the Nat C. Goldstone Agency, a copartnership consisting of Nat C. Goldstone and Charles Goldstone, for confirmation of an award of arbitrators. From an order confirming the arbitrators' award and from the judgment thereon, defendants appeal.

Order and judgment affirmed.

Kaplan, Livingston & Lewis and Eugene S. Goodwin, all of Los Angeles, for appellants.

A. L. Weil, of Los Angeles, for respondents.

VALLEE, Justice pro tem.

The parties submitted a controversy which existed between them to arbitration. The submission was unqualified and without restriction. It did not contain any provision that the arbitrator should make his award according to law or according to the legal right of the parties or any like provision. It said, in part, "we will abide by and perform any Award rendered pursuant to this Agreement, and that a judgment of the Court having jurisdiction may be entered upon the Award."

The conflict arose from an oral agreement by which respondents agreed to decorate the office of appellant. The work included painting and carpeting. The dispute was with respect to respondents' charges for the painting and carpeting. The arbitrator made an award in favor of respondents. Within three months after the arbitrator made his award, respondents applied to the superior court for an order confirming the award. The application for confirmation did not allege that respondents, either as a firm or individually, were licensed by the State of California to act as contractors at the time the work was done. On the day of the hearing on the application, appellant filed an affidavit of one of its attorneys in opposition to confirmation of the award. The affidavit stated, upon information and belief, that neither of respondents "is or was a licensed contractor." It contained a positive statement "that no allegation or proof of contractor's license was made by petitioners or either of them during the said arbitration." The court made an order confirming the award and ordered that a judgment be docketed in favor of respondents for the amount of the award. The appeal is from this order.

We have before us: (1) The petition for confirmation of the award, to which is attached the submission, notice to arbitrator of appointment, acceptance by arbitrator of the appointment, award of arbitrator, and arbitrator's statement and conclusions; (2) order to show cause why award should not be confirmed; (3) affidavit of Monte E. Livingston in opposition to petition for confirmation of award and points and authorities in support thereof; (4) order confirming arbitrator's award and ordering that judgment be docketed.

Appellant contends that the petition to confirm the award is fatally defective because it does not allege or appear therefrom or from any of the documents attached that respondents were duly licensed contractors at all times during performance of the agreement and that, therefore, the order is without legal support. It is conceded that the order is proper as to the charge for carpeting. The contention of appellant applies solely to the order insofar as it confirms the award for painting appellant's offices amounting to $1,648.59.

[1] The affidavit of the attorney for appellant, insofar as it states upon information and belief that neither of petitioners is or was a licensed contractor, may not be considered for three reasons: First, an affidavit upon information and belief is hearsay and no proof of the facts stated therein. Kellett v. Kellett, 2 Cal.2d 45, 48, 39 P.2d 203; Swain, The Use of Affidavits As Evidence, XXII State Bar J. 144. In the absence of a reporter's transcript we must presume that proper objection to its use was made before the judge who confirmed the award and that the objection was sustained. Second, an affidavit on information and belief as to a public record is hearsay and no proof of the facts stated therein. Vickery v. Valdez, 113 Cal.App. 135, 139, 298 P. 151. Whether a contractor's license had or had not been issued to respondents by the Contractors' State License Board was a matter of public record. Bus. & Prof. Code, secs. 7000, 7072, 7080. Third, as will be developed, the award of the arbitrator may not be attacked upon this ground. Appellant, in effect, conceded at the oral argument that the affidavit was and is of no value and relied solely upon his point that it was incumbent upon the respondents to allege a license in their application for confirmation.

It is unlawful for any person to act in the capacity of a contractor within this state without having a license therefor. Bus. & Prof.Code, sec. 7028. Business and Professions Code, section 7031, provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[2-4] An agreement in writing to submit an existing controversy to arbitration pursuant to the provisions of section 1281 of the Code of Civil Procedure, is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Code Civ. Proc., sec. 1280. Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit which arises out of a contract or the refusal to perform the whole or any part thereof. Code Civ. Proc., sec. 1281. At any time within three months after the award is made, unless extended by the parties in writing, any party to the arbitration may apply to the superior court for an order confirming the award, and "thereupon said court *must* grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections." (Emphasis added) Code Civ. Proc. § 1287. Code of Civil Procedure, section 1288, provides that a court must vacate an award upon the application of any party to the arbitration in either of the following cases: "(a) Where the award was procured by corruption, fraud, or undue means. (b) Where there was corruption in the arbitrators, or either of them. (c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced. (d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." Section 1289, providing for modification or correction of the award, is not pertinent here.

[5] There must be attached to the application to confirm the award copies of: The agreement, the appointment of the arbitrator, and the award. Code Civ. Proc., sec. 1291. Upon granting the order confirming the award, judgment may be entered in conformity therewith. The judgment so entered has the same force and effect "as if it had been rendered in an action in the court in which it is entered." Code Civ. Proc. § 1292.

[6-8] The only grounds for vacating or refusing to confirm an award are those set forth in Code of Civil Procedure, section 1288. In re Connor, 128 Cal. 279, 282, 60 P. 862; Kerr v. Nelson, 7 Cal.2d 85, 89, 90, 59 P.2d 821. An arbitrator, who is frequently not learned in the law, is not required to award on principles of dry law

but may decide on principles of equity and good conscience and make an award ex aequo et bono. In re Connor, supra; Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 241, 174 P.2d 441. The merits of the dispute between the parties to an arbitration proceeding are not subject to judicial review. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., supra, pages 232, 233 of 29 Cal.2d, 174 P.2d 441. In the Pacific Vegetable case it was said (page 240 of 29 Cal.2d, 174 P.2d, 449): "The purpose of the law in recognizing arbitration agreements and in providing statutory means of enforcement is to encourage persons to avoid delays by obtaining adjustment of their differences by an agency of their own choosing. This was pointed out in Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 159, 162 P. 631, 633, where it was also said: 'The statutory provisions for a review thereof are manifestly for the sole purpose of preventing the misuse of the proceeding, where corruption, fraud, misconduct, gross error, or mistake has been carried into the award to the substantial prejudice of a party to the proceeding. * * * Therefore every reasonable intendment will be indulged to give effect to such proceedings.' Citing authorities. See, also, Moore v. Griffith, 51 Cal.App.2d 386, 388, 124 P.2d 900; Dugan v. Phillips, supra, 77 Cal.App. 268, 278, 246 P. 566."

[9, 10] Unless reserved by the terms of submission, an arbitrator has full power to decide questions of law as well as fact which directly or indirectly arise in considering and deciding the questions embraced in the submission "for, in the absence of such reservation, the parties are presumed to agree that everything, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the arbitrator." 6 C.J.S., Arbitration and Award, § 48 b; 3 Am.Jur. 923, sec. 92; see, Anno., 112 A.L.R. 874; 17 Cal.L.Rev. 643, 660. Where the submission to the arbitrator is unqualified, his findings on questions of law as well as on questions of fact are final and conclusive and may not be reviewed by the court except for fraud or similar misconduct or unless error appears on the face of the award. In re Frick, 130 Cal.App. 290, 292, 19 P.2d 836; Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 417, 147 P.2d 60. In Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, page 160, 162 P. 631, 633, it was said: "An award made upon an unqualified submission cannot be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice."

[11, 12] The law favors arbitration. The modern arbitration law, enacted first in New York in 1921 and in California in 1927 (Code Civ.Proc., secs. 1280–1293), was passed at the behest of business men and business trade associations for the express purpose of providing for self-regulation in business and industry and of making a submission to arbitration valid and irrevocable and with the idea that the courts must enforce them. 46 Harv.L.Rev. 1258, 1262. The proceeding is one before a tribunal selected by the parties in lieu of an action or proceeding for a judgment in an established tribunal of justice. Its object is to avoid, what some feel to be, the formalities, the delay, the expense and vexation of ordinary litigation. It is a substitute for an action in court. It depends for its existence and for jurisdiction of the parties and subject matter upon the voluntary agreement of the parties, the submission. It is subject to limitation only by express provision of law. Formerly the courts were disposed to look with jealousy upon arbitrations. The recent authorities encourage them. Snyder v. Superior Court, 24 Cal.App.2d 263, 267, 74 P.2d 782.

The submission is a binding contract. The parties agree to be bound by the decision of the arbitrator as to questions of law as well as of fact. Under statutes similar to ours, providing for the summary entry of judgment on the award, it has been held, if the statutory provisions have been complied with, that the court becomes charged with the ministerial duty of entering judgment on the award. 6 C.J.S., Arbitration and Award, § 129. Our statute, Code of Civil Procedure, section 1287, says that, upon application for confirmation, the court "must" grant such an order (confirming the award) unless the award is vacated, modified or corrected, as prescribed in sections 1288 or 1289.

[13, 14] If they were required to do so at all, it was in the proceeding before the arbitrator that respondents were bound to establish that they were licensed contractors. The statute does not require them to set that fact forth in the agreement to arbitrate or in the application to the superior court for confirmation of the award. All that is essential in the submission is agreement to submit to arbitration. Code of Civ. Proc., sec. 1281. All that is necessary in the application to the court for confirmation is allegation of the agreement, of the appointment of the arbitrator, and of the award. Code Civ.Proc., secs. 1287, 1291. The application to the court for confirmation of the award is not the bringing or maintaining of an action for the collection of compensation within the meaning of section 7031 of the Business and Professions Code. It is in the nature of a motion for an order enforcing an award of compensation already made by the arbitrator. The affidavit of the attorney to the effect that no allegation or proof of a contractor's license was made by respondents, or either of them, during the arbitration, may not be considered for two reasons: First, it does not set forth any one of the grounds prescribed by the statute for refusing to confirm the award; second, as the parties agreed to an unqualified, unrestricted submission, the award may not be impeached for an alleged error which does not appear on its face. The submission having been unqualified, the decision of the arbitrator was final and conclusive except as it was subject to vacation on one or more of the grounds prescribed by the statute. The question whether respondents, or either of them, were licensed contractors was not open to judicial review. As no one of the prescribed grounds for vacating the award was presented or urged by appellants in the superior court, the order of the judge confirming the award was right.

The order confirming the award and the judgment thereon are, and each is, affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

PEOPLE v. WALLIN. *

Cr. 2010.

District Court of Appeal, Third District, California.

Jan. 8, 1948.

As Modified on Denial of Rehearing Jan. 23, 1948.

Hearing Granted Feb. 5, 1948.

1. Criminal law ⚷507(1)

Under statute defining "accomplice" as one liable to prosecution for the identical offense charged against defendant, mere co-operation in acts which will subject parties to prosecution for distinct offenses does not make them "accomplices". Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⚷507(1, 5, 6, 9)

Giver and receiver of bribe, or perjurer and suborner, or woman who submits to illegal operation and one charged with abortion, or thief and receiver of stolen goods, are not "accomplices". Pen.Code, § 1111.

3. Criminal law ⚷75

One cannot be an "accessory after the fact" to his own crime, in that one cannot be convicted of both charges though one might be convicted as accessory for lack of evidence of guilt as principal. Pen.Code, §§ 31, 32.

See Words and Phrases, Permanent Edition, for all other definitions of "Accessory After the Fact".

4. Criminal law ⚷507(1)

The statutory definition of "accomplice" is in accord with policy of requiring corroboration because witness may be seeking to save himself by procuring conviction of others upon promise or expectancy of immunity or leniency. Pen.Code, § 1111.

5. Criminal law ⚷507(1)

In prosecution for being an accessory to murder, murderess whose conviction had not been reversed at time of trial and who testified positively as to her own acts in killing child, could not be liable to prosecution as an "accessory" and therefore could not be an "accomplice" whose testimony required corroboration. Pen.Code, §§ 32, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accessory".

6. Criminal law ⚷1186(4)

Loose terminology of district attorney's argument to jury upon failure of defense to move for "dismissal or instructed verdict," referring to motion for advisory verdict, was not prejudicial in view of whole record. Const. art. 6, § 4½.

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* Subsequent opinion 197 P.2d 734.

7. Criminal law ⚿1186(4)

In prosecution for being accessory to murder, district attorney's statement in argument concerning defendant's arrest, that he did not think he had sufficient evidence to charge defendant with murder but "evidence unmistakably, conclusively and convincingly" pointed to defendant's complicity in disposal of body, was not prejudicial in view of whole record. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Morton Wallin was convicted of being an accessory to murder, and he appeals.

Affirmed.

Goldstein, Barcelouz & Goldstein, of Chico, Miller & Kroloff, of Stockton, J. Oscar Goldstein, of Chico, and Jack J. Miller, of Stockton, for appellant.

Fred N. Howser, Atty. Gen., Leonard M. Friedman, Deputy Atty. Gen., of Sacramento, Chester E. Watson, Dist. Atty., of Stockton, and Doris Maier, of Sacramento, for respondent.

PEEK, Justice.

The defendant herein has appealed from his conviction under Penal Code section 32 of being an accessory to the murder of the incurable spastic daughter of one Jeanette Paz, for which crime the latter had been tried and convicted as principal prior to the trial of defendant. He also appeals from the order of the trial court denying his motion for a new trial.

The evidence adduced at the trial consisted largely of the testimony of the murderess implicating the defendant as actively participating in aiding her to dispose of the body of her murdered child by driving her in his car to an isolated spot and helping her to dig a grave and inter the remains. The witness also testified that although the defendant did not participate in the crime he had encouraged her to take the life of her child and had suggested means of accomplishing this purpose but that she did not pursue any of the means suggested by him.

The basis of appellant's argument on appeal is the assertion that as Jeanette Paz was his accomplice and her testimony is uncorroborated, therefore the trial court committed reversible error in refusing to instruct the jury on the question of corroboration of an accomplice.

The question which this court must first consider and which, if answered in the negative, not only disposes of the first of appellant's contentions but also makes unnecessary any consideration of the questions of the failure of the trial court to instruct the jury and the existence of corroborating evidence, is: Was Jeanette Paz, a convicted principal to the crime of murder, an accomplice of defendant Wallin who was charged with being an accessory, within the meaning of Penal Code section 1111, which defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"?

The respondent in support of the verdict and the attacked rulings of the trial court maintains that inasmuch as she could not be an accessory to her own crime she therefore could not be an accomplice of defendant Wallin because she is not liable to prosecution for the identical offense charged against him.

Prior to the 1915 amendment to section 1111 as above quoted, the Supreme Court defined accomplices as "All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or did aid and abet in its commission, or, not being present, have advised and encouraged its commission." People v. Coffey, 161 Cal. 433, 439, 119 P. 901, 903, 39 L.R.A.,N.S., 704. The court in that case specifically rejected the definition of an accomplice as one who may be indicted for the same crime as that charged against the person on trial, and in this connection stated: At pages 443, 444, of 161 Cal., at page 905 of 119 P., "One who is an accomplice, we repeat because of what he has done, and not because of the form of punishment which the law may mete out for his acts. Wherever the law has denounced as a separate crime the particular act of participation by an accessory or accomplice, the sole logical and legal effect is not to destroy the relationship of accomplice, but merely to effect a modification of section 31 of the Penal Code, as though by an express proviso it should read, 'All persons concerned in the commission of a crime,' etc., 'are principals in any crime so committed, provided that they shall not be indicted as principals in any case where the law has denounced their participation as a separate crime and declared that they shall be prosecuted exclusively for such separate crime.' But this, as we have said, does not and cannot, by any species of legal hermeneutics or legerdemain, relieve an accomplice of his character of accomplice. It is merely prescribing a separate punishment for the particular act of one who is still an accomplice."

[1, 2] The amendment to section 1111 providing a legislative definition of an accomplice which is clear and unambiguous and contra to the rule laid down in People v. Coffey, supra, requires that an accomplice must be one who is liable to prosecution for the identical offense charged against the defendant. Under this statutory definition mere cooperation in acts which will subject the parties to prosecution for separate and distinct offenses does not make them accomplices. People v. Clapp, 24 Cal.2d 835, 151 P.2d 237. This change in the law defining accomplices is well marked out by the fact that the decision in People v. Coffey, supra, held the giver of a bribe to be an accomplice of one charged with receiving the bribe, whereas, subsequent to the amendment to Penal Code section 1111 the cases have consistently held that such persons are not accomplices. See People v. Davis, 210 Cal. 540, 293 P. 32. Neither are the perjurer and the suborner (People v. Nickell, 22 Cal. App.2d 117, 70 P.2d 659), nor the woman who submits to an illegal operation and the one charged with abortion (People v. Clapp, supra), nor the thief and the receiver of stolen goods (People v. Burness, 53 Cal. App.2d 214, 127 P.2d 623), accomplices, although each is liable to criminal prosecution for participating in the act or transaction.

A clearer analogy to the question posed herein is found in those cases of other jurisdictions where it has been held that a prisoner who has been aided to escape by an outsider is not an accomplice of such outsider who furnished him with the means of escape. Ash v. State, 81 Ala. 76, 1 So. 558; State v. Duff, 144 Iowa 142, 122 N.W. 829, 24 L.R.A.,N.S., 625, 138 Am.St.Rep. 269; Bryce v. State, 130 Tex.Cr.R. 243, 93 S.W.2d 426.

[3] In order to avoid a circuity of reasoning in reaching a solution to the problem presented on this appeal it is necessary to bear in mind certain basic facts and principles. Firstly, Jeanette Paz is shown to be the principal to the crime of murder not only by her conviction on that charge, but also by her testimony at the trial of this defendant. Secondly, the defendant herein is not on trial for the crime of murder, but for violation of Penal Code section 32 in that he aided Jeanette Paz with the intent that she might avoid arrest, trial, conviction or punishment, having knowledge that she had committed the murder. Thirdly, it must be taken as axiomatic that one cannot be an accessory after the fact to his own crime. To hold otherwise would be analogous to stating the absurdity that a minor who purchases cigarettes might be charged not only with the illegal purchase, but also with contributing to the delinquency of himself as a minor. While it is true that from an abstract point of view one who is in truth and fact a principal to a crime might, for lack of evidence on such charge, be tried and convicted on the only evidence available of being an accessory to such crime, the practical possibility of the occurrence of such a circumstance does not detract from the truth that one cannot be tried and convicted of both charges. The clear language of Penal Code section 32 admits of no other construction than that the status of one guilty of the crime therein defined is inconsistent with and contributory to that class of participants included within section 31. Authorities are not lacking which hold that one cannot be both a principal and an accessory after the fact to the same crime (Regina v. Brannon, 14 Cox C.C. 394; People v. Chadwick, 7 Utah 134, 25 P. 737), although a complete absence of the statement in the reports might be expected from the unaffectedly simple nature of the inquiry.

The appellant further contends that the testimony of Jeanette Paz establishes the existence of a conspiracy between her and the defendant to murder the child, and therefore, the two being co-conspirators, are accomplices. In support of this argument reliance is placed upon People v. Lima, 25 Cal.2d 573, 154 P.2d 698, wherein it was held that in a prosecution for receiving stolen property the thief was an accomplice of the receiver, where the parties conspired in a prearranged plan for one to steal and the other to purchase the stolen goods from the thief. The court therein, however, did not depart from the statutory definition of an accomplice, but strictly applied it, specifically stating that by reason of the conspiracy between the parties each was liable to prosecution for either offense. In distinguishing and commenting upon the case of People v. Clapp, supra, the court stated: "The present case, however, does not relate to a situation where different statutory provisions separately prescribed punishment for the acts of certain participants in a crime. On the contrary, the same sections of the Penal Code, namely, sections 489, 490 (theft) and section 496 (receiving stolen property), provide for the punishment of the acts perpetrated by each and all of the parties in execution of the conspiracy or prearranged plan to deprive owners of their olives. Section 31 of the Penal Code is therefore applicable to each of them since there is no provision superseding that section. And while, as stated above, the prosecution under the peculiar facts of this case may have had a right to elect which of the group should be prosecuted for theft and which for receiving stolen property, it could not thereby eliminate the conspiracy element and resulting accomplice relationship." At page 579 of 25 Cal.2d, at page 701 of 154 P.2d.

In substance the position taken by the appellant on this point amounts to an assertion that he is guilty of a more serious crime than that with which he is charged, i. e. a principal in the crime of murder together with Jeanette Paz. In People v. Lima, supra, the designation of accomplice attached not because the testimony of the witness implicated the defendant in another crime of which both the witness and the accused were guilty (but for which the accused was not then on trial), but because the testimony of the witness implicated himself in the identical crime with which the defendant was charged. Herein lies the distinction between the Lima case and the argument of the appellant here that the testimony of Jeanette Paz involves him in the crime of murder by showing what he alleges to be a conspiracy between them to dispose of the child by killing it. If the testimony of this witness had established herself as being an accessory after the fact together with the defendant by means of a conspiracy to commit that crime, then the argument would be valid, but its fallaciousness is indicated by the impossibility of Jeanette Paz being both an accessory and a principal.

A different situation might have presented itself had Jeanette Paz not stood convicted of the crime of murder at the time of defendant's trial, or had she not testified so decisively as to her status as a principal.

[4] The definition thus followed and which the legislature has codified, namely, that one is an accomplice who is liable to prosecution for the identical offense charged against the defendant on trial, is in accord with what would appear to be the only rational theory for the existence of the rule requiring corroboration of the testimony of an accomplice—the possibility that the witness may be seeking to save himself by procuring the conviction of others upon the promise or expectancy of immunity or leniency. (See Wigmore in his treatise on Evidence, 3d Ed., Vol. VII, page 322.)

[5] We conclude that Jeanette Paz, having been convicted of the crime of murder, and such conviction not having been reversed at the time of the defendant's trial, and she further having testified positively as to her own acts in killing the child, could not be liable to prosecution as an accessory and therefore could not be an accomplice of defendant Wallin.

[6] Finally, appellant alleges prejudicial misconduct on the part of the district attorney as grounds for reversal. The first of two instances cited on this point consisted of a comment by the district attorney in his argument to the jury upon the failure of the defense to make a motion for an advisory verdict, or for "dismissal or instructed verdict" as he called it, at the close of the prosecution's case. No authority is cited to support the contention that such comment prejudiced the appellant's case before the jury by giving them "the false impression that counsel for appellant had the right to move for a dismissal of the case or an instructed verdict." The loose terminology was immaterial in its possible effect upon the jury; to the lay mind "instruct" being synonymous with "advise". See People v. Ward, 145 Cal. 736, 79 P. 448.

The second instance of alleged misconduct consisted of the district attorney's statement to the jury in connection with the arrest of the defendant, "I did not think I had sufficient evidence to charge him with murder; to me, the evidence unmistakably, conclusively and convincingly pointed to his complicity in the disposal of that body, with knowledge of what she had done."

[7] This comment on the circumstances of the appellant's arrest and the factual evidence which led to the arrest to which the district attorney refers after making this comment is entirely dissimilar to those cases cited by appellant, (People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102, and cases therein cited) in which it was held that a district attorney's statement of his own opinion as to defendant's guilt unsupported by evidence before the jury, or a statement that he would not prosecute a defendant unless convinced of his guilt, constitutes prejudicial misconduct. No such statement was made here and appellant has failed to point out any prejudice resulting from the quoted comment.

In view of the record as a whole, we cannot say that a miscarriage of justice has resulted as a consequence of these statements to the jury. Art. VI, sec. 4½ Const.

The judgment and order are affirmed.

THOMPSON, J., concurs.

83 Cal.App.2d 182

SABATHE et al. v. GALE.

Civ. 3805.

District Court of Appeal, Fourth District, California.

Jan. 8, 1948.

Rehearing Denied Jan. 29, 1948.

1. Mines and minerals ⇨38(18)

Evidence sustained judgment establishing common boundary between two lode mining claims.

2. New trial ⇨99

The refusal to grant defendant's motion for new trial was not abuse of discretion where the new evidence suggested was not controlling and would have merely added to the existing conflict.

3. Witnesses ⇨246(2)

In action to determine common boundary between lode mining claims, appointment of mining engineer to advise court with respect to existing physical facts and conditions was discretionary. Code Civ. Proc. § 662.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to determine common boundary between two lode mining claims by Frank M. Sabathe and others, against Jessie Gale. From the judgment, the defendant appeals.

Affirmed.

Ben F. Griffith, of Los Angeles, for appellant.

Emmett A. Tompkins, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to determine the common boundary between two lode mining claims in Riverside County.

On November 20, 1934, the plaintiffs located the "Southern Cross No. 4" mining claim on unsurveyed government land. It extended 1,500 feet northerly and southerly and 600 feet in width, being 300 feet on each side of the lode line containing the point of discovery. On December 15, 1934, the plaintiffs also located the "Lone Star" mining claim, adjoining the Southern Cross claim on the east. This claim also extended 1,500 feet northerly and southerly and 600 feet in width, being 300 feet on each side of the lode line containing the point of discovery. Thus the east side line of the Southern Cross claim was identical with the west side of the Lone Star claim, and the two points of discovery were approximately 600 feet apart. Both claims were legally claimed and monumented, and location notices were recorded and were posted in monuments at the respective points of discovery.

On April 9, 1935, the plaintiffs sold the Lone Star claim on contract to the defendant. While this deal was being made the defendant noticed a certain "open cut" near the dividing line between the two claims. She inquired whether this cut was on her claim and was told that it was. A year or two later, it was discovered that this cut was actually on the Southern Cross claim. The plaintiffs then voluntarily moved the dividing line between the two claims 53 feet westerly and marked the new dividing line with a row of monuments and stakes with notices attached, thus giving the defendant an additional 53 feet in order to make good their statement that this cut was upon her claim.

On January 31, 1945, the defendant, with her son and others, and the plaintiff Sabathe, went to the claims together. They found that the original notice for the location of the Lone Star claim was then in a monument at the "open cut" near the boundary between the two claims and Sabathe discovered that the original monument, discovery hole and notice for the Lone Star claim had been removed and destroyed. Sabathe told them that the place where the notice was then found, at the "open cut" near the boundary line, was not the place of discovery, but the defendant and her son insisted that it was and, over his protest, posted an amended notice of location at that point. On March 6, 1945, the defendant and her son, with a surveyor, returned to the claims and posted a second amended location notice at the "open cut" and had the surveyor survey a claim, using that point as the center and setting stakes for new corners with the result that the Lone Star claim, as claimed under the amended location notice, was moved 300 feet westerly, taking in 247 feet of the Southern Cross claim in addition to the 53 feet which had already been given to the defendant. It is this 247 feet which is in controversy here.

At some time after 1935 the defendant had also purchased a one-fourth interest in the Southern Cross claim, which she still owns. The defendant applied for a patent on the Lone Star claim in accordance with the survey which was thus made. The plaintiff Sabathe visited the claim and found the second amended location notice with the plat and notice of application for patent posted at the "open cut" near the boundary between the two claims and he then restored the monument at its original place on the Lone Star claim, approximately 600 feet east of the point of discovery on the Southern Cross claim, and placed a copy of the original location notice therein. He then filed an adverse claim in the United States Land Office and brought this action for the purpose of determining the true boundary between the two claims.

The trial court filed a memorandum decision holding that the point of beginning for finding the boundary of the Southern Cross claim would be at the discovery monument on that claim, a point which was thoroughly established in the evidence, and that the east line of that claim would be the west line of the Lone Star claim, as determined by measurements from this well-established point of beginning. Findings were accordingly made in favor of the plaintiffs and a judgment entered decreeing that the two amended location notices filed by the defendant and her survey and application for patent were unfounded and void, insofar as the 247 feet here in question is concerned, and that if the defendant acquired any right, title or interest through the filing of her amended location notices she acquired the same as trustee for the plaintiffs insofar as the 247 feet is concerned. From this judgment the defendant has appealed.

The appellant contends that certain of the findings are not supported by substantial evidence and are uncertain and conflicting; that some of the conclusions of law are erroneous for the same reasons; that the judgment is uncertain and contains conflicting provisions; and that the court failed to find upon several matters which are claimed to be material.

It is unnecessary to consider, in detail, the many points raised by the appellant. They are all based upon the contention that there was a "new discovery place" at the "open cut" near the boundary between the two claims which should be taken as the discovery point of the Lone Star claim, from which the 300 feet each way should be measured; that the court has failed to find and indicate the precise point of discovery on each of these claims; and that the evidence is insufficient to support the material findings made and the judgment based thereon. In making her argument appellant ignores the evidence which is unfavorable to her and relies on the so-called "new discovery place" when this has no immediate relation to the problem here presented. While a new discovery was later made at the "open cut" near the boundary line between the two claims no relocation or amended location was made, and this was never used, except as the appellant attempted it, as a discovery place for locating the claim which had long before been located by use of a discovery point some 300 feet easterly from the "open cut", and which had been maintained as such for many years until the monument was destroyed and the notice removed, apparently by the appellant or her agents.

[1] The evidence is overwhelming that the discovery point on the Southern Cross claim was clearly marked on the ground and that it was at the point where the court found and held it to be. That fact alone clearly establishes that the boundary line in question is approximately 300 feet easterly from that point, which entirely destroys all of the appellant's contentions. There is also substantial evidence to establish the location of the original discovery point of the Lone Star claim, and that this was approximately 600 feet easterly from the discovery point on the Southern Cross claim. Assuming that there was some conflict in the evidence with respect to this latter loca-

tion, it hardly seems possible that the trial court could have taken a contrary view of that evidence in the light of two other undisputed facts. The respondent Sabathe was a miner of many years' experience in this locality. Twenty-five days after he located the Southern Cross claim he located the Lone Star claim immediately to the east thereof, and with the same dimensions. Having just located the Southern Cross claim it seems incredible that he would use a point of discovery as the center line of the new claim which would give him less than the 600 feet to which he was entitled, or that he would take a new point of discovery on the boundary line between the two claims, thus losing one-half of the new claim he was attempting to make. The evidence to the contrary is not contradicted. Moreover, when the appellant was purchasing the Lone Star claim she was shown the boundaries of that claim by the respondent Sabathe; she was also familiar with the Southern Cross claim; she noticed the vein appearing in the "open cut" near the boundary between the two claims; she was particularly interested in that vein; and she was very careful to ascertain whether or not that "open cut" was within the boundaries of the claim she was buying or whether it was over the line on the Southern Cross claim. It seems unbelievable that she would have had any doubt about this matter, or have felt it necessary to require assurance in this regard, if this point had been at the center of the claim she was buying instead of at or near its edge. There is ample evidence to sustain the court's findings and conclusions, and there is no evidence which would have sustained a finding that the original discovery point on the Lone Star claim was at the place now claimed by the appellant and used by her in her amended location notices and application for a patent.

There is no uncertainty or indefiniteness in the judgment with respect to the location of the original discovery point on the Southern Cross claim which controls the rights to the lands here in dispute, and from which the true boundary between the two claims is readily ascertainable. There is no conflict between the material facts found. There is one mistake in the findings as to a certain distance, but this is immaterial here and in no way interferes with the definite and conclusive manner in which the starting point for the measurements necessary to determine the boundaries of the Southern Cross claim is established. The boundary line between these two claims is clearly established by the findings and judgment, and the record indicates that the trial court could not reasonably have come to any other decision.

[2, 3] The appellant further argues that the court should have granted her motion for a new trial and that the court erred in failing to grant her motion, made under section 662 of the Code of Civ.Proc., for the appointment of a mining engineer to advise the court with respect to existing physical facts and conditions. The new evidence suggested on the motion for a new trial was not controlling, would have merely added to the existing conflict, and the entire matter was well within the discretion of the trial court. The appointment of a mining engineer for the purpose suggested was also within the discretion of the trial court and the record discloses ample reasons why the court did not consider any such assistance necessary. The appellant purchased one of two adjoining claims with full information as to their location and boundaries and nothing appears in the record to justify her attempt, 10 years later, to take her half out of the middle of the combined properties. Even her own pleadings, and much of her own evidence, are opposed to such a result. The appeal is without merit insofar as anything material is concerned.

It clearly appears that the appeal was taken in proper time, and it is unnecessary to consider the appellant's application for the production of additional evidence relating to that matter.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

83 Cal.App.2d 215

TURNER et ux. v. HOPPER et ux.

Civ. 3478.

District Court of Appeal, Fourth District, California.

Jan. 12, 1948.

1. Waters and water courses ⚷119(3)

Every landowner must bear the burden of receiving upon his land the surface water naturally falling on land above it and naturally flowing to it therefrom, and he has corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon lower land adjoining, as it would flow under natural conditions.

2. Waters and water courses ⚷119(2)

Where under natural conditions surface water flowed from plaintiffs' land to defendants' land through a swale having an extreme width of 250 feet, plaintiffs by changing the swale to a ditch of 20 feet did not make such a change in natural conditions as to justify a complaint by defendants, where bottom of ditch was not below bottom of swale and was in lowest part of swale where surface water flowed before change, ditch was of ample size to accommodate flow of all surface water, outlet was in a similar location and ditch did not increase volume of surface water reaching defendants' land.

3. Waters and water courses ⚷119(5)

Where surface water originally flowed naturally through a swale from plaintiffs' land across defendants' land, defendants were entitled to fill in their land so long as the natural flow of surface water was not interfered with and defendants would be required to provide sufficient facilities to receive and transport surface waters naturally flowing from plaintiffs' land but would not be required to remove the fill and dam constructed by defendants cutting off the natural drainage where removal was unnecessary.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by L. M. Turner and Irene Chandler Turner, his wife, against George L. Hopper and Velda E. Hopper, his wife, to compel defendants to remove their obstruction to the natural drainage of surface waters wherein defendants cross-complained. From an adverse judgment defendants appeal.

Judgment affirmed as modified.

R. M. Crookshank, of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

MARKS, Justice.

This is an appeal from a judgment which enjoined defendants from interfering with the free passage of rain and surface waters from plaintiffs' property flowing across defendants' property, and required defendants to remove a "fill-in and dam" located on their property.

The evidence in this case is not conflicting. The precise problem presented does not seem to have been decided in the exact form appearing here in any California decision to which our attention has been directed.

Plaintiffs are the owners of eight acres of land lying east of Verano Road in Orange County, and defendants own five acres on the west side of that road. The north line of defendants' property is about 50 feet north of the southwest corner of plaintiffs' land. One Conkle owned the land immediately south of and adjoining plaintiffs' property.

The natural drainage of the land is slightly south of west so that the surface waters on plaintiffs' land originally would drain across part of defendants' property.

At least since a severe flood breaking out of the Santa Ana River in 1916, there has been a swale running across the southerly portion of plaintiffs' and the northerly portion of the Conkle property and extending westerly across defendants' land which drained the surface waters westerly so that they finally reached the Pacific Ocean. The drainage area is relatively small. Prior to the operations we will detail, the swale was described as about 250 feet wide and not over four feet in depth.

Verano Road extends north and south and separates the properties and some years ago was improved so that its grade was raised in crossing the swale. To permit the passage of surface waters from east to west two 12-inch pipes were placed under the road, presumably in or near the lowest portion of the swale as it then existed. The westerly fall of the country is gentle so that during heavy rains the water formed a pond on plaintiffs' and Conkle's properties before it drained through the pipes and across defendants' land.

Early in 1943 plaintiffs leveled their land and filled the swale to the grade of the surrounding land, but leaving a ditch about 20 feet wide and about four feet deep adjoining and north of their south line. Conkle filled his property to his north line. Thus a ditch was left along what had formerly been the lowest part of the swale which was otherwise closed by the leveling operations. Defendants leveled their property completely filling the swale by raising the ground to the approximate level of the adjoining land. This cut off the natural drainage of surface waters from plaintiffs' property across defendants' land to the injury of plaintiffs by causing water to pond along and on their property.

The purpose of this action was to compel defendants to remove their obstruction to the natural drainage of surface waters westerly across their land as it had flowed prior to the time they made their fill. The plaintiffs had judgment and this appeal followed.

Plaintiffs rely on the well-established rules governing the natural drainage of surface waters in this state. Here we have involved no stream or flood waters so we need give no attention to them. The rules governing the flow and overflow of stream and flood waters and the drainage of surface waters are set forth in detail in many cases of which we need cite only Heier v. Krull, 160 Cal. 441, 117 P. 530; San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; San Gabriel Valley Country Club v. City of Pasadena, 184 Cal. 201, 193 P. 97; LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Mogle v. Moore, 16 Cal.2d 1, 104 P.2d 785; Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1; Coombs v. Reynolds, 43 Cal.App. 656, 185 P. 877; and Switzer v. Yunt, 5 Cal.App.2d 71, 41 P.2d 974.

[1] The general rule applicable to the facts before us is clearly stated in Heier v. Krull, supra [160 Cal. 441, 117 P. 531], as follows: "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions."

Defendants in effect argue that the narrowing of the swale from an extreme width of 250 feet and changing it to a ditch of the width of 20 feet was such a change in the natural conditions as to justify their complaint of the conduct of plaintiffs.

[2] The evidence fails to support this contention. The bottom of the ditch is not below the bottom of the swale and is in the lowest part of the swale where surface waters flowed before, and the outlet is in a similar location. There is nothing to indicate that the ditch is not of ample size to accommodate the flow of all surface waters. There is undisputed evidence that the ditch does not increase the volume of water reaching defendants' land although it does increase the velocity of the flow across plaintiffs' property. As the volume of the surface waters reaching defendants' property is not increased by the ditch the burden placed upon them, as owners of the servient tenement, was not increased by the change made by plaintiffs in narrowing the swale to a ditch.

[3] We must next consider the right of landowners to level their properties by

filling in depressions on them. The only California case to which we have been cited bearing directly on that question is Switzer v. Yunt, supra, which is relied upon by both parties and which we believe must be held to be decisive of the issues here presented, although there are some factual differences in the two cases.

In Switzer v. Yunt, supra, it appears that Yunt owned 80 acres of land on the east side and Switzer owned 20 acres on the west side of a county road in Tulare County which had been raised in grading with a pipe extending across and under the road at the low point. The slope of the country was westerly so, as far as ordinary drainage was concerned, the Yunt property was the dominant tenement and the Switzer land the servient tenement. The land was originally "hog wallow land" which had to be leveled before it could be farmed successfully. There was a depression of about one and one half acres on the Yunt property which witnesses referred to as a "duck pond". It held water during the rainy season. Yunt leveled his property and raised the bed of the "duck pond" but did not otherwise change the general level of the land so that after grading the drainage was still westerly. He dug several ditches which caused water to flow towards the pipe under the road. Switzer built a dam on his property opposite the west end of this pipe. During a hard rain the dam broke and the water washed away top soil and fertilizer which had just been spread.

In his actions Switzer sought damages caused by the water erosion and an injunction prohibiting Yunt from permitting any water from his land to escape onto the Switzer property. The trial court gave Switzer damages in the sum of $200 and enjoined Yunt from causing by artificial means (the dug ditches) any water to flow from the Yunt property onto the Switzer land. It also enjoined Switzer from maintaining a dam or bank that would interfere with or prevent the natural flow of surface waters westerly and that would cause the water to back up on the Yunt property. This judgment was affirmed on appeal.

It was held that an owner could level his property to make it fit for cultivation but could not by artificial means (dug ditches there) increase the discharge of surface waters onto the land of a lower owner; that the lower owner could not, by means of an artificial dam, prevent the natural flow of surface water onto his property. Numerous cases are cited to support these conclusions which we think are controlling here.

It was held that owners had the right to level their properties and to fill in the low places to make their respective properties fit for cultivation just so long as the grading and filling operations did not increase the burden placed on the servient tenement to receive the natural flow of surface waters from the dominant tenement; that the owner of the servient tenement could not, by artificial means, prevent the natural flow of those surface waters onto his property. We can see no difference in principle between a dam several feet wide involved in the Switzer case and a fill several hundred feet wide involved here. Both were intended to check the natural flow of surface waters along the course provided by Nature.

Among other things, the judgment in the instant case provided that defendants "are, and each of them is, hereby ordered to forthwith remove the fill-in and dam located on their real property situated in the County of Orange, State of California, described as follows".

The foregoing portion of the judgment might well be construed as requiring defendants to remove all of the dirt placed in the fill so as to leave the swale in its original condition of about 250 feet wide. We do not believe that it is necessary to place any such burden upon them any more than it is necessary to require plaintiffs to remove all of the dirt they placed in the swale to level it. All that the law requires is that defendants receive the surface waters naturally flowing onto their property so that it will not back up onto plaintiffs' land. It is obvious that with the small drainage area involved and the relatively small ditch which plaintiffs find sufficient to care for the surface water, that a swale 250 feet wide across defendants' property is not necessary.

It is ordered that the quoted portion of the judgment be stricken therefrom and in lieu thereof the following be inserted: "are, and each of them is hereby ordered to provide sufficient facilities to receive and transport the surface waters naturally and normally flowing from plaintiffs' property hereinbefore described, and such facilities to be of sufficient capacity to receive and transport such surface waters from plaintiffs' property that may flow through or over the county road at that place, so that such surface waters may flow onto and across defendants' property in the County of Orange, State of California, described as follows".

As so modified the judgment is affirmed. Each of the parties will pay their own costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

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83 Cal.App.2d 147

SAVOIA v. MOOREHEAD et al.

Civ. 15753.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1948.

1. New trial 🔑27

New trial for error of law should not be granted unless such error is prejudicial. Const. art. 6, § 4½.

2. Appeal and error 🔑978(1)

Granting of new trial for error of law will not be disturbed on appeal except for manifest abuse of discretion. Const. art. 6, § 4½.

3. New trial 🔑35

In wrongful death action wherein jury rendered verdict in favor of defendants, granting of new trial, on ground that admission of evidence in response to questions suggesting that defendants or insurance carrier might have lien on judgment in return for consent to dismissal of other defendant was prejudicial, was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Carmen Savoia against Dan H. Moorehead and others to recover damages for wrongful death. Jury rendered verdict in favor of defendants. From an order granting plaintiff's motion for new trial, the defendants appeal.

Affirmed.

Chase, Rotchford, Downen & Chase, Richard T. Drukker, and Donn B. Downen, Jr., all of Los Angeles, for appellants.

Samuel A. Rosenthal, of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant action is one for damages for wrongful death brought by the father of decedent, a minor. In his complaint, plaintiff named as defendants Dan H. Moorehead and Jane Moorehead, individually and as copartners d. b. a. Dan Moorehead Construction Company, their employee, James Parrish; the Airline Bus Company, its employees, and several fictitious defendants. Plaintiff alleged that while his deceased minor son was upon Highway 33, near Avenal, Fresno County, on July 3, 1944, he was struck by a truck negligently operated by an agent of defendants Moorehead so as to cause him to be thrown to the pavement and that he was then struck and run over by a bus negligently operated by an agent of the Airline Bus Company; that such alleged acts of negligence proximately caused the death of said minor, Anthony Savoia, to the damage of plaintiff.

At the start of the trial, plaintiff dismissed the action against all defendants except Dan H. Moorehead, Jane Moorehead and James Parrish, and the jury rendered its verdict in their favor. Thereafter, upon motion of plaintiff, the court granted a new trial. This appeal is prosecuted from the order granting said motion.

A statement of facts which respondent agrees is "correct" appears in appellants' opening brief to the following effect:

"The Macco-Robinson Construction Company, employer of respondent's decedent, was constructing a pipe line running in a general southerly direction along Highway 33. The point at which this pipe line began with reference to this accident was approximately one mile north of the point of impact. The pipe line was being laid on the west side of the highway approximately eighteen feet west of the west shoulder running along the highway. This shoulder was an oiled dirt shoulder approximately five to six feet wide. To lay the pipe line it was necessary that an excavation be dug, the pipe fitted, sealed with tar, cemented, and lowered into the excavation * * *.

"From the northern beginning of the excavation to the point of impact, a distance of approximately one mile, certain 'Men at Work' signs were located at intervals of several hundred feet. These signs were placed approximately two to three feet west of the west edge of the highway and were themselves about three feet in width. At a point opposite the point of impact and at the west side of the highway there was parked a truck having an ordinary tar pot connected to the rear end in 'trailer fashion'. Both the truck and the 'trailer' were situated just west of the west shoulder of the highway. The respondent's decedent, who had been on the job for one or two days, and who was about sixteen years old, was engaged in drawing hot tar from the tar pot in buckets and carrying the tar over to the excavation for use by other employees of the construction company. At or about the time the accident occurred, the decedent was drawing a bucket of hot tar and either the bucket or the tar pot itself burst into flames. The decedent then dropped the bucket and ran in an easterly direction onto the highway. He reached a point approxmately midway across the highway when he suddenly reversed his direction from east to west and started back toward the west edge of the highway. When he had reached a point approximately two feet east of the west edge of the pavement he was struck by appellants' truck.

"The right front fender and bumper came in contact with decedent and carried him across the highway in an easterly direction, dropping him on the highway where his leg was run over by the Airline Bus. Death resulted during an amputation of this leg."

The trial court granted respondent's motion for a new trial "on the ground of errors of law occurring in the trial and excepted to by the party making the application and motion for new trial."

While appellants urge that "there was no error of law in the record," they assert that the trial court could have relied solely upon two possible errors of law in granting the motion for the new trial, to-wit:

"(a) The admission of the questions and answers relating to the possibility of the receipt of consideration by respondent for the dismissal of the joint defendant other than appellants; and (b) the admission in evidence of Exhibit 'G' and the failure to remove this evidence from the jury's consideration."

"It is settled that before a voluntary dismissal as to one defendant will operate as a release of a codefendant it must appear that the defendants are joint tort-feasors and that plaintiff has received some satisfaction for such dismissal. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Commercial Transfer, Inc., v. Daigh & Stewart, 33 Cal.App.2d 370, 91 P.2d 951; Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.2d 556, 558, 90 P. 2d 371." Key v. Caldwell, 39 Cal.App.2d 698, 701, 104 P.2d 87, 88.

Therefore, say appellants, when counsel for respondent announced his dismissal of action against the codefendants, stating that there had been no consideration or satisfaction for the same, "the door was closed to appellants in the matter of a retraxit unless appellants could establish by evidence the fact that respondent had received consideration amounting to a satisfaction in exchange for his dismissal of the other alleged tort feasors."

Appellants were permitted to examine respondent (in chambers and out of the hearing of the jury) over the objection of his counsel, as follows:

By Mr. Downen:

"Q. And you knew that the terms of the complaint charged the defendant Airline Bus Company with having been guilty of some negligence which was a direct and proximate cause of the injuries and resulting death of your son, that is true, isn't it? A. That is true.

"Q. And you do know that they no longer are a defendant, that they have been dismissed through your counsel, that is true, isn't it? A. Well, I did everything that my lawyer tells me, that is all; I don't know nothing about it.

"Q. Your lawyers told you that the Airline Bus Company has been dismissed? A. That is what he told me.

"Q. Now, let me ask you this question, Mr. Savoia; In consideration, that is in return for your consenting to the dismissal of the Airline Bus Company have you received any money whatsoever? A. Not from bus line, I never receive a dime.

"Q. Now, has the bus line agreed or said that they would sometime in the future after the trial of this case or during the trial of the case pay you any sums of money in return for your having consented to that dismissal? A. You want to know if I would accept that money?

"Q. No; I want to know if they have made you a promise to pay you any money in the future in return for the dismissal? A. Not that I know of, I never hear of it.

"Q. Not that you know of. Now, Mr. Savoia, do you know whether or not the bus company has agreed to repay and apply upon any lien which the employer Macco Construction Company or its insurance carrier might have against any possible judgment which you receive in this action any sum of money in return for your having consented to the dismissal of that company, the Airline Bus Company? A. I don't know what that is, I don't know a thing about the Airline, I don't know what is going to come. I have no arrangement on anything, I am just neutral, that is all, I am just taking my lawyer's word that is all.

"Q. Do you know whether any other arrangement has been made whereby the bus company, that is, the Airline Bus Company will pay to Macco Construction Company or to the insurance carrier for Macco Construction Company any sum of money in return for their having been dismissed from this action; do you know? A. I don't know whether they are going to do or not, I don't know nothing. * * *

"The Court: Do you still insist that you want that matter before the jury?

"Mr. Downen: Yes, your Honor. The Court: All right. Call the jury in. How do you want to present it to the jury?

"Mr. Downen: On the record, your Honor.

"The Court: All right. The reporter can read it. * * *

"The Court: The Court finds the jurors present and in their places. Members of the jury, during your absence the reporter took down some testimony from the plaintiff, Carmen Savoia, which the reporter will now read to you. (The reporter then read to the jury the testimony of the plaintiff, Carmen Savoia, which was taken in chambers at a time when the jury was not present.)"

That the trial court considered this testimony prejudicial to respondent is evinced by his comments at the time he granted the new trial, to-wit: "When you analyze what the witness, Carmen Savoia, said in that respect, it was simply that he knew absolutely nothing at all; that he was just a poor ignorant Italian and he did not know anything about it and he did not even know what counsel was talking about. There was nothing of any constructive value in what he said and nothing of evidentiary value to go before the jury. Still I permitted it to go before the jury and I am satisfied that I committed error in letting it be done for the simple reason that it exaggerated in the minds of the jurors the old question of insurance—that somewhere in the background, some insurance was going to take care of something. That was wrong. * * * I don't think that that matter was proper to go before the jury."

[1] "The trial court, no less than the appellate court, is expressly enjoined by article VI, section 4½, of our Constitution to deny a new trial for error of law unless such error is prejudicial. If it is clear that the error could not have affected the result of the trial, the court is bound to deny the motion. But if the error can possibly have been prejudicial, the trial court must con-

sider its probable effect and decide the motion accordingly." Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929, 931.

[2] And, as stated in Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 792, 178 P.2d 445, 451: "Whether or not the rights of the moving party were prejudiced by an error of law occurring at the trial is a matter which rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action in granting a motion for a new trial upon that ground except for a manifest abuse of discretion."

In Ferrario v. Conyes, 19 Cal.App.2d 58, 61, 64 P.2d 975, 976, the order of the trial court granting plaintiff a new trial was affirmed where defendant's counsel injected before the jury, the issue of his being paid compensation by his employer. It was there stated: "Where a workman is injured in the course of his employment by a person other than his employer, he is entitled to bring an action at law against such party and he is not to be prejudiced in such action by the fact that he may be receiving compensation. * * * It is well established in this state that it is prejudicial misconduct in an action of this type for the opposing party to bring before the jury the fact that the employee suing a person other than his employer is entitled to or being paid compensation by his employer."

[3] In granting the motion, the trial court necessarily considered the probable effect upon the jury of the evidence objected to, especially the question: "Now, Mr. Savoia, do you know whether or not the bus company has agreed to repay and apply upon any lien which the employer Macco Construction Company or its insurance carrier might have against any possible judgment which you receive in this action any sum of money in return for your having consented to the dismissal of that company, the Airline Bus Company?" And, there was no abuse of discretion by the court when it decided that such evidence was prejudicial to respondent's cause.

In view of the conclusion heretofore reached, it is not deemed necessary to decide whether the admission in evidence of Defendants' Exhibit G constituted prejudicial error. An examination of the record with respect to this document reveals that it was marked for identification at the request of appellants and later in the trial was offered in evidence by respondent's counsel, at which time the trial court stated that he had grave doubts "as to any of the memorandum being admissible in evidence."

For the reason stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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82 Cal.App.2d 958

CLYNE et al. v. BROCK et al.

Civ. 7380.

District Court of Appeal, Third District, California.

Dec. 18, 1947.

1. Jury 🔑10

The right of trial by jury as guaranteed by the Constitution is the right as it existed at common law or in those cases triable by a jury as a matter of right under the common law. Const. art. 1, § 7.

2. Jury 🔑14(6)

Where primary result sought by plaintiffs' action was cancellation of deed of reconveyance and adjudication that real property was held subject to deed of trust, action was clearly equitable in nature and was not triable by jury at common law, so that denial to defendants of a jury trial was not an abuse of discretion. Const. art. 1, § 7.

3. Stipulations 🔑14(7)

Where plaintiffs contended that entries, allegedly made by decedent in a receipt book, were forged, and defendants contended that entries proved payment and court asked for a stipulation, which was made for submission of entries to an expert selected by court, and defendants did not ask for an examination by an expert of their own choosing until they discovered that testimony of expert chosen by court was adverse, denial of defendants' request to obtain a handwriting expert of their own choosing was not error.

4. Executors and administrators ⚷450

In action by executrix and certain of decedent's children to set aside deed of reconveyance and for an adjudication that decedent's son and daughter-in-law held real estate subject to a deed of trust in decedent's favor, wherein son and daughter-in-law contended that note secured by trust deed was paid, evidence justified judgment for executrix.

5. Bills and notes ⚷499

The fact that note alleged by defendants to have been paid was still in possession of decedent in her safety deposit box at time of her death raised a presumption that note was wholly unpaid.

6. Deeds ⚷196(2, 3)

While neither mere relationship of mother and son, nor advanced age of mother nor her physical disabilities alone are sufficient to raise a presumption of fraud or undue influence in conveyance of property from mother to son, son bears a confidential relationship to his mother and he has burden of showing that transaction out of which advantage arose was fair and just.

7. Appeal and error ⚷203(3), 230

Defendants, by failing to properly and timely object to testimony of attorneys or their secretary concerning transactions in which attorneys over a period of years had acted for all parties, waived any infirmity testimony might have had as a privileged communication.

8. Witnesses ⚷213

Testimony of attorney relative to defendants' income tax returns was properly excluded on ground that information was privileged.

9. Witnesses ⚷199(2)

Where persons have mutually employed same counsel and have discussed freely their problems in presence of one another and their counsel, reason for rule of privilege has been destroyed, since each party by such concerted action thereby has waived right to place such communications under shield of privilege.

◆

Appeal from Superior Court, Yuba County; Ben R. Ragain, Judge.

Action by Alice Louise Clyne, individually and as executrix of the last will and testament of Jeanette M. Brock, deceased, and others against Frank A. Brock and Ethel Brock to set aside a deed of reconveyance executed by decedent and to declare certain property subject to the lien of a trust deed and for other relief. From a judgment for plaintiffs and from an order denying defendants' motion for a new trial, defendants appeal.

Judgment and order affirmed.

Manwell & Manwell, of Marysville, for appellants.

Rich, Weis, Carlin & Fuidge, of Marysville, for respondents.

PEEK, Justice.

Some time prior to 1920 defendant Frank Brock purchased a ranch from his mother Jeanette M. Brock, giving her a note and mortgage for the unpaid balance of the purchase price. This was followed by a note and trust deed dated October 25, 1927, which apparently was a renewal of the original note and mortgage, and which in turn was followed by a trust deed and note dated October 5, 1932, in the amount of $25,000. All of said instruments, except the first, were signed by Frank and his wife Ethel, the other defendant herein. Five years later Frank and Ethel entered into an agreement with Jeanette wherein they acknowledged that neither the last mentioned note nor the interest thereon had been paid. They further agreed to pay the same on demand and waived the statute of limitations. On December 1, 1937, a typewritten endorsement, which was signed by Frank and Ethel and accepted by Jeanette stated the balance to be the sum of $20,000. Further endorsements on the note showed six interest payments had been made from 1938 to 1941. Jeanette died July 27, 1945, and shortly thereafter proceedings were instituted to probate her will. Plaintiff Alice Louise Clyne and defendant Frank Brock were named as executors thereof. On November 19, 1945 the present action was filed. All of the parties to said action except Ethel are the children of Jeanette.

By their complaint plaintiffs allege that decedent was 94 years of age at the time of her death, and that during the year immediately preceding that event was failing both physically and mentally; that all of her children except her son Isaac and defendant Frank resided some distance from her home in Wheatland; that defendants lived only one block from decedent and were constantly with and cared for her during the winter of 1944-45; that during such time Jeanette counseled with defendants concerning her financial affairs and reposed great confidence and trust in them; that relying upon the false and fraudulent representations of defendants that their obligation to her, as evidenced by said note and trust deed of October 5, 1932, had been paid in full, decedent was induced to and did execute a request for a full reconveyance of said trust deed which request was complied with by the trustees named therein. The complaint concluded with a prayer that the court determine the amount owing to the estate by defendants Frank and Ethel; that the said deed of reconveyance be set aside and canceled, and that the said ranch property be declared to be subject to the lien thereof. By an amendment to plaintiffs' complaint it is further alleged that the purported signature of Jeanette to said request for said reconveyance was forged. Defendants' answer denied that any monies were owing to said decedent by virtue of said note and trust deed, and alleged that the same had been repaid prior to her death.

From the exhaustive findings of fact, which in the main followed the allegations of the complaint, the court concluded that defendants were indebted to the estate in the principal sum alleged, together with interest; that a confidential relationship existed between decedent and defendants; that the signature of decedent to the request for reconveyance of the deed of trust was obtained fraudulently or was a forgery; that the reconveyance issued pursuant to said request should be canceled and that the real property be subject to said trust deed and lien thereof.

Defendants' appeal is from the judgment entered in accordance with said findings of fact and conclusions of law and from the order of the trial court denying their motion for a new trial.

[1,2] Appellants' first contention, that the Constitution of this state guarantees a trial by jury (Article I, sec. 7) the court abused its discretion in denying this right to them, is not well founded. The right so guaranteed by the Constitution is that of the right as it existed at common law or in those cases triable by a jury as a matter of right under the common law. (15 Cal. Jur. 325.) Here the primary result sought by plaintiffs' action was the cancellation of the deed of reconveyance and that the real property be held subject to the deed of trust. Such action is clearly equitable in its nature and is not triable by jury. Pomeroy v. Collins, 198 Cal. 46, 243 P. 657; Proctor v. Arakelian, 208 Cal. 82, 98, 280 P. 368; Angus v. Craven, 132 Cal. 691, 64 P. 1091; Santa Ana Mortg. & Inv. Co. v. Kinslow, 30 Cal.App.2d 107, 110, 85 P.2d 899.

[3] Appellants' next contention, that the court erred in refusing them the right to obtain a handwriting expert of their own choosing as a witness in their behalf, is likewise without merit. An examination of the transcript discloses that the trial court desired testimony by an expert concerning certain entries appearing in a small receipt book owned by Frank, which entries related to payments alleged by defendants to have been made to decedent. These entries plaintiffs contend were forged. Specifically the court stated: "I wonder if counsel on each side would like to have this case continued for a proper time and have this book submitted to one of our experts to be chosen by the Court, to determine from a scientific standpoint whether or not those entries were in fact made as stated, in this book at the times stated."

In answer to the court's suggestion the following colloquy occurred between the trial judge and counsel:

"Mr. Rich: Yes.

"Mr. Manwell: I haven't looked. I have no objection.

"Mr. Fuidge: I don't know who your Honor has in mind.

"The Court: It will be one of the recognized authorities along this line. Would that be agreeable to counsel?

"Mr. Manwell: I haven't looked at it. Certainly."

* * * * * *

"The Court: The court would rather have the matter left to the Court. It will be one in whom I am sure counsel would have absolute confidence in.

"Mr. Manwell: Certainly."

Thereupon the case was continued one month so that such an examination could be made, and upon reconvening of the court on May 3, the court stated as follows:

"The Court: I might state, as counsel remember, at the close of the taking of testimony on April 3rd, the Court suggested, or asked for a stipulation that the matter might be continued for one month and that this Court be authorized to submit Exhibit B to an expert of its own choosing, and that the expert's testimony be given at this time. That stipulation was given. I will state that same afternoon the Court forwarded a letter to Mr. Heinrich, who is present in Court now."

Thereupon Mr. Heinrich was sworn and testified that instead of the entries in the account book being made by defendants on different dates over a period of years, the entries were made continuously as one set of writings. After the witness had explained how he arrived at that conclusion and was cross-examined by counsel for appellants, the following statement was made to the court:

"Mr. Manwell: If your Honor please, I would like to have an opportunity, if these exhibits will be filed in the Clerk's office—the original book will be there—if we could have another expert."

In answer to the request, the court replied:

"That will not be allowed, because under the stipulation, the Court may submit the writing to any expert of his choosing, which the Court had absolutely confidence in and that was stipulated to and we would only be getting into controversial matters, and the request will not be allowed. That is one of the reservations made at the time of the closing of the case and isn't part of the stipulation.

"Mr. Manwell: We will ask it be submitted on briefs and we may determine something along that line, during submission * * *."

Therefore it appears that appellants did not ask for an expert of their own selection until it was ascertained that the testimony of Mr. Heinrich was against them. In effect they gambled on his testimony and lost. Appellants cite no authority, or do we know of any, to support their contention that they should have been allowed to obtain an examination of the writings by an expert of their own choosing after learning that the testimony of the expert chosen by the court pursuant to stipulation of counsel was unfavorable to their position.

[4] Appellants next attack the findings, that they were guilty of fraud and/or forgery, as being wholly unsupported by the evidence. The only evidence of payment of the $20,000 appears in testimony by Frank that he kept a book in which he entered payments as made. However, this is the same book containing the entries which the handwriting expert testified were all posted at one and the same time and not as individual items entered at the time of the purported payments.

The law firm appearing for respondents herein, represented and did income tax work and other business for both decedent and appellants. Two members of the firm, Messrs. Weis and Carlin, were the trustees in the deed of trust. Decedent's income tax returns were made at her home by Mr. Carlin and according to this witness at no time did she or Frank tell him the indebtedness had been paid. Carlin also testified that pursuant to a request from Frank he prepared a reconveyance of the trust deed as well as a form of request from decedent to the trustees that they execute the reconveyance, and mailed such documents to Frank. Later the request purportedly signed by Jeanette was returned to Carlin by Frank, and the reconveyance executed by the trustees.

There is evidence that this instrument, after being recorded, was mailed to Frank, accompanied by a statement of the fee for drafting and recording the same, which Frank paid. However, he denied receipt thereof but at no time did he complain to the attorneys of his failure to receive the document. There was further testimony that decedent kept an account book of receipts and disbursements which was seen in the house at the time of her death but disappeared thereafter and had not been found up to the time of trial. Also, there is testimony that no mention of payment of the debt was made by Frank to any of his sisters or brothers until after the death of their mother. Contrary to Frank's claim that he paid his mother, Mrs. Martha Waltz, his sister, in addition to testifying that she never heard of the payment until after her mother's death, stated that in 1943 her mother tried to have her take over the note of Frank and Ethel.

[5] As previously stated appellants were constantly in the home of the elderly decedent during the period immediately preceding her death. They produced neither a single canceled check nor other evidence of payment except the aforementioned book of Frank's, the entries in which the handwriting expert found were all entered at the same time. Additionally, the note alleged to have been paid was still in the possession of the decedent in her safety deposit box at the time of her death, which fact of itself raises an additional presumption that the note was wholly unpaid. Levey v. Henderson, 177 Cal. 21, 169 P. 673; Bank of Italy etc. v. Bettencourt, 214 Cal. 571, 7 P.2d 174; Egilbert v. Hall, 44 Cal.App.2d 305, 112 P.2d 291.

[6] While it is true that neither the mere relationship of mother and son nor the advanced age of the testator nor her physical disabilities alone, are sufficient to raise a presumption of fraud or undue influence (Best v. Paul, 101 Cal.App. 497, 281 P. 1089), however, where, as here, one who bears a confidential relationship to his or her benefactor has derived a benefit from such relationship the law places upon him the burden of showing that the transaction out of which the advantage arose was fair and just in all of its particulars. Hatch v. Penzner, 44 Cal.App.2d 874, 113 P.2d 295.

All of such facts, including the presumptions previously mentioned present ample evidence to sustain the findings of the trial court on this issue.

The next and final contention of appellants is that the court erred when it permitted the attorneys, who had acted over a period of years for all parties, to testify over the objection of counsel for defendants to confidential information gathered while acting in such capacity.

[7] An examination of the transcript reveals that with one exception no objection was interposed to the testimony of the attorneys or their secretary concerning the transactions here in question, and that counsel for appellants cross-examined each witness on the evidence so given. By failing to properly and timely object to such testimony they thereby waived any infirmity the testimony might have had as a privileged communication. Faylor v. Faylor, 136 Cal. 92, 68 P. 482; 27 Cal.Jur. 55.

[8] The one exception was the objection by appellants to questions propounded to attorney Carlin relative to Frank's income tax returns, which the trial court properly sustained on the ground that the information was privileged.

[9] However, it is well established that where, as here, persons have mutually employed the same counsel and have discussed freely their problems in the presence of one another and their counsel, the reason for the rule of privilege has been destroyed, for each party by such concerted action thereby has waived the right to place such communications under the shield of privilege. Leitch v. Gay, 64 Cal.App.2d 16, 22, 147 P.2d 631; De Olazabal v. Mix, 24 Cal.App.2d 258, 262, 74 P.2d 787; Croce v. Superior Court, 21 Cal.App.2d 18, 19, 68 P.2d 369; Gerety v. O'Sheehan, 9 Cal.App. 447, 450, 99 P. 545; Harris v. Harris, 136 Cal. 379, 69 P. 23.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

HEUER v. HEUER et al. *

Civ. 7373; Sac. 5828.

District Court of Appeal, Third District, California.

Jan. 10, 1948.

Rehearing Denied Feb. 9, 1948.

Hearing Granted March 8, 1948.

1. Appeal and error 🔑882(3)

Defendants who tried case on theory that property involved was community property could not change theory on appeal by contending that property was held in joint tenancy.

2. Divorce 🔑326

A person collaterally attacking a foreign divorce decree has burden of proving its invalidity.

3. Divorce 🔑327

A foreign divorce decree may be impeached in another state on ground that neither of parties had domicile at the divorce forum, notwithstanding recital in divorce decree of jurisdictional fact of domicile or residence.

4. Divorce 🔑327

A foreign divorce decree may be impeached collaterally by extrinsic evidence showing that court pronouncing decree did not have jurisdiction because petitioning party had not established a bona fide domicile.

5. Appeal and error 🔑1010(1)

Where evidence sustains trial court's findings on questions of fact, reviewing court cannot reverse the judgment.

6. Divorce 🔑327

In wife's action to set aside husband's conveyance of community property, where husband relied upon Nevada divorce decree, evidence relating to circumstances under which husband was temporarily located in Nevada at time of obtaining decree sustained trial court's determination rejecting the Nevada divorce decree on ground that husband was not a bona fide resident of Nevada.

7. Divorce 🔑327

The fact that wife appeared in Nevada divorce proceeding did not preclude her from attacking Nevada divorce decree on ground that husband did not have a bona fide residence in Nevada, in absence of any showing that wife tendered issue in the Nevada proceeding as to bona fides of her husband's residence.

8. Husband and wife 🔑265

A husband is without right, prior to death, to give away any of community property without wife's consent, and, if he attempts to do so, wife may have conveyance set aside and property restored to the community.

9. Divorce 🔑327

The fact that findings of Nevada court in divorce proceeding stated that plaintiff was a bona fide resident of Nevada was not conclusive in collateral proceeding on question of whether the issue was contested in Nevada proceedings, where findings were entered several months after decree and at a time when plaintiff was not a resident of Nevada.

THOMPSON, J., dissenting.

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Georgia Heuer against Henry Heuer and others to set aside conveyances by the named defendant to the remaining defendants. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

John Sinai, of Reno, Nev., and Fontaine Johnson and Thomas Perkins, both of Sacramento, for appellants.

Gumpert & Mazzera, by J. Calvert Snyder, all of Stockton, for respondent.

ADAMS, Presiding Justice.

Plaintiff Georgia Heuer brought this action in San Joaquin County against defendant Henry Heuer and two of his brothers, alleging that she and Henry Heuer were husband and wife, that they were the owners of certain described real and personal community property, which said property her husband, during their marriage, had conveyed to one or the other of his said brothers, without consideration and without her consent and for the purpose of defeating and defrauding her of her rights therein; and she prayed judgment that such conveyances be set aside.

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* Subsequent opinion 201 P.2d 385.

Defendants answered said complaint, denied that Henry Heuer and plaintiff were husband and wife, admitted that they had been such but alleged that on October 25, 1945, defendant had secured a decree of divorce from plaintiff in Nevada. They admitted that the property described in the complaint was community property, and that Henry Heuer had executed the conveyances as alleged in the complaint; but asserted that said conveyances were intended to convey only Henry Heuer's half interest in such community property, and that such conveyances were made for full and adequate consideration.

After trial of the issues raised by the pleadings, the trial court made findings in conformity with the allegations of the complaint, found that plaintiff and defendant Henry Heuer were husband and wife, that the property in controversy was community property, that the conveyances executed by defendant Henry Heuer (with one exception not involved on this appeal) were made without any valuable consideration, and that they were made for the sole purpose of defrauding and defeating plaintiff of her interest therein. Judgment was entered ordering that all of the conveyances executed by Henry Heuer (with the exception above noted) be vacated, that the real and personal property described therein be declared to be the community property of plaintiff and defendant Henry Heuer, and that the title thereto be quieted against any claims of Clarence Heuer and/or James Heuer, the grantees in the aforesaid conveyances.

On this appeal the questions raised by appellants are said to be: (1) Can a husband acting without his wife's consent convey his interest in real property which is held by himself and his wife as joint tenants? (2) Can a contested Nevada divorce decree which recites that evidence was heard on both sides and that from such evidence the court finds that there was a bona fide residence in Nevada be rendered void by a collateral attack which fails to produce any proof of lack of a bona fide residence? (3) Is community property transformed into a common tenancy when the husband and wife are divorced?

[1] The first of these questions need be given no consideration since it was admitted in defendants' answer and was stipulated during the trial that all of the property involved was community property; and the trial court so found. Defendants' counsel during the trial made no claim that the property was held in joint tenancy, his contention being, as stated by him, that "the husband can convey a half interest in the community property at any time regardless of what the status of the marriage is." Appellants may not be permitted to change their theory on appeal. Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715; Hayward Lumber & Investment Co. v. Ford, 64 Cal.App.2d 346, 354, 148 P.2d 689.

As for appellants' second contention, that the divorce secured by Henry Heuer in Nevada was valid, it is urged first that such a decree rendered in a sister state is presumed to be valid, that the issue of jurisdiction of the Nevada court was contested by the parties in that state, and that respondent is precluded by her conduct from attacking the Nevada decree.

[2-4] That in a collateral attack upon a foreign divorce decree the burden of proof is upon one asserting its invalidity has been frequently stated by our courts. See Crouch v. Crouch, 28 Cal.2d 243, 249, 250, 169 P.2d 897; De Young v. De Young, 27 Cal.2d 521, 524, 165 P.2d 457. However, it is equally well established, as stated in Crouch v. Crouch, supra, 28 Cal.2d at page 549, 169 P.2d at page 900, that a decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicil at the divorce forum; and that this is true notwithstanding the recital in the decree from the other state of the jurisdictional fact of domicil or residence. And, as stated in another way in the Crouch case (28 Cal.2d at page 250, 169 P.2d at page 900), it is always competent to impeach collaterally a decree of divorce rendered in another state by extrinsic evidence showing that the court pronouncing it did

not have jurisdiction because the petitioning party had not established a bona fide domicil.

[5] That the determination of whether defendant Henry Heuer was or was not a bona fide resident of Nevada at the time of the rendition of the decree in that state was a question of fact for the determination of the trial court in the case before us is conceded. Under well established rules of law, if there is competent evidence in a record sufficient to sustain the findings of a trial court on questions of fact this court cannot reverse its judgment. Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; 10 Cal.Jur. 1167, 1168, sec. 380; 2 Cal.Jur. 918, sec. 542.

[6] We think there is sufficient evidence to justify the findings in this case. It shows that plaintiff and defendant Henry Heuer were married in California in October, 1911, and lived together in this state until March, 1944. On September 18, 1944, Heuer filed a complaint for divorce in San Joaquin County, alleging extreme cruelty. Plaintiff herein filed an answer and cross-complaint in the action. On January 25, 1945, the parties entered into an agreement that they would go back together and live on one of their parcels of real property in San Joaquin County. The divorce proceeding was thereupon dismissed. Mrs. Heuer testified that she immediately took steps to put their proposed residence into livable condition, and that defendant gave her some little assistance. They did not, however, resume marital relations, and on or about June 11, 1945, Henry Heuer took the trailer in which he had been living, and went to Reno, Nevada, where one of his brothers resided. He secured employment there with a construction company, lived in his trailer at an auto court, paying by the week, and took his meals with his brother Clarence. On July 24, 1945, he filed his action for a divorce, and, as his wife had come to Reno to see about her husband's health, summons was there served upon her. She personally appeared in the action when it came on for hearing on October 25, 1945, but as the pleadings in that action are not in the record before us, nor is a transcript of the proceedings, the extent of her contentions before that court is not apparent; but she did not testify there. However, it appears to be conceded by her counsel that she did consent to the entry of a decree in favor of her husband, which decree was made and entered on October 25, 1945.

Approximately one month after the entry of that decree Henry Heuer left Nevada, and has ever since resided in California, living in the trailer which, in November, 1945, he had transferred to his brother James. During the course of the original divorce litigation in California and up to the time that the present action was filed, said defendant made various transfers of the community property to his brothers. The first was made on or about January 8, 1945, and the next was made in May, 1945, less than a month before he went to Nevada. On July 19, 1945, he made another transfer, and, as above stated, conveyed his trailer house in November; and on February 9, 1946, he transferred the remaining item of real property. In this action he testified in his own behalf and sought to show that the property transfers were made for a valuable consideration. He also testified that he intended to make his home in Nevada after he went there, and still intends to do so; that he returned to California in November, 1945, on the advice of a doctor who stated that the Nevada climate was too severe for his health; that he could not do his kind of work there during the winter weather. However, the trial court was not bound to accept the statements of this defendant as true, and we are of the opinion that it was justified in disregarding them. His testimony was in many respects evasive. And his general course of conduct, as well as his testimony, fully justifies the inference that he went to Nevada solely for the purpose of getting a divorce, and that he did not establish a bona fide residence there. While in the reconciliation agreement which he entered into with plaintiff on January 25, 1945, he agreed to resume the relationship of husband and wife with plaintiff and agreed that he would use his best efforts to support and maintain a home for her, and be a dutiful and considerate husband, he took no steps to that end. Though it is stated in appellants' brief that the agreement was that the parties should live on the property described as Parcel One, and the testimony shows that plaintiff herself moved there and prepared it for their occupancy, Heuer continued to live in his trailer. Also he had, in fact, already conveyed Parcel One to his brother Clarence, on January 8, 1945. He admitted that after going to Nevada he was back in California several times on business, that when he went to Reno he left some of his tools in California, that while in Nevada his trailer was registered in this state, that he retained his union affiliation here, that he did not change his social security address, and did not register as a voter in Nevada; that he did not work all the time while there; that one of the reasons he went there was to get a divorce; and that his present home is wherever he can get a job.

In Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 1098, 89 L.Ed. 1577, 157 A.L.R. 1366, the court said that the record showed that petitioners, long-time residents of North Carolina, came to Nevada where they stayed in an auto court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It then added: "It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina."

It would, we think, be equally unreasonable to assert that in the instant case the trial court could not reasonably find that Heuer went to Nevada solely for the purpose of divorce, and intended all along to return to California.

While other testimony of this witness is relied upon by appellants, it merely creates a conflict and need not be considered here.

[7] As for appellants' contention that respondent is precluded by her conduct from attacking the Nevada decree because she appeared in the action there, the record before us does not show that she there tendered the issue as to the bona fides of her husband's residence in that state. And in Crouch v. Crouch, supra, the court said, 28 Cal.2d at page 250, 169 P.2d at page 901, that a decree of a foreign state, based upon personal or constructive service or "even a personal appearance," may be attacked upon the ground that the party seeking the divorce had not established a bona fide residence. Numerous authorities are there cited including In re Estate of Davis, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545 (hearing in Supreme Court denied), in which it is said 38 Cal.App.2d at page 582, 101 P.2d 762: "No act of the parties in the nature of waiver, stipulation, appearance, consent or estoppel can confer upon a foreign court a jurisdiction which it does not possess when the subject matter of the controversy is beyond its limitations. Kegley v. Kegley, 16 Cal. App.2d 216, page 220, 60 P.2d 482; In Estate of Bruneman, 32 Cal.App.2d 606, 608, 90 P.2d 323; In re Estate of McNutt, 36 Cal.App.2d 542, 98 P.2d 253." Also see Andrews v. Andrews, 188 U.S. 14, 40, 41, 23 S.Ct. 237, 47 L.Ed. 366, 373.

Finally, appellants urge that the effect of the Nevada decree, which did not purport to dispose of the community property, was to transform the interest of the spouses therein into a tenancy in common, thus rendering valid as to his one-half interest any transfers made by Henry Heuer after the divorce decree was rendered; and that such property should have been adjudged to belong to plaintiff and the respective grantees as tenants in common. Also that all other community property which was such prior to the Nevada decree should now belong to plaintiff and Henry Heuer as tenants in common. Just what property should be included in the latter classification is not pointed out by appellants. They describe the various real properties as Parcels One, Two, Three and Four. Only Parcel Four was conveyed by Henry Heuer after the Nevada decree, the other three parcels having been conveyed as follows: Parcels

One and Two on January 8th and Parcel Three on July 19th, all in 1945.

As for the personal property appellants describe it as Items One, Two, Three, Four and Five. A conveyance of Item Three, furniture and furnishings on Parcel Two, a motel, was made to defendant Clarence Heuer on May 11, 1945, and of Item Four, the trailer and a Dodge coupe, to James Heuer in November, 1945. Presumably, as Items One, Two and Five were not conveyed, it is those items which appellants say should be declared to be held by plaintiff and Henry Heuer as tenants in common.

[8] Regarding the property conveyed, as it was community the conveyances were ineffective, for it is well established in this state that a husband has no right, prior to death, to give away any of the community property without the wife's consent; and when this is attempted to be done, the wife has a right to have such a conveyance set aside in its entirety and the property restored to the community. See Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221; Ballinger v. Ballinger, 9 Cal.2d 330, 334, 70 P. 2d 629; Lynn v. Herman, 72 Cal.App.2d 614, 618, 165 P.2d 54; Matthews v. Hamburger, 36 Cal.App.2d 182, 184, 97 P.2d 465.

[9] Appellants argue that the issue of the bona fides of plaintiff's residence in Nevada was contested in the Nevada divorce proceeding. They state in their brief that the Nevada court set forth in its findings "the facts that it had heard evidence on both sides and that, from such evidence, it determined that Henry Heuer was a bona fide resident of Nevada."

However, an examination of the said findings shows that they were not made or filed prior to or at the time that the divorce decree was rendered in October, 1945, but that they are dated April 22, 1946, and recite that they were "Done in open court this 22nd day of April, 1946" (which was after the institution of the action before us). And what they recite about Heuer's residence is that "the said plaintiff, Henry Heuer, is now and has been for more than six weeks last past, continuously preceding the filing of the complaint herein, a bona fide resident of and domiciled within the County of Washoe, State of Nevada, and has been physically and corporeally present in said County and State each and every day for said period of time." Just why the said findings were made at such a late date is not explained; but obviously Heuer was not, on April 22, 1946, a resident of Nevada, nor had he been such for six weeks then last past. Apparently they were secured to be filed by the judge of the Nevada court in April, 1946, solely for use in the case before us, as the copy introduced in evidence by appellants was certified by the clerk on April 23, 1946. The decree which was rendered on October 25, 1945, recites that it appeared to the court that plaintiff then was, and had been for more than six weeks immediately preceding the filing of the complaint, a resident of and domiciled in Reno, but there is nothing in said judgment to indicate that the issue of the bona fides of his residence had been controverted by defendant in the action; nor does said decree indicate that any testimony whatever was introduced by Mrs. Heuer or on her behalf.

However, as held by the cases above cited, consent of respondent could not have conferred jurisdiction upon the Nevada court where neither of the parties had established a bona fide residence there, and as the trial court has found, in effect, that appellant Henry Heuer did not have a bona fide residence in Nevada. the judgment appealed from is affirmed.

PEEK, Justice (concurring).

Although I concur in the opinion of Presiding Justice ADAMS, I cannot do so without voicing my disagreement with the rule as stated by our Supreme Court in Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897, and the United States Supreme Court in Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366, which compel like conclusions by this court.

For a member of an intermediate appellate court of this state to discuss at length the principles enunciated by the respective Supreme Courts in those two cases with the avowed purpose in so doing to show the conclusions therein approved to be improper and thereby reach a contrary conclusion in this case, is to liken oneself to the man who could not be put in jail. However impotent I may be under the circumstances the conviction remains that the reasons for the minority view as stated by Justice Schauer in his dissenting opinion in the Crouch case (Justice Carter concurring) which in general followed the dissenting opinions of Justices Rutledge and Black (Justice Douglas concurring) in the Williams case, impress me as a much more sound approach to the problem presented—the full faith and credit clause as applied to a judgment of divorce of a sister state admittedly valid therein.

THOMPSON, Justice (dissenting).

I dissent.

I am convinced the trial court erred in setting aside the instrument of conveyance of the properties, in toto, and in quieting title thereto in both the husband and the wife. The judgment should be modified in that regard and sustained only to the extent of Mrs. Heuer's undivided one-half interest therein. Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429; Trimble v. Trimble, 219 Cal. 340, 344, 26 P.2d 477. It was stipulated that the properties were acquired by Mr. and Mrs. Heuer during their previous marriage. He admitted in his answer that he had no intention of conveying to his brothers more than his one-half interest in the properties. If he conveyed the properties to defraud his wife, as the court found that he did, equity should leave him in the situation in which he placed himself, and not reward him for his fraud by cancelling the instruments entirely and quieting title in him, as well as in his wife. He claims no interest in the properties. He did not ask the court to quiet title in him to any portion of the property. A modification of the judgment, as suggested, would protect the plaintiff, Mrs. Heuer, in her title to all interest which she claims in the properties conveyed.

The trial court erroneously determined that Mr. and Mrs. Heuer "are now husband and wife." The majority opinion assumes that was a sufficient finding upon which to base a conclusion that the former Nevada divorce is void for lack of jurisdiction and for lack of proof of plaintiff's residence in that forum. I think not. The Nevada decree is entitled to full faith and credit. Mrs. Heuer, the plaintiff in this case, is estopped from collaterally denying the validity of that divorce decree, since she went to Nevada where she was personally served with process; she appeared in person and by counsel, answered the complaint and participated in the trial; she stipulated, in that trial, that "all the issues raised by the pleadings are adjudicated by the granting of a decree to plaintiff;" she was awarded by the terms of that decree, and profited by the allowance of $2,500 for her support and maintenance, and she acquiesced in that decree by profiting thereby and by failing to appeal therefrom.

The complaint in this case was silent regarding that former Nevada divorce, but Mr. Heuer, one of the defendants, in his answer alleged its existence and relies upon its conclusiveness. The findings and decree in the Nevada divorce case were received in evidence in this case without objection. The Nevada court specifically found that Mrs. Heuer appeared with counsel, answered the complaint and participated in the trial. That court determined that "evidence having been introduced on behalf of both parties" the "plaintiff, Henry Heuer, is now and has been for more than six weeks last past, * * * a bona fide resident of and domiciled within the County of Washoe, State of Nevada," and that the defendant was guilty of extreme cruelty as alleged in the complaint. Upon those findings plaintiff was awarded a divorce on the ground of extreme cruelty, and defendant was awarded alimony in said sum of $2,500. Under such circumstances, as between the former spouses, that decree is final and conclusive as to their marital status and is entitled to full faith and credit under the provisions of Article IV of the Constitution of the United States. I do not favor bootleg divorces, but I am concerned in preserving inviolate the constitutional guaranty of full faith and credit for all judgments of other states without discrimination. The majority opinion in this case appears to disregard that important principle by denying its application, and that of estoppel, to the circumstances of this case. The authorities appear to be uniform to the effect that Mrs. Heuer is estopped from collaterally attacking the Nevada decree for lack of jurisdiction, for insufficiency of proof of plaintiff's residence, or otherwise, since she was personally served in Nevada with process and appeared and participated in the Nevada trial, because she had the opportunity of proving that plaintiff had not acquired a residence in that forum, and for the reason that she consented to and profited by the decree containing an award in her favor of $2,500 alimony. Frost v. Frost, 260 App.Div. 694, 23 N.Y.S.2d 754; Bruguiere v. Bruguiere, 172 Cal. 199, 203, 155 P. 988, Ann.Cas. 1917E, 122; 17 Am.Jur. 574, secs. 759-761; 27 C.J.S., Divorce, § 337.

In the authority last cited it is said, at section 337:

"A person may be estopped to attack, impeach, or deny the validity of, a foreign divorce decree, as where he or she obtained the decree, participated in the fraud or wrong by which the decree was obtained, voluntarily appeared in the foreign action, did some act which in itself recognized the validity of the decree, accepted the benefits of the decree, or treated it as valid, or took advantage thereof, by remarrying."

California and other authorities have adopted the rule that, as between the parties to a foreign divorce, the spouse who procured the divorce and recognized its validity by remarrying another person, is estopped from thereafter denying the validity of the decree. Kelsey v. Miller, 203 Cal. 61, 86, 263 P. 200; Petry v. Petry, 47 Cal. App.2d 594, 118 P.2d 498; Estate of Davis, 38 Cal.App.2d 579, 582, 101 P.2d 761, 102 P. 2d 545; 153 A.L.R. 946, note; 39 A.L.R. 695, note.

In the Frost case, supra, upon facts which were similar to those of the present action, except that the question of benefiting by an award of alimony and maintenance, in the decree of divorce, was not involved therein, the New York court held that since the defendant appeared by counsel and answered in a previous Nevada suit for divorce, a decree in favor of the wife dissolving the marriage was immune from collateral attack by him in a subsequent suit in New York on the ground that the wife had not acquired a residence in the State of Nevada. The wife brought suit for divorce in Nevada, alleging a bona fide residence of six weeks in that state. The husband appeared by an attorney and answered in that suit for divorce. The Nevada court found that the allegations of the complaint were true, and rendered a decree of divorce in favor of plaintiff, dissolving the marriage. Subsequently the husband brought suit in New York to set aside that decree of divorce on the ground that "neither of the parties was a resident of the state of Nevada." [260 App.Div. 694, 23 N.Y.S.2d 756] That is exactly what occurred in the present case. The New York court said in that regard:

"We think the Nevada decree cannot be subjected to collateral attack in this State and that it constitutes a conclusive adjudication of a then existing marriage. The Nevada court had jurisdiction of the subject-matter in the sense that it had power to grant or withhold a decree of divorce. Kinnier v. Kinnier, 45 N.Y. 535, 539, 6 Am. Rep. 132. It had jurisdiction over the person of the plaintiff in that action (the defendant here) in consequence of the complaint which she had filed. It had jurisdiction over the defendant in that action (the plaintiff here) by his voluntary submission to its jurisdiction by an attorney authorized to appear for him. Tatum v. Maloney, 226 App.Div. 62, 234 N.Y.S. 614. One of the issues which it was necessary to determine in that action *was the wife's residence within the State,* and that issue the Nevada court decided in her favor. *The question of her residence could have been litigated by the husband had he desired to litigate it then. That he did not do. Not having done so, the determination is as conclusive upon him as the determination of any other issue of fact.* Hunt v. Hunt, 72 N.Y. 217, 28 Am.Rep. 129; Pray v. Hegeman, 98 N.Y. 351. *He may not now assert that the issue of residence was not correctly determined on account of an imposition practiced by the defendant on the Nevada court or on account of collusion of the parties.* Glaser v. Glaser, 276 N.Y. 296, 12 N.E.2d 305; Tiedemann v. Tiedemann, 225 N.Y. 709, 122 N.E. 892. The fraud of which he complains was fraud perpetrated on the Nevada court in respect to the very issue which was submitted for determination. Against fraud of that character courts of other States do not accord relief, even if it be assumed that relief is available at all. [Citing authorities.]" (Italics added.)

In the present case the Nevada divorce decree is less vulnerable to attack for lack of residence of the plaintiff, for the reasons that Mrs. Heuer not only answered in the divorce case, but personally appeared and participated in the trial, and consented to the rendering of the decree, and also obtained and enjoyed the benefits of an award therein of alimony, maintenance and counsel fees.

The marital status of the former spouses in this case was a vital issue, for upon that status the character of the owner's title to the property and the husband's authority to convey his half interest therein depended. The Nevada divorce decree did not purport to distribute to the spouses any of their community properties, with the exception of the allowance of alimony. It was stipulated the spouses owned community property. When a valid decree of divorce is rendered, which does not dispose of the community property, the divorce dissolves the community interests and the former husband and wife thereafter became tenants in common of such property. Brown v. Brown, 170 Cal. 1, 3, 147 P.1168; Lang v. Lang, 182 Cal. 765, 770, 190 P. 181; Biggi v. Biggi, 98 Cal. 35, 38, 32 P. 803, 35 Am.St.Rep. 141; Buller v. Buller, 62 Cal. App.2d 687, 693, 145 P.2d 649; Tabler v. Peverill, 4 Cal.App. 671, 676, 88 P. 994; 1 Schouler on Marriage and Divorce, 6th Ed., 643, sec. 614.

Except when a party is estopped by his conduct or appearance in an action in another state, a judgment of that forum may be impeached by evidence of a lack of jurisdiction, collusion or fraud. C.C.P., sec. 1916. But the presumption is in favor of the validity of the judgments of sister states. C.C.P., sec. 1963, subd. 16. The burden is on one who asserts a lack of jurisdiction or residence in another forum to establish those facts by "clear and convincing proof." In re Estate of Wiechers, 199 Cal. 523, 527, 250 P. 397, 398; Collins v. Maude, 144 Cal. 289, 293, 77 P. 945. In addition to plaintiff's estoppel in this case to deny the validity of the Nevada divorce on account of the husband's alleged lack of residence, or otherwise, her evidence in that regard is neither clear nor satisfactory. Moreover, if the trial judge intended to determine that the Nevada decree was void for lack of jurisdiction, insufficiency of evidence of the husband's residence in Nevada, or otherwise, this defendant, Henry Heuer, certainly was entitled to specific findings on those vital issues. The trial court failed to adopt those findings in this case. All that it determined was that plaintiff and defendant "are now husband and wife." The Nevada court, upon evidence *adduced "on behalf of both parties"* specifically found that Henry Heuer was a bona fide resident of Nevada. To hold the contrary in this suit would seem to refute the very purpose for which Article IV of the Federal Constitution was adopted. We are without knowledge as to what evidence was adduced at the Nevada trial. The burden was on Mrs. Heuer to furnish this court with the evidence adduced at that trial, which she failed to do. The result is that this court in effect prefers to accept the judgment of our California court on that issue rather than that of the foreign court, regardless of convincing or even conclusive evidence which may have been received by the Nevada court. The full faith and credit clause was adopted to prevent that very conflict of judicial authority.

Domestic relations are the source of many perplexing problems. The differences in application of apparent conflicting principles in this case demonstrate the need of a uniform national divorce law. For many years we have had a national bankruptcy act. Why not adopt a national divorce act to apply to bankrupt marriages? Public welfare seems to demand it.

The judgment in this case should be modified to hold the conveyances void as to plaintiff's one-half interest in the properties, and to quiet title in her to such interests only. The Nevada divorce decree should be upheld as valid, particularly on the ground that plaintiff is estopped from denying its validity.

Rehearing denied; THOMPSON, J., dissenting.

83 Cal.App.2d 206

DE VICTORIA v. ERICKSON et al.

Civ. 13550.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1948.

Rehearing Denied Feb. 11, 1948.

1. Appeal and error ⚿989

A reviewing court in passing upon the merits of a motion for new trial merely passes upon the legal sufficiency of the evidence to sustain the determination of the matter in the trial tribunal if the question is evidentiary. Code Civ.Proc. § 657.

2. New trial ⚿72

The trial judge in passing on the merits of a motion for new trial must weigh the evidence and consider the reasonably resulting inferences if the question is evidentiary. Code Civ.Proc. § 657.

3. New trial ⚿41(2)

If an error of law has occurred in admission of evidence over objection and failure of court upon proper motion to eliminate evidence from consideration, trial judge in passing on merits of motion for new trial may consider all circumstances surrounding the ruling, including weight that may be accorded the questioned evidence, attitude of interrogator, and any other facts tending to show importance of admission or rejection of the evidence. Code Civ.Proc. § 657.

4. Appeal and error ⚿933(1)

The reviewing court being confined to the record is warranted in assuming that action of trial court in granting a new trial is an indication of importance that trial court placed on ruling and its influence in causing a miscarriage of justice. Code Civ.Proc. § 657.

5. Appeal and error ⚿978(1)

Where, in action for injuries, testimony injurious to plaintiff was admitted on ground that testimony was foundation for impeachment of witness, but, after eliciting testimony, a written statement offered by defendants as impeaching evidence was excluded because of defendant's failure to show the persons present or circumstances surrounding signing of statement and defendant abandoned proposed impeachment and trial court failed to rule on plaintiff's motion to strike out the testimony, order granting plaintiff's motion for a new trial would be affirmed. Code Civ. Proc. §§ 657, 2052.

6. Automobiles ⚿160(1), 216

A motorist and a pedestrian are bound to the duty of using the care of a person of ordinary prudence acting under the same or similar circumstances.

7. Appeal and error ⚿978(1)
New trial ⚿39

In granting a new trial on the ground of erroneous instructions, as upon other grounds, much is committed to the discretion of the trial court, and an abuse of such discretion must appear before the order will be set aside. Code Civ.Proc. § 657.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Ruth De Victoria against Donald P. Erickson and others for personal injuries. From an order granting a new trial, defendants appeal.

Order affirmed.

Hoge, Peiton & Gunther, Franklin C. Latcham, and Leo V. Killion, all of San Francisco, for appellants.

Abraham M. Dresow and Burton McGovern, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from an order granting a new trial in favor of plaintiff in a personal injury action. The motion for a new trial was made upon all of the statutory grounds designated in Code of Civil Procedure, sec. 657. The record does not disclose the ground or grounds upon which the order was based. During the oral argument counsel for plaintiff designated certain errors considered as grounds for a new trial. It was then stipulated that the respective parties should file additional briefs.

In the present case on cross examination witness Joseph De Victoria, a son of plaintiff, was interrogated. The following appears in the record:

"Q. Don't you [De Victoria] recall of a gentleman coming up there, and you saying to him, giving out certain exclamations of distress about this automobile that had gone by and splashed the water, and caused you to back up?

"Mr. Dresow [attorney for plaintiff]: Just a minute, I object to that as not proper cross examination.

"Mr. Gunther [attorney for defendants]: It is laying the foundation. I have such a witness.

"Mr. Dresow: You can impeach him by other testimony.

"Mr. Gunther: Your Honor, I am laying the foundation for the impeachment.

"The Court: All right.

"Mr. Gunther: Q. After the accident, there at the scene, do you recall of a gentleman coming up there and talking to you? A. I remember a lot of people saying a lot of things to me, sir.

"Q. But do you remember a gentleman coming up? A. I recall there was quite a few people around there, that is all.

"Q. Do you recall a gentleman coming up while your mother was still lying there on the pavement? A. No, sir.

"Q. Do you remember of a gentleman coming up and taking off his overcoat and putting it over your mother? A. No, sir.

"Q. And do you recall of a gentleman, after taking off his overcoat, standing there in the rain without any overcoat, while his overcoat was on your mother, until the ambulance came? A. No, sir.

"Q. Do you deny that you ever tried to get the number of this car that went by? A. Yes, sir.

"Q. And do you deny that a car ever splashed any water on you? A. Yes, sir.

"Q. And you also deny the fact that you backed up at any time? A. Yes, sir."

Further questions were asked and answers given as grounds for the foundation for impeachment, tending to show that a car, other than defendants', caused the accident. Defendants then offered a written statement, evidently signed by the witness but written by some other person, as impeaching evidence. This written statement was excluded from the record evidently because defendant did not show the persons present or the circumstances surrounding the signing of the statement. Plaintiff thereafter moved to strike out the evidence previously claimed to be grounds for impeachment. The court failed to rule on this motion. Defendants not only failed to prove, through the witness Joseph De Victoria, the circumstances of time, place and persons present as a foundation for the subsequent offer of the written statement, but refused, or at least neglected when the statement was finally offered, to prove "the circumstances of times, places, and persons present" when the alleged impeaching statement was signed by the witness. Code, Civ.Proc., sec. 2052. The record indicates that after asking questions of Joseph De Victoria injurious to plaintiff Ruth De Victoria's claim for damages against defendants, the defendants abandoned the proposed impeachment of the witness.

[1-5] The special duty imposed upon a reviewing court in passing on the merits of a motion for a new trial is distinct and separate from the function of a trial judge in passing upon a similar motion. If the question is evidentiary the reviewing court merely passes upon the legal sufficiency of the evidence to sustain the determination of the matter in the trial tribunal. The trial judge in his official capacity must weigh the evidence and consider the reasonably resulting inferences. 20 Cal.Jur., p. 110, sec. 70. If an error of law has occurred in the admission of evidence over objections and failure of the court upon proper motion to eliminate the evidence from consideration, the trial judge may consider all the circumstances surrounding the ruling of the court, including the weight that may be accorded the questioned evidence, the attitude of the interrogator and any other fact tending to show the importance of the admission or rejection of the evidence. The reviewing court, confined to the record on appeal, and without oppor-

tunity to precisely weigh the effect of the ruling upon the triers of the facts, is warranted in assuming that the action of the trial court in granting a new trial is an indication of the importance that the trial court placed on the questioned ruling (20 Cal.Jur., p. 136, sec. 87) and its influence in causing a miscarriage of justice.

The second point relied upon by plaintiff as a reason why the new trial was properly granted is the refusal of the trial court to give a certain instruction. The trial court did not designate the grounds upon which the new trial was granted. This court has been aided only by the reasons set forth by plaintiff. The refused instruction reads: "You are instructed that defendant Donald P. Erickson, the driver of the automobile, and Mrs. De Victoria, the pedestrian, were both chargeable with only the exercise of reasonable care, but a greater amount of such care was required of the defendant Erickson, the driver of the automobile, at the time of the accident in question by reason of the fact that he was driving and operating an automobile which was capable of inflicting death or injury upon others on the highway."

[6] Similar instructions have been approved and disapproved depending in great measure upon the facts of each appealed case. See Warnke v. Griffith Co., 133 Cal. App. 481, 24 P.2d 583. In Dawson v. Lalanne, 22 Cal.App.2d 314, at page 315, 70 P.2d at page 1002, it was declared that a similar instruction "states the rule of law applicable to the facts of the case and has been approved in a number of cases." However, the court also stated: "The error in failing to give the instruction becomes more apparent when it is considered that the court gave at the request of the defendant the following instruction: 'No higher or greater degree of care was required of the defendant to avoid the accident than was required of the plaintiff. Each was required to exercise ordinary care under the conditions confronting him.' The refused instruction was not covered in any of the instructions given by the court." It is not necessary to state that the substance of the instruction would be proper on a second trial. The evidence thereon may differ considerably from that on the previous trial. It may have been error to refuse the instruction on the first trial though other instructions appear to cover the subject matter. If it is appropriate on a second trial it would be well to add that a driver and a pedestrian are "bound to the duty of using the care of a person of ordinary prudence acting under the same or similar circumstances." McNear v. Pacific Greyhound Lines, 63 Cal. App.2d 11, 18, 146 P.2d 34, 37. This is a measuring medium or standard of the amount or quantum of care that should be used by each party.

[7] "In granting a new trial on the ground of erroneous instructions, as upon other grounds, much is committed to the discretion of the trial court, and an abuse of such discretion must appear before the order will be set aside." 20 Cal.Jur., p 140, sec. 92. Whether there was an abuse of discretion in refusing the proposed instruction as applied to all the facts of this case is not necessary to decide in view of the prejudicial errors in the admission of evidence.

The order granting plaintiff's motion for a new trial is affirmed.

PETERS, P. J., BRAY, J., concur.

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83 Cal.App.2d 282

LE BLOND v. WOLFE et al.

Civ. 15920.

District Court of Appeal, Second District,
Division 3, California.
Jan. 16, 1948.

As Modified Jan. 29, 1948.

1. Brokers 🔑43(1)

An agreement authorizing or employing an agent or broker to purchase realty for compensation or a commission is invalid unless it, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

2. Frauds, statute of ⚷116(3)

An authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. Civ. Code, § 2309.

3. Frauds, statute of ⚷119(2)

The statute of frauds was enacted to prevent fraud, and courts will not permit it to become the instrument of fraud. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

4. Frauds, statute of ⚷144

The facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds, and foreclose such party from relying thereon, and the operation of the doctrine of equitable estoppel is not limited to any particular class of contracts included within the statute of frauds, provided that the essential elements of an estoppel are present. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

5. Brokers ⚷43(1)

In action for broker's commission where defendant contended that broker's claim was unenforceable under statute of frauds, evidence warranted conclusion that conduct of defendant gave rise to an equitable estoppel against the setting up of the statute of frauds by defendant. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

6. Frauds, statute of ⚷144

Where a party who relies on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it will be an injustice to permit the other party to rely on statute of frauds, doctrine of equitable estoppel will be invoked and statute of frauds is not available to perpetuate the fraud. Civ. Code, § 2309.

7. Brokers ⚷60

Prospective purchaser could not relieve himself from his contractual liability to pay licensed real estate broker commission of $2,500 by signing a supplemental escrow instruction, without the knowledge or agreement of the broker, authorizing the escrow holder to pay the $2,500 only "if and when the deal was closed".

8. Brokers ⚷60

Unless the wording of an agreement with a real estate broker makes payment of his commission contingent on the performance of the terms of the contract between the vendor and the purchaser or any of them, the voluntary abandonment of the contract cannot affect the broker's rights to commission.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Fred Le Blond, Jr., against Jean Wolfe and Alexander Bisno to recover a real estate broker's commission. From a judgment in favor of the plaintiff as against Alexander Bisno, Alexander Bisno appeals.

Judgment affirmed.

Benjamin & Lieberman, of Los Angeles, for appellant.

Richard J. O. Culver and Felix H. McGinnis, both of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Appeal by defendant Bisno from a judgment for plaintiff in an action for a real estate broker's commission.

Plaintiff, a licensed real estate broker, was employed by owners of real property, situate in Eureka, California, to effect a sale of the property. The price asked included a commission of $5,000 to plaintiff. Plaintiff interested Bisno in purchasing the property. After some negotiation Bisno orally informed plaintiff that he would buy the property if he could do so at the asking price less plaintiff's $5,000 commission. Bisno orally asked plaintiff to release the owners of the property from their obligation to pay him a commission and to obtain from them a net price exclusive of any commission to plaintiff and that if plaintiff did so he (Bisno) would pay plaintiff $2,500 for his services. Pursuant to Bisno's request and in reliance upon his oral promise to pay him $2,500, plaintiff released the owners from any obligation to pay him a commission and obtained a net offer to sell to Bisno for the previous asking price exclusive of any commission to plaintiff.

Bisno orally agreed to buy at the net price upon the terms and conditions fixed by the sellers. Bisno was an active operator in large properties maintaining an office in Chicago and one in Los Angeles. He had operated in Los Angeles for only a relatively short period before the transaction involved here. Bisno, in his real estate operations, followed the apparently invariable custom of never signing a contract or escrow instructions personally. He acted through a "dummy." He did so in order that he could hold the other party to the contract or escrow instructions bound thereby and at the same time "back out of the deal * * * without obligation" himself. Plaintiff knew of Bisno's practice in this respect. He and Bisno had consummated two or more transactions in which Bisno acted through a "dummy."

Upon Bisno's oral agreement to buy, he orally informed plaintiff that one Jean Wolfe, Bisno's stenographer, was his authorized and acting agent with authority to bind him in connection with the purchase of the property. An escrow was opened on July 27, 1944. The sellers signed escrow instructions. Wolfe, at the direction of Bisno, signed the buyer's instructions. On the same day, in the presence of Bisno and at his direction, Wolfe signed the following instrument: "Additional or Supplemental Escrow Instructions to Beverly Hills National Bank and Trust Company Escrow No. 12977-P. It is the understanding and agreement of the undersigned that the printed conditions on the reverse side hereof shall be and are hereby made a part of these instructions. July 27, 1944. The undersigned Buyer will hand you the additional sum of $2,500.00 which you will pay to Early Investment Company for services rendered. License No. 17031. Address 3841 Wilshire Blvd., Los Angeles, 5, California., *if and when deal is closed.* Jean Wolfe." (Italics added.) The words, "if and when deal is closed," were written by Wolfe in her handwriting in the presence of Bisno and at his direction. Among the printed conditions on the reverse side of the instrument is an agreement by the escrow holder to deliver money received by it in accordance with the written instructions given to it in the escrow. Plaintiff did not agree to the terms of this instrument. The insertion was made and the instrument signed without his knowledge or consent. The instrument was delivered to the escrow holder. Plaintiff is the owner of all rights of Early Investment Company in the money payable under the instrument.

Wolfe did not have written authority of any sort to act for or bind Bisno. Thereafter, and before the date fixed for closing of the escrow, the sellers performed all of the obligations of the escrow on their part to be performed. Wolfe did not perform any of the obligations of the buyer in the escrow. Bisno failed and refused, without any justification whatever, except his claim that he was not legally bound, to perform the buyer's obligations in the escrow.

Plaintiff sued Bisno and Wolfe alleging an obligation on the part of each of them to pay him $2,500. Bisno and Wolfe, by the attorneys now representing Bisno, filed separate answers, each seeking exoneration from liability. The attorneys claimed on behalf of Wolfe that she was not liable because she acted only as agent for Bisno, and claimed on behalf of Bisno that although he had orally authorized Wolfe to act and that she did act pursuant to his directions, he was not liable because he did not authorize Wolfe to act in writing. In his answer Bisno pleaded no liability because the "deal" was not closed, and that the agreement to pay plaintiff $2,500 was unenforceable under the statute of frauds.

The court found the facts as we have stated them, found that the "deal" was not closed because of Bisno's refusal to perform the obligations of the escrow, and concluded that the defense of the statute of frauds was not available to Bisno. Judgment was for Wolfe and for plaintiff against Bisno. Bisno appealed.

Appellant contends, first that plaintiff's claim is unenforceable under the statute of frauds, and second, that if it is enforceable, the escrow instructions provided that plaintiff was to be paid "if and when deal is closed"; that the "deal" was not closed, therefore nothing is owing to plaintiff.

[1-5] An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a com-

mission is invalid unless the same, or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. Civil Code, sec. 1624, subd. 5; Code Civ.Proc., sec. 1973, subd. 5. An authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. Civil Code, sec. 2309. The statute of frauds was enacted to prevent fraud. The courts will not permit it to become the instrument of fraud. The statute is to be used as a shield, not as a sword. Wilson v. Bailey, 8 Cal.2d 416, 422, 65 P.2d 770. It is well-settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon. The operation of the doctrine of equitable estoppel is not limited to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present. Wilson v. Bailey, supra, 8 Cal.2d at pages 421, 423, 65 P.2d at page 770; Wilk v. Vencill, 30 Cal.2d 104, 180 P.2d 351. The doctrine is not destructive of the statute of frauds, as appellant contends. Wilk v. Vencill, supra. As said in Wilson v. Bailey, supra, 8 Cal.2d at page 423, 65 P.2d at page 773, "It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U.S. (578), 580, 25 L.Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. (677), 687, 47 P. (695), 697, as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.' "

[6] Where a party, in reliance on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds is not available to perpetuate the fraud. Grant v. Long, 33 Cal. App.2d 725, 740, 92 P.2d 940. The doctrine has been applied to a state of facts identical with those found by the court in the present case. Karns v. Olney, 80 Cal. 90, 22 P. 57, 13 Am.St.Rep. 101; Fleming v. Dolfin, 214 Cal. 269, 270, 4 P.2d 776, 78 A.L.R. 585; Brenneman v. Lane, 87 Cal.App. 414, 417, 262 P. 400.

Had it not been for Bisno's promise, plaintiff no doubt could have arranged with the owner to receive the entire amount of Bisno's offer and to pay plaintiff therefrom a commission of $2,500. The finding, supported by the evidence, that Bisno orally agreed to pay the $2,500; that in reliance thereon plaintiff irremediably changed his position to his detriment by releasing the owners of the property from any obligation to pay him a commission is sufficient to support the court's conclusion that the statute of frauds was not available to Bisno. Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, 759, 161 P.2d 217, 162 A.L.R. 747; Halsey v. Robinson, 19 Cal.2d 476, 481, 122 P.2d 11; Vierra v. Pereira, 12 Cal.2d 629, 86 P.2d 816; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770.

[7, 8] Appellant's second contention is without merit. This question must be decided upon the premise that Bisno made a valid enforceable agreement with plaintiff. Bisno's agreement was to pay plaintiff $2,500. Bisno is estopped from relying on the statute of frauds. Therefore, the court enforced Bisno's oral agreement. The agreement to pay the $2,500 was complete prior to the signing of any escrow instructions. Bisno could not, by having Wolfe sign a supplemental escrow instruction authorizing the escrow holder to pay the $2,500 "if and when deal is closed," without the knowledge or agreement of plaintiff, release himself from his obligation. Neither could Bisno, by refusing to perform the buyer's obligations in the escrow, free himself of his obligation to plaintiff. The added words did not purport to give him the right to withdraw from the deal. There was nothing in plaintiff's agreement with Bisno making his right to compensation contingent or dependent upon anything other than his releasing the sellers from

their obligation to pay him a commission and his obtaining from the sellers a net price exclusive of any commission to plaintiff. Plaintiff had performed before the opening of the escrow. His right to the $2,500 had accrued. It makes no difference whether the "deal" was closed or not. As said in Clark v. Dulien Steel Products, Inc., 54 Cal.App.2d 92, 97, 128 P.2d 608, 610: "Unless the wording of the agreement with the broker made payment of his commission contingent upon the performance of the terms of the contract between the seller and the buyer or any of them, the voluntary abandonment of it by them could not affect the broker's rights." See also Levy v. Dusenbery, 32 Cal.App. 411, 417, 163 P. 231; Kaufman v. Haney, 80 Cal.App.2d 249, 182 P.2d 250.

Judgment affirmed.

SHINN, Acting P.J., and WOOD, J., concur.

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83 Cal.App.2d 188

COOK et ux. v. NORDSTRAND.

Civ. 15761.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1948.

1. Escrows 🔑9

Vendor's oral statement, upon which purchasers did not rely, that she would not perform contract to convey, was ineffectual as a repudiation or cancellation of escrow agreement and was not an anticipatory breach of agreement which would excuse performance by purchasers.

2. Vendor and purchaser 🔑350

One who sues another for breach of contract to convey must show that he has performed all conditions of the contract on his part which are precedent to performance by vendor and that he is able and has offered to perform all concurrent conditions on his part, except when he is excused from such performance.

3. Contracts 🔑324(1)

An action to recover damages for breach of contract rests upon theory that contract is still in force.

4. Vendor and purchaser 🔑350

In action to recover damages for breach of contract to convey real property, where purchasers sought to recover difference between agreed price and value of estate to be conveyed, burden was upon purchasers to prove that vendor acted in bad faith. Civ. Code, § 3306.

5. Vendor and purchaser 🔑345

Purchasers changing escrow instructions to their own benefit, without knowledge or consent of vendor, by decreasing amount of monthly installments, failed to comply with contract in a substantial matter, and where later purchasers not only breached contract further by failure to make required deposit in escrow, but also terminated escrow and withdrew down payment and canceled notes and deed of trust, purchasers could not recover damages for alleged breach by vendor of contract to convey.

6. Vendor and purchaser 🔑44

In action to recover damages for breach of contract to convey real property, evidence that purchaser gave his opinion regarding value of the property was insufficient to support finding that he had fraudulently represented such value, particularly where vendor's own agent stated that that amount was all that vendor could hope to get therefor.

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Stephen F. Cook and wife against Emily Nordstrand to recover damages for breach of contract to convey real property. Judgment for defendant, and plaintiffs appeal.

Affirmed.

William R. Law, of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiffs, husband and wife, sought damages for breach of contract to convey real property. In a trial without a jury, judgment was for defendant and plaintiffs appeal therefrom.

The defendant employed a real estate broker to sell her house and lot. On October 8, 1945, the plaintiffs, and a saleslady who was employed by the broker, went to the home of defendant, inspected it and then left. (The saleslady will be referred to as the agent.) A few days later, in a telephone conversation, plaintiff Mr. Cook told defendant that he would like to have a construction engineer inspect the property. On October 12, 1945, Mr. Cook, the construction engineer, and the agent, returned to defendant's home. The engineer made an inspection of the house and the garage, and went away. Mr. Cook then told defendant that the engineer had stated that the house was in need of numerous repairs which would cost about $1,000, and Mr. Cook asked defendant to take such cost into consideration in determining the purchase price. After further discussion, they agreed orally upon the price and terms, and Mr. Cook then paid $1,000 to the agent as a deposit, and the agent prepared and signed a deposit receipt for that sum. The receipt provided that an escrow should be opened at once, and that the plaintiffs should "deposit in said escrow an additional $2500.00 to complete the purchase of $15000.00." The defendant then signed that document at the bottom thereof agreeing to sell upon the terms stated, and Mr. Cook also signed it at the bottom thereof agreeing to buy upon said terms and adding thereto the following: "2nd mortgage to be balance difference between cash payment and $15,000 less 1st mortgage principal." The next morning, October 13, 1945, plaintiffs and defendant went to a bank where plaintiffs placed $2,500 in escrow, which was the balance of the down payment. The plaintiffs and defendant signed escrow instructions which provided in substance as follows: that plaintiffs were to obtain a loan (the amount was not specified) to be secured by a first mortgage on the property, and the amount of that loan was to be applied on the purchase price, and defendant was to accept a promissory note made by plaintiffs and secured by a second mortgage on the property for the amount of the purchase price then remaining unpaid; that the unpaid balance of the purchase price was to be payable in monthly installments of one per cent of the amount of the second mortgage, including interest at the rate of five per cent; and that the escrow should be completed by November 13, 1945. About November 2, 1945, defendant told the plaintiffs by telephone that she would not perform the agreement. About November 9th the bank wrote a letter to defendant asking her to complete her part of the escrow, but she did not comply with the request. Plaintiffs arranged for a loan of $8,000 which was to be secured by a first trust deed on the property, and the lending agency sent proposed forms of the promissory note and the first trust deed to the escrow for plaintiffs to sign. On November 13, 1945, plaintiffs signed the note and trust deed, but the lending agency did not at any time deposit the $8,000 or any part thereof in the escrow. On said day plaintiffs made and placed in the escrow a promissory note in the amount of $3,500 for the balance of the purchase price, which note was payable to defendant in monthly installments of $25 or more including interest; and plaintiffs also made and placed in escrow a second trust deed on said property to secure that note. On the same day, and without notice to defendant, plaintiffs signed an amendment to the escrow instructions which provided that the balance of $3,500 was payable in monthly installments of $25 or more including interest (which was less than one per cent of the unpaid balance as was required by the original escrow instructions). On November 29, 1945, plaintiffs signed another amendment to the escrow instructions requesting the return of all funds and "papers executed" by plaintiffs which had been placed in escrow. On the same day the bank returned to the plaintiffs the money which they had placed in escrow, but it retained the promissory notes and deeds of trust, upon each of which plaintiff Mr.

Cook, on that day, had written as follows: "Cancelled S. F. Cook." On December 13, 1945, defendant, who then had no knowledge that plaintiffs had terminated the escrow, gave plaintiffs written notice of rescission of the agreement to sell the property, and instructed the bank and the real estate agent to return any money deposited with them by plaintiffs. Thereupon, the real estate agent returned the $1,000 deposit to plaintiffs.

On March 20, 1946, plaintiffs commenced this action. The complaint alleged performance on the part of the plaintiffs; that defendant without cause and in bad faith refused to convey the property; that the reasonable market value of the property at the time of the breach was $20,000 and that plaintiffs were damaged in the sum of $5,000. The answer denied that the defendant in bad faith refused to convey the property, and alleged that plaintiff Mr. Cook and the agent fraudulently represented the value of the property to defendant for the purpose of inducing her to enter into the agreement; that defendant believed and relied upon those representations and by reason thereof signed the deposit receipt and escrow instructions; that the reasonable market value of the property on the day the agreement was made was $20,000, which value was known to plaintiffs but was unknown to defendant; that defendant had had no experience in real estate and was unfamiliar with its values; that plaintiff Mr. Cook and the agent informed the defendant that a promissory note secured by a second deed of trust would have the same value as cash and could be sold for face value; that the agent was not acting for the benefit of defendant but was acting for his own benefit or the benefit of plaintiffs. At the time of trial it was stipulated by the parties that the property was worth $20,000 on October 13, 1945 (the day the escrow was made). The court found that all of the allegations of the answer were true; that the reasonable market value of the property on October 12, 1945, and at all times subsequent thereto was $20,000; that the plaintiffs failed to deposit at any time in escrow the sum of $8,000 for which the promissory note was executed; and that the plaintiffs failed to deliver to the escrow holder a promissory note in the amount of $3,500, payable in monthly installments of one per cent of the amount of the note, that is, $35 a month including interest; that on November 13, 1945, plaintiffs delivered to the escrow holder, without defendant's consent, an amendment to the escrow instructions providing that the balance of the purchase price be paid in installments of $25 a month including interest; and that on November 29, 1945, plaintiffs delivered another amendment to the escrow holder stating that defendant had not complied with the escrow instructions and requested that the papers and funds deposited therein by plaintiffs be returned to them; that the escrow holder delivered the money to plaintiffs who canceled the two promissory notes and the two trust deeds, and the escrow was terminated.

The defendant testified that she had purchased the property in 1941 for $8,000 and had spent $2,000 to redecorate it; that she had never had any experience in buying or selling real estate; that at the time of entering into the agreement she had no knowledge whatever as to the value of the property; that at the time she listed it for sale with the agent she told him she had no idea as to what its value was, but she had heard that real estate values had gone up; that she asked him to advise her of its value, and he said he thought $15,750 was the most she could get for it; that the first time she had any conversation with Mr. Cook was on October 12, 1945, when he and the agent were in her home, and at that time Mr. Cook said that $15,000 was all that the property was worth because it was necessary to make various repairs and to make the garage larger; that she then told him that she had been informed that $15,750 was the market value of the property; but Mr. Cook reiterated that $15,000 was all it was worth; that the agent said that $15,000 was all defendant could hope to get for it; that Mr. Cook stated he had $3,500 in cash for a down payment; that the agent said as follows: that Mr. Cook could probably obtain a loan on the property to pay part of the purchase price; that defendant would have to take a promissory note for the balance of the purchase price, which would be paid in small monthly payments; that the note would be equivalent to cash; that plaintiffs would pay five per cent interest on the unpaid balance; that that was a good arrangement, and that defendant could use the second trust deed as cash. Defendant testified further that Mr. Cook then wrote a check for $1,000, and the agent wrote a deposit receipt which defendant, the agent, and Mr. Cook, signed; that at that time Mr. Cook said he was paying top price for the house because he was in a hurry to get settled; that he said he wanted to open an escrow at once; that it was then too late to open an escrow that evening, but they met at the bank early the next morning and signed escrow instructions; that she first discovered that the property was worth more than $15,000 when she began looking for another home; that upon discovering that she could not find a place she notified Mr. Cook by telephone that she would be unable to go through with the deal because she had no place to move; that had she known the property had a value in excess of $15,000 she would not have entered into the agreement; that she had no advice as to the value of the property, prior to the time she sold it, other than that given to her by the agent and Mr. Cook; that she relied upon their statements as to value, and upon their statement that the trust deed was the equivalent of cash; that had she known she could not use the second deed of trust the same as cash she would not have entered into the agreement; that after the escrow had been opened she inquired at a bank as to the value of the promissory note, and was informed that the bank would not buy it for face value; that on December 13th, the day she gave the notice of rescission, she instructed her broker to return the $1,000 deposit to Mr. Cook; that no one talked to her about changes in the payments on the second trust deed; that the bank (where the escrow was) did not inform her by telephone or otherwise of any changes in the second trust deed; that at the time she gave the written notice of rescission she did not know that plaintiffs had canceled their escrow instructions, and she did not know that they had made any change in their escrow instructions until after she had given notice of recission.

The plaintiff Mr. Cook testified that at the time he first inspected defendant's house he explained to defendant that he had only $3,500 to pay down on a home and it would be necessary for him to find a place within the range of that financing; that upon his second visit to defendant's home he told her that the construction engineer had stated that it would be necessary to repair the roof; that he mentioned that there were termites around the back of the garage; that portions of the cement in the driveway needed to be replaced; that it would be necessary to extend the length of the garage because his automobile was longer than the garage; that he told defendant it was the engineer's opinion that the total cost of repairs would be approximately $1,000, and he asked her if she would take that amount into consideration as a price reduction on the property; that he did not say anything to her about the value of the property; that the engineer did not advise him as to its value; that the agent said nothing in his presence to the effect that the second trust deed was the equivalent of cash. He also testified that the termite condition was to be taken care of by defendant, according to their agreement; that according to the original escrow instructions the monthly payments would have been $35 but that was not according to their verbal agreement.

Appellants contend that the findings with reference to "what happened in escrow" are "immaterial for the reason that the transaction was repudiated by the defendant, thereby making escrow instructions and deposits in escrow of money or papers immaterial." They also assert that the findings that defendant's refusal to convey was not in bad faith, and that plaintiffs were guilty of fraud, are not supported by the evidence. Respondent contends that appellants failed to perform their part of the agreement.

[1] Appellants' assertion that "the transaction was repudiated by the defendant" is based upon defendant's oral statement of November 2nd that she would not perform the agreement. It appears, however, from the actions of appellants thereafter that

they did not rely upon defendant's oral statement as a repudiation or regard it as an anticipatory breach of her agreement. On November 13th appellants signed the notes and trust deeds which were in escrow, and amended their escrow instructions, and purportedly attempted to complete their part of the escrow. On November 29th, when appellants canceled the escrow, they regarded the escrow as material. On that date, in their amendment to the escrow instructions, they said: "As seller has not complied with escrow requirements, we hereby request that you return all papers executed by the undersigned and return all funds deposited by the undersigned." It is clear that appellants' conduct indicated that they regarded the escrow as material and that they did not treat the oral statement of defendant as an absolute refusal to perform. "The refusal to perform must be treated and acted on as a distinct and unequivocal absolute refusal to perform the promise." 12 Am. Jur. 974, sec. 395; see also Rauer's Law & Collection Co. v. Harrell, 32 Cal.App. 45, 67, 162 P. 125. Defendant's oral statement, under the circumstances here, was ineffectual as a repudiation or cancellation of the escrow, and was not an anticipatory breach of agreement which excused performance by appellants of their agreement. "What happened in escrow" was material.

[2] The appellants failed to perform the contract on their part to be performed. According to the escrow instructions, appellants were required to execute a promissory note for the unpaid balance of the purchase price, which note was to be made payable in monthly installments equal to one per cent of the original amount of the note. The original amount of the note was $3,500, and therefore the amount of each installment under the escrow instructions should have been $35. Appellants, however, on the last day of the escrow period and without the knowledge or consent of respondent, made the note payable in installments of $25 per month (instead of $35) and signed amended escrow instructions which provided that the unpaid balance was payable in installments of $25 a month (instead of one per cent of $3,500). The provision of the contract requiring the appellants to pay one per cent of the amount of the note or $35 per month was specific, and the act of appellants in making the promissory note payable in installments of a lesser amount was a failure to comply with the terms of the contract with respect to a material and substantial matter. The appellants also breached the contract with respect to another material matter, in that, they never deposited, or caused to be deposited, in escrow the $8,000 which they asserted they had obtained as a loan, nor did they deposit in the escrow "the proceeds of a new loan" as required by the escrow instructions, nor did they at any time deposit any money in the escrow except $2,500. In Simpson v. Schurra, 91 Cal. App. 640, 267 P. 384, which was an action for damages for breach of contract to sell real property and wherein an escrow was involved, the court said at page 645 of 91 Cal.App., at page 386 of 267 P.: "One who sues another for breach of a contract must show that he has performed all conditions of the contract on his part which are precedent to performance by the defendant and that he is able and has offered to perform all concurrent conditions on his part, except when he is excused from such performance." The court said further therein at page 647 of 91 Cal.App., at page 386 of 267 P.: "They tendered only one mortgage instead of two as provided in the escrow instructions * * * and the tender therefore failed as a compliance with the instructions."

[3] The appellants not only breached the contract themselves, but they rescinded or abandoned the contract on November 29, 1945. The unauthorized act of appellants on November 13th in changing the escrow instructions very materially to their own benefit, by decreasing the amount of the monthly installments, indicated that they did not intend to stand ready and willing to perform the escrow contract as originally written. The evidence shows that on November 29th they terminated the escrow, withdrew the money deposited therein, and canceled the two notes and the two deeds of trust signed by them. They also recovered the money which they had paid as a deposit to the real

estate agent. In other words, at the time they commenced this action they had recovered all the money they had paid, and they had canceled the notes and trust deeds, and had withdrawn from the escrow. Appellants base this action for damages on the contract. An action for damages for breach of contract rests upon the theory that the contract is still in force. House v. Piercy, 181 Cal. 247, 251, 183 P. 807. As above shown, appellants did not keep the contract in force. Whether the conduct of appellants amounted to an abandonment of the agreement, or a rescission, or an acceptance of an offer to rescind, the result is that the contract was not kept alive and the appellants have received back all the money they had paid.

[4, 5] As above shown, the court found that defendant did not refuse in bad faith to convey the property. Section 3306 of the Civil Code provides that the measure of damages for breach of an agreement to convey real property "is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed * * *." The burden was upon appellants to prove that defendant acted in bad faith. Wilson v. Rosenkranz, 112 Cal.App. 511, 513, 297 P. 44. Under the finding that defendant did not act in bad faith appellants would not be entitled to the difference between the purchase price and the value of the property, and since all money paid by appellants had been returned to them, they would not, under that finding, be entitled to a judgment for the recovery of anything. By reason of the conclusions hereinabove stated, it is not necessary to discuss whether the evidence was sufficient to support the finding that the defendant did not act in bad faith.

[6] The evidence was not sufficient to support the finding that appellant Mr. Cook fraudulently represented the value of the property. Mr. Cook merely stated his opinion that $15,000 was all the property was worth. Defendant's own agent stated that $15,000 was all that defendant could hope to get for the property. Such evidence is wholly insufficient to justify that finding.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

83 Cal.App.2d 164

Ex parte MARTIN et al.

Cr. 2039.

District Court of Appeal, Third District, California.

Jan. 8, 1948.

1. Health 🔑24

The statutory duty of health officers to take all measures necessary to prevent transmission of venereal disease is mandatory, and in the enforcement of such mandate, health officers are vested with full power of quarantine. Health and Safety Code, § 2554 et seq.

2. Health 🔑24

Health officer may exercise his unusual powers over right of personal liberty by quarantine only when, under facts as brought within his knowledge, reasonable ground exists to support belief that person so held is infected. Health and Safety Code, § 2554 et seq.

3. Health 🔑24

A health officer is not required to first determine that one is afflicted with an infectious or communicable disease before subjecting such person to quarantine, all that is required being that there be probable cause to believe that person so held has such a disease. Health and Safety Code, § 2554.

4. Health 🔑24

Evidence before health officer tending to show that premises where petitioners were taken into custody was commonly regarded as a house of prostitution; that it contained usual paraphernalia generally found in such establishments; that within past few months cases of venereal disease were reported as having been contracted there; that arrests for prostitution had been made at premises, although not of petitioners; and petitioners themselves admitted having been engaged either in prostitution or in operating a house of prostitution constituted probable cause to believe that petitioners were infected with venereal disease and authorized quarantine order. Health and Safety Code, § 2554.

5. Health ⚷24

The necessary proof in cases of quarantine is analogous to that required on a preliminary examination before magistrate prior to commitment on criminal charge, extent of inquiry being merely as to existence of reasonable cause pending opportunity for further investigation or examination. Health and Safety Code, §§ 2554.

6. Habeas corpus ⚷85(1)

Petitioners for habeas corpus to secure release from their quarantine in county jail to determine whether they were infected with venereal disease failed to establish that the reasonable cause essential to warrant quarantine no longer existed where affidavits filed by petitioners failed to show that they could not or did not mask presence of disease by use of local disinfectants or drugs. Health and Safety Code, § 2554.

7. Health ⚷24

A person held under quarantine may be detained legally until there is sufficient showing that probable cause no longer exists. Health and Safety Code, § 2554.

8. Health ⚷24

The fact that San Joaquin county jail was overcrowded and had been condemned by a legislative investigating committee did not make confinement therein by reason of a quarantine order improper, particularly in the absence of special facilities for confinement under quarantine. Health and Safety Code, § 2554.

9. Health ⚷24

The place of quarantine is generally discretionary with health officers in absence of any special provision for quarantined persons. Health and Safety Code, § 2554.

ADAMS, P. J., dissenting.

◆

Proceeding in the matter of the application of Dorothy Martin and Kitty Andrews for a writ of habeas corpus to secure their release from imprisonment under a quarantine order.

Writ discharged and petitioners remanded to custody of sheriff.

Wyatt, Green & Carr, of Stockton, for petitioners.

Louttit, Marceau, Louttit & Wilson, and Chester E. Watson, Dist. Atty., all of Stockton, for respondent.

PEEK, Justice.

The petitioners herein allege that the quarantine order of the San Joaquin Local Health District by which they are imprisoned and restrained without bail is illegal in that (1) the county health officer does not have reasonable cause to believe that either of them is infected with any of the diseases specified in sections 2554 and 2571 of the Health and Safety Code, and therefore there is no justification for their quarantine and to deny them bail; (2) the San Joaquin county jail is an improper place to be designated by the said health officer as a place of isolation, and (3) at the time of their arrest they had no connection with prostitution in any form and neither was in fact infected with any of the diseases mentioned in said sections.

By reason of the stipulation of counsel at the time this matter was argued the transcript of proceedings in the Superior Court of San Joaquin County, where a like application was made and denied, was made a part of the proceedings herein, subject however, to petitioners' objection to certain testimony of one of the health officers of said county, which testimony had been admitted over their objection in the Superior Court hearing.

Said transcript discloses that on the evening of September 9, 1947, a robbery was reported as having occurred at the De Luxe Rooms located in the city of Stockton. The following morning petitioners were arrested by officer Knight and taken to the police station for questioning. The next day a complaint was filed in the Stockton police court charging defendants with vagrancy and bail fixed in the sum of $500 each. However, by reason of subsequent quarantine orders of the local health officer both petitioners were refused their release on bail because of said orders, and were held by the sheriff of said county.

When called as a witness by the respondent sheriff, officer Knight testified that for more than one year he had been a member of the vice squad, had personally made one arrest for prostitution and knew of three other arrests for the same offense having been made of persons living at the De Luxe Rooms but that none of said arrests involved these petitioners; that the latest arrest at this place was in February 1947, and since that time no arrest had been made although there were attempts to get investigators into the rooms but the doors were always locked. He also testified that said rooming house had the reputation of being a house of prostitution and that an examination of the premises at the time of the arrests disclosed various articles and paraphernalia usually found in such places but that such things were commonly found in many lodging houses in Stockton. The witness further stated that during a conversation at which he was present between petitioners and the Chief of the Stockton Police Department, Kitty Andrews admitted having worked as a prostitute during the last two years and that Dorothy Martin admitted trying to run a house of prostitution but that the police were so active she did not have a chance to do any business; on another occasion she stated to the witness that she was running the De Luxe Rooms. The officer had no knowledge of any prior arrests of either of the petitioners.

The assistant health officer of the district, over the objection of counsel, as previously mentioned, was permitted to testify that since May 1947 four cases of venereal diseases had been reported as having been contracted at the De Luxe Rooms, and three women who gave their addresses as the De Luxe Rooms had been examined for venereal disease, but with one exception all such examinations were negative. No investigation was made by said officer to ascertain if the women actually did reside there.

[1] By statute (Health and Safety Code, Sec. 2554 et seq.) a mandatory duty is imposed upon health officers to take all measures necessary to prevent the transmission of venereal disease and in the enforcement of this legislative mandate such officers are vested with full power of quarantine.

[2, 3] It would seem unnecessary to state that the delegation of such complete authority over one of the most fundamental of our constitutional rights—the right of personal liberty—must of necessity carry with it the obligation to exercise such unusual powers only when, under the facts as brought within the knowledge of the health authorities, "reasonable ground exists to support the belief" that the person so held is infected. In re Arata, 52 Cal.App. 380, 385, 198 P. 814. However, that is not to say that in order to warrant the exercise of such powers it is necessary for a health officer to first determine that one is afflicted with such disease before subjecting such person to quarantine, all that is required is that there be probable cause to believe the person so held has an infectious disease mentioned in said statutes. Ex parte King, 128 Cal.App. 27, 16 P.2d 694.

In the Arata case the court in discussing what would amount to a sufficient factual showing to justify or warrant quarantine, observed that such facts might consist of a showing that the suspected person had been exposed to contagion or infectious influences or that some one had contracted the disease from him or her; that the one quarantined was one who committed acts of prostitution as shown by a conviction for that offense or was an inmate of a house of ill fame, thereby coming within that group, a majority of whom are diseased, as shown by medical statistics.

This case was followed by In re Dayton, 52 Cal.App. 635, 199 P. 548, wherein oral testimony and affidavits were presented from which the court concluded that the house at which petitioner was residing at the time of her arrest was a house of ill fame, and she being one of the inmates thereof, sufficient showing was made to detain her.

A later case, In re Clemente, 61 Cal.App. 666, 215 P. 698, cited with approval the Dayton and Arata cases. There the court held that testimony that petitioner therein was conducting a house of ill fame in which she was also an inmate and personally participated in the unlawful acts carried on therein, furnished reasonable ground for the health officers to enforce quarantine measures against her.

We do not understand the two cases cited by petitioners (In re Arata, supra, and In re Shepard, 51 Cal.App. 49, 195 P. 1077) as modifying or changing in any way the rule as stated. It is true that in each instance the petitioner therein was discharged. However, in the Arata case it was because the facts relied upon as sufficient to warrant the order appeared only by way of "narration" in the respondent's return and which statement the court stated could not be taken as "proof that the charge made against petitioner." [52 Cal.App. 380, 198 P. 817] In the Shepard case it was held either to establish knowledge that the peti- that the facts shown were insufficient tioner was infected or reason to believe so. Both cases reiterate the much repeated rule that whether or not a quarantine order is justified depends upon the facts of each individual case, and the obvious corollary thereof is that what may appear to be sufficient to one person may not appear to be sufficient to another.

The real issues in the present case, stripped of surrounding circumstances immaterial to such issues and simply stated, are whether or not there was reasonable cause for the health officer to believe that these petitioners were infected with a venereal disease in an infectious stage at the time the quarantine order was issued, and if so, whether such reasonable cause continued to exist at the time of the hearing before this court as shown by the testimony and affidavits of the health officers or was negated by the affidavits of physicians who examined them subsequent to the quarantine order and reported a partial negative finding.

[4] Under the rules enunciated in the Arata case and cited with approval in In re Dayton and In re Clemente, supra, such belief has sufficient basis in evidence brought to the knowledge of the health officer tending to show that the premises in question was commonly regarded as a house of prostitution; that it contained the usual paraphernalia generally found in such establishments; that within the past few months cases of venereal diseases had been reported as having been contracted there; that several arrests had been made at the premises on charges of prostitution, although not of these petitioners; and further, that the petitioners themselves admitted having been engaged either in prostitution or in operating a house of prostitution, thus placing themselves within that class of persons more likely to be infected than not.

[5] The necessary proof in cases such as this is analogous to that required on a preliminary examination before a magistrate prior to commitment on a criminal charge, the extent of the inquiry being merely as to the existence of reasonable cause pending opportunity for further investigation or examination.

[6, 7] Petitioners further contend that the above mentioned affidavits of the physicians who examined them indicate that the reasonable cause essential to warrant quarantine no longer exists. In support thereof they cite a portion of the opinion in the case of In re Johnson, 40 Cal.App. 242, 245, 180 P. 644. Obviously, if one who is so detained is not and never has been afflicted with such infection he or she would be entitled to a writ. However, this cannot be said of the facts disclosed in the record in the present case. From the testimony of Dr. James C. Malcolm, assistant District Health Officer, as well as the affidavits of Drs. John J. Sippy and H. D. Chope, District Health Officer and assistant respectively, to the effect that in order to determine the existence or contamination of a venereal disease in an infectious stage it is necessary that the person quarantined be confined for a period of approximately eight days under circumstances such as would restrict the individual from sexual

contact or medication. This, the doctors say, is necessary for the reason that a person by the use of local disinfectants or drugs can temporarily mask or inhibit the growth of the responsible organisms and thus prevent the detection of a venereal disease. The affidavits filed by petitioners are insufficient to overcome this evidence. It is not shown that they could not or did not mask the presence of such organisms, and further, with respect to Dorothy Martin there is no report on syphilis. If the testimony of the health authorities is predicated upon sound medical knowledge in light of present day drugs and treatment techniques, and we have no cause to believe otherwise, then the conclusion of the court in the King case [128 Cal.App. 27, 16 P.2d 695] supra, that a "person so held may be detained legally until there is sufficient showing that the probable cause no longer exists", applies.

[8, 9] The final contention made by petitioners, that the San Joaquin county jail is an improper place to be designated as a place of isolation under said quarantine order, is likewise without merit. It does not necessarily follow from the facts alleged by petitioners in relation to the conditions of the San Joaquin county jail, which facts in the main are admitted by the sheriff in his return—its overcrowded conditions— its condemnation by a legislative investigating committee, that their confinement at said jail by reason of the quarantine order is improper. From an examination of the applicable sections of the statutes to the question of quarantine generally it would appear that the place of quarantine would be discretionary with the health officers in the absence of any special provision for such persons. "While jails, as public institutions, were established for purposes other than confinement of diseased persons, occasions of emergency or lack of other public facilities for quarantine require that jails be used as places of quarantine." (4 Op.Atty.Gen. 146, at page 148.) Hence, in the absence of special facilities, use of the jail in question, although admittedly unsatisfactory, is proper for such purpose under the facts shown.

We therefore conclude that the quarantine order was proper under the circumstances and showing made by respondent in his return to the petition. The order fixing bail for petitioners' appearance in this court and requiring them to report to the San Joaquin Health District for examination at such times as that authority may suggest is therefore set aside, the writ discharged, and the petitioners remanded to the custody of the respondent sheriff.

THOMPSON, J., concurs.

ADAMS, Presiding Justice.

I dissent.

This is an original proceeding before us in which we are called upon to determine upon the evidence before us whether the further detention of petitioners in the San Joaquin County jail is justified. In the verified petition filed herein petitioners alleged that they were imprisoned in the San Joaquin County jail on an order of the San Joaquin Local Health District, and that such imprisonment was illegal in that the county health officer did not know or have reason to believe that either of them was infected with any of the diseases enumerated in sections 2554 or 2571 of the Health and Safety Code, and that there is no justification for their isolation. Also that the jail was an improper place for their isolation since said jail had been condemned, that there were 13 girls in quarters occupied by them which quarters were designed to accommodate but six, and that they were required to sleep four in a bed; that at the time of their arrest petitioners had no connection with prostitution in any form, and that neither was infected with any of the diseases mentioned in the aforesaid code sections. Both petitioners denied that they ever made admissions which were ascribed to them by police officer Knight who testified at a hearing in the superior court, and they averred that they verily believed they were free from infection of any communicable disease, and that they had not for several years been exposed to such infection; that their detention in custody was not necessary to secure their submission to examination by the physicians connected with the Health District, and they were willing to report to their clinic and submit to examination, and treatment if necessary, at any reasonable times.

The writ having issued and petitioners having been released on bail, on condition that they submit themselves for examination by the San Joaquin Health District authorities, the sheriff of the county made a return which merely recited that the petitioners had posted bail bonds and been released; but on the day set for hearing before this court the said sheriff made an amended return, in which he alleged that petitioner Martin had been detained in the San Joaquin County jail pursuant to an order signed by Dr. Chope, Assistant District Health Officer, on September 11, a copy of said order being attached to the return; and that petitioner Andrews had been detained on an order signed by Dr. Malcolm, also an Assistant Health Officer, a copy of which order was likewise attached as an exhibit. The return also recited the hearing on the writ in the superior court, and attached thereto a transcript of the proceedings therein.

Answering the allegations of the petition herein, he denied the allegations of the petition that petitioners had been restrained because of a charge of vagrancy filed against them, but because of the orders aforesaid. He denied the allegations that the health officers did not know or have reason to believe that the petitioners were infected, the reasons for such denial being the orders attached as exhibits. He denied that the county jail was an improper place of detention, but admitted it had been condemned by a Legislative Investigating Committee, that it was in "a greatly crowded condition," that petitioners were confined with prisoners charged with crime, and that prisoners were required to sleep two in a bunk bed, which bunk beds were set in tiers. On information and belief he denied the allegation of the petition that at the time of their arrest petitioners had no connection with prostitution and that neither was infected.

The sheriff also presented to this court a motion to set aside the order of this court admitting petitioners to bail, alleging, in support of said motion, that petitioners had been held by orders made by health officers which orders were issued pursuant to facts brought within the knowledge of said officers, which furnished reasonable grounds to support the belief that petitioners were, and still were infected with "a venereal disease in an infectious stage." Attached to said amended return were copies of affidavits made by Drs. Sippy and Chope, which will be hereafter considered.

At the hearing before us it was stipulated by counsel for petitioners that the transcript of the proceedings before the superior court might be considered as evidence by this court, subject, however, to the objections interposed before that court as to admissibility of some of the evidence there presented by respondent upon which this court should make independent rulings. Counsel for respondent conceded that the burden was on the health authorities to show reasonable cause for the detention of petitioners.

In view of that concession and subject to our rulings as to admissibility of evidence, we turn to the transcript of the testimony before the trial court.

It shows that defendants had been apprehended on September 11th, charged with vagrancy, and upon the fixing of bail by the Justice of the Peace, the defendants were held by virtue of quarantine orders. The respondent called as a witness police officer Knight who testified that he had been a Stockton police officer for 20 years, and for more than a year assigned to the "vice squad"; that petitioners were arrested at the De Luxe Rooms in Stockton; that he had made one arrest there for prostitution over a period of a year; that the general reputation of the place was that it was a house of prostitution; that he had arrested petitioners there, while they were in their beds; that on being taken to the office of the chief of police, Kitty Andrews was asked if she had ever worked as a prostitute, and she said she "tried to chippie but the police ran up and down the stairs so much she didn't have a chance to do business." On cross-examination he said that the De Luxe Rooms was situated within a block of the Court House and of the Y. M. C. A.; that he had known Dorothy Martin for more than a year, and had never arrested her, nor had he any information that she had ever been arrested; that officers had gone to the place the night before in connection with a reported robbery; that when arrested petitioners were alone in their rooms; that he was the first one that placed a quarantine order against Kitty Andrews but not against Dorothy Martin; that no others had been arrested at this place since, and no evidence of prostitution had been obtained. On redirect he stated that when petitioners were arrested they found on the premises—but not in the rooms occupied by petitioners—what were known as "trick beds," a money box on the kitchen wall, glasses with prophylactic solutions and "guns," and an enormous number of towels; but on recross-examination he said that these could be found in any rooming house in Stockton; that other than mentioned he had nothing upon which to base a quarantine order against petitioners—that all he had was a general suspicion that it might be possible that they were infected with a communicable disease.

Dr. Malcolm, Assistant Health Officer of the San Joaquin Local Health District, was then called, and a quarantine order issued against petitioner Andrews, signed by Dr. Chope, Assistant District Health Officer, was introduced. It recited that "based upon information received by this office the said Dorothy Martin, is suspected of being infected with a venereal disease in an infectious stage." (The words "known to be" in place of "suspected" were crossed out; and the kind of venereal disease suspected is not stated.) The order then directed that Dorothy Martin be quarantined for examination and treatment if necessary, the county jail being designated as the place for quarantine.

A similar order regarding Kitty Andrews, signed by this witness as Assistant District Health Officer, was then introduced.

The witness was then permitted over the objection of petitioners to testify that within the past year there had been reported to him or his office from the premises in question four cases of venereal infection by men who reported that their infection was acquired at that address, but these parties were not quarantined; also that they had examined three women who gave their addresses as the De Luxe Rooms, but he made no examination to determine whether or not they resided there; that they found none of them infected, and that only one of them was quarantined; that he had never examined these petitioners; that he found in the present situation no greater reason for quarantine than he found in the aforesaid cases; that it is his experience quarantine is necessary but that there are many instances in which venereal disease is treated without confinement; that there was nothing presented to him by the police or other person indicating recent prostitution on the part of Dorothy Martin; nor was there anything to indicate such recent participation by Kitty Andrews, except that the arrest report stated that she admitted living with Dorothy Martin in the De Luxe Rooms and admitted working as a prostitute. Under questioning by the superior court this witness said that their routine was to examine girls and women who were in the county jail after 24 to 48 hours following their arrest, and if no positive symptoms were found, to hold them for a second examination, one reason being that because of mechanical cleansing shortly before arrival at the jail, and by use of drugs, the signs of disease might be masked, and it then took from two to five days to overcome the masking.

As above stated, respondent attached to his notice of motion a copy of an affidavit by Dr. Sippy and one by Dr. Chope. They add nothing to the record before us that goes to show justification for quarantining petitioners. The one states that "reasonable grounds continue to exist to support the belief that each of said persons [petitioners] is afflicted with a venereal disease in an infectious stage"; and the other recites that "upon information received by affiant and by the office of the District Health Officer of the San Joaquin Local Health District, affiant has reasonable grounds to believe and affiant does suspect that the said Dorothy Martin and the said Kitty Andrews and both of them are infected with a venereal disease in an infectious stage." Upon what these opinions and suspicions are based is not stated. The affiants in this respect furnish no evidence to support the conclusions asserted.

As against the showing relied upon by respondent, the verified petition of these women denies that they made the admissions ascribed to them by officer Knight. They also presented to this court certificates of two reputable doctors whose qualifications were admitted, which certificates stated, as to Dorothy Martin that she had been examined by them on September 19th and September 22nd, and that smears and cultures were both negative for gonococci infection, and Wasserman and Kline tests were negative (for syphilis). And as for Kitty Andrews, that she had been examined on September 19th, and that both smear and culture were negative for gonococci infection. There was no report as to syphilis for the latter.

On the argument before us it was conceded by respondent's counsel that the essential question is whether or not the health authorities had or have now reasonable cause to believe that petitioners were or are infected with a venereal disease in an infectious stage. He conceded that habeas corpus is a proper proceeding for the determination of this question, and also concedes that the burden is upon respondent to show that such reasonable cause existed or now exists.

In my opinion the evidence before us fails signally to meet the burden of proof imposed upon respondent to show reasonable cause to believe that petitioners are now or were at the time of their incarceration afflicted with a venereal disease in an infectious stage or at all. Giving the showing made by respondent its fullest effect, it shows no more than that one person (officer Knight) testified that the De Luxe Rooms was reputed to be a house of prostitution. His testimony is in my opinion unworthy of credence since, admittedly, if he had that knowledge nothing had ever been done about it until a robbery was reported to have been committed there. He admitted knowing these women, and for all that appears there was just as much reason for apprehending them six months before as in September of this year. Furthermore, they were not arrested for practicing prostitution but were charged with vagrancy. The evidence that three other women who stated they lived at the De Luxe Rooms had, some months before, submitted themselves for examination by the health authorities, was pure hearsay as to these petitioners. Furthermore, the fact that those women were found not to be infected, and only one of them was quarantined, indicates that the health authorities do not find it necessary in all cases to quarantine in order to reach a conclusion as to whether a person is infected. The evidence offered that four men who *stated* that they had been subjected to infection at this place had some time before reported to the health authorities for examination, is hearsay of the rankest kind as to these petitioners, and furthermore it is conceded that the men were not quarantined.

In Re Shepard, 51 Cal.App. 49, 195 P. 1077, the return to writ of habeas corpus alleged that Shepard was isolated in a hospital "suspected of being infected with * * * syphilis and gonococcus infection," and that in the opinion of respondent doctor it was necessary to isolate her until an examination was made to determine whether she was so infected; and that there was "reasonable cause" to believe that she was so infected. The evidence relied upon was that a deputy sheriff was told by three Negro sailors that there were some girls to be found at the residence of Mrs. Shepard, whose house they pointed out; that two days later the deputy went to the house, asked Mrs. Shepard if she would indulge in sexual intercourse with him for a consideration, and she said she would, it being arranged that the deputy sheriff would return later for the act. She was charged with conducting a house for the purpose of prostitution, and taken to the jail, then ordered to the city hospital. The court said, 51 Cal.App. page 51, 195 P. page 1077: "There is certainly nothing in the record here to show that the respondent knows Mrs. Shepard to be diseased, and we cannot see that he has sufficient reason to believe that she is diseased. Paying just regard to the constitutional guaranties of the right to personal liberty and personal security, it must be asserted that more than a mere suspicion that an individual is afflicted with an isolable disease is necessary to give an officer 'reason to believe' that such person is so afflicted. The circumstances disclosed to us here are lacking in the elements necessary to establish even a well-defined suspicion that Mrs. Shepard is diseased as alleged in the return. The facts before us come within the purview of the language of the court in Ex parte Dillon [In re Milstead, 44 Cal.App.239], 186 P. 170."

Her discharge followed.

In Re Arata, 52 Cal.App. 380, 198 P. 814, Arata was charged in the police court with violation of a city ordinance making it an offense for a woman to commit an act of prostitution. She was arraigned and a date set for her trial, bail being fixed; but her release on bail was refused by the police, they asserting that the health department had ordered her held until she submitted to an examination for the purpose of determining whether she was infected with a quarantinable disease. The petition for habeas corpus alleged that she was not so infected, that she was not and never had been a prostitute, and did not commit the act charged against her. Facts stated in the return and relied upon by respondent were that a police officer had been directed to a room occupied by Arata, that he had gone there and Arata had offered to commit an act of sexual intercourse and fixed a price which the officer paid; that thereupon she was arrested and by order of the health department placed in quarantine in the city jail, and held "to be examined by officers of the health department * * * to determine her freedom from * * * venereal disease"; that she had refused to submit to examination and had been ordered held pending determination of her freedom from such disease. It was further stated in the return that the health department had determined from experience that over 90% of women apprehended for prostitution are infected, and that the rules of the health department required that the health officer of the city cause examination to be made of all such persons to determine their freedom from such disease. The court said, 52 Cal. App. page 383, 198 P. page 816: "That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases coming within the definition set forth in Political Code, § 2979a, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual, personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, *reasonable ground exists to support the belief* [Italics by that court] that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case. Where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order. It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be. Such proof would furnish tangible ground for the belief that the person was afflicted as claimed. *And we wish here to emphasize the proposition, which is unanswerable in law, that a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine."* (Italics mine.)

It also said, 52 Cal.App. page 385, 198 P. page 816: "One of the most important rights guaranteed under our Constitution, that of the liberty of the citizen, is involved and cannot be lightly passed over, nor can encroachments upon that right be tolerated even under the argument that, in the main, the general result sought is a beneficent one. The law may not be set at defiance, even to subserve the best-intentioned effort; much less by officers who have taken an oath to uphold it. At the hearing of this writ proof was not offered to be made that petitioner was at the time of her arrest a woman of ill fame. The narrative contained in the return of alleged acts in which the police officer took part cannot be taken as proof that the charge made against petitioner in the police court was true."

Petitioner was thereupon discharged.

In In re Milstead, 44 Cal.App. 239, 186 P. 170, on habeas corpus it was contended that petitioners' detention in quarantine pending investigation of their condition after their arrest for violation of a city ordinance was illegal. The ordinance made it unlawful to resort to any roominghouse, etc. for the purpose of having sexual intercourse with one other than a spouse. The return alleged that it was the practice to examine all persons brought to jail charged with a violation of such ordinance, or charged with any other offense involving sexual immoralities, to determine their freedom from quarantinable venereal disease, and that petitioners were being so held.

The court said, 44 Cal.App. page 242, 243, 186 P. page 172, after commenting that in the event persons charged refused to submit to examination it was conjectural how long they might be kept in confinement, that sick persons who are subjected to such quarantine are not deemed to be criminals and are to be treated with every consideration and afforded conveniences reasonably procurable under the circumstances. Also, that, assuming that the arrest was legally made, and that under the laws relating to the public health inspection and quarantine by duly constituted health authorities may be made "where it is known, or appears upon reasonable ground, that the person so subjected to inspection or quarantine is afflicted with contagious or infectious diseases, such as are enumerated in section 2979a, Political Code," in order to justify detention the return of the officer should show some further reason why the persons so detained are suspected of being afflicted with disease. It also said (44 Cal.App. page 244, 186 P. page 172) that where sufficient *reasonable cause* exists to believe that a person is afflicted with a quarantinable disease, there is no doubt of the right of the health authorities to examine into the case and, in a proper way, determine the fact. But such preliminary investigation must be made without delay, and, if quarantining is found to be justifiable, such measures may be resorted to only as are reasonably necessary to protect the public health, remembering that the persons so affected are to be treated as patients and not as criminals. The conclusion was that the health authorities did not have reasonable cause to believe petitioners to be afflicted with contagious or infectious disease warranting quarantine; and they were ordered discharged.

In In re Dayton, 52 Cal.App. 635, 199 P. 548, relied upon in the majority opinion, after hearing on writ of habeas corpus the court said that the order of quarantine was based upon the alleged ground that the health authorities had "reasonable and probable cause to believe that petitioner is affected with a contagious or infectious venereal disease"; that the respondent justified on the ground that petitioner was a prostitute, and that such fact afforded sufficient ground for the inference that she *might be* affected with the disease; that from the evidence the conclusion was reached that the house in which petitioner was residing was a house of ill fame and that she was one of the inmates thereof; that all of the circumstances tended to support that conclusion; that all of the surroundings, as the evidence illustrated them, the actions, conduct and demeanor of the persons occupying the place in the aggregate established to their minds quite clearly and beyond a probability merely that the house was a house of ill fame and that the inmates were prostitutes. Just what the testimony was in that case does not appear, but it was obviously much more comprehensive than that which is now before us.

In In re Clemente, 61 Cal.App. 666, 215 P. 698, also cited in the majority opinion, the court said that there was testimony that the reputation of the house conducted by petitioner was a house of ill fame; that she was an inmate thereof and *personally participated* in the unlawful acts carried on therein; and that the health officers, having this information had reasonable ground to believe that petitioner was affected with venereal disease, and that was all that was necessary to have authorized the health department to enforce quarantine measures against her.

In that case there was no showing, apparently, on petitioner's part, that she was not so afflicted; and, as stated, the evidence showed that she had participated in the unlawful acts carried on in the house.

In Ex parte King, 128 Cal.App. 27, 16 P. 2d 694, also cited in the majority opinion, petitioner was arrested on a morals charge, examined physically and *found to be afflicted with a venereal disease.* She disputed the finding and demanded a second examination which was denied. It was said, on petition for habeas corpus, that the law only requires probable cause to believe that a person has such disease, to justify detention in quarantine until there is sufficient showing that such probable cause no longer exists. That case is not comparable to this as petitioner had been found to be infected before she sought release on habeas corpus.

In Ex parte Hardcastle, 84 Tex.Cr.R. 463, 208 S.W. 531, 2 A.L.R. 1539, on habeas corpus, relator was held by virtue of a quarantine order. The court said that she had a right to have the existence of the disease for which she was allegedly quarantined, inquired into on habeas corpus, and that "If those facts do not exist, the officer has no jurisdiction to continue the restraint and the court in the habeas corpus proceeding has authority to inquire whether the facts essential to jurisdiction exist." It went on to say that the decision of the health officer who ordered the arrest was not conclusive; that relator had the right to prove the nonexistence of the facts necessary to authorize her continued detention.

In Wragg v. Griffin, 185 Iowa 243, 170 N.W. 400, 2 A.L.R. 1327, on hearing in a habeas corpus proceeding to adjudge the power of the health authorities to hold petitioner in quarantine and extract his blood in order to make a Wasserman test where, as here, the order for his detention in the county jail was based upon what amounted to no more than a suspicion that he was afflicted with a venereal disease, the court said, 170 N.W. at page 401: "It may be said at the outset that the objection raised by this petitioner does not necessarily challenge the validity of any statute or any rule of the board of health by which authority is given to quarantine persons who are afflicted with contagious disease, or to remove or segregate a person so diseased from his own home for detention in a separate house or detention hospital and there detain him until he has so far recovered his health as to be no longer a menace to the health of the community. All such measures may, for the purposes of this case, be sustained as a wise and valid exercise of the police power for the general good. But, admitting such to be the case, does it follow that a person not known to be so diseased and (so far as here appears) showing no visible evidence, sign, or symptom of such disease, may be subjected to arrest, imprisonment, and violation of his person for no better reason than that he is 'suspected,' by some one whose identity is not revealed, to be diseased, and to satisfy the board of health or some of its officers whether there is in fact any ground for such suspicion? If such extraordinary and drastic authority exists, it must be found in the statute or in some valid rule or rules lawfully prescribed by the board of health."

Also see dissenting opinion of Judge Nourse in In re Travers, 48 Cal.App. 764, 768-771, 192 P. 454.

As for the assertion of respondent's witness, Dr. Malcolm, as to the necessity for holding these petitioners in quarantine for at least eight days in order that the health authorities may ascertain whether or not they are afflicted with a venereal disease, it is weakened by his admissions that quarantine was not imposed on others, one of whom at least admitted being a prostitute, and that the men examined were not quarantined. Furthermore, as for his assertion that suspected persons may mask or conceal evidence of venereal disease by the methods to which he referred, I see no reason to assume that these petitioners would have any motive or desire to conceal evidence of disease. They are not detained as criminals, and under the provisions of section 1963(1) of the Code of Civil Procedure are presumed to be innocent of crime or wrong.

Important as it may be considered that those persons who have recourse to houses of prostitution may be protected from the danger of infection from venereal disease as a result of their indulgence, in my opinion it is at least equally important that these women should not be deprived of their constitutional right to freedom from detention in jail and that they should not be compelled, on pain of indefinite restraint, to submit to invasion of their rights to privacy of their persons, without more than has been shown in this case as purported justification for their further detention, particularly in view of the evidence presented on their behalf indicating that they are not afflicted with venereal disease.

As for the protests of respondent that parties detained on quarantine orders should not be admitted to bail, it is not without precedent for a court to so release a petitioner seeking relief by way of habeas corpus. It appears in several cases, not only in this state but elsewhere, that petitioners were so released. See, for instance, In re Johnson, 40 Cal.App. 242, 180 P. 644; In re Travers, supra; Wragg v. Griffin, supra.

In my opinion respondent has failed to show reasonable or probable cause to believe that these petitioners are infected with any venereal disease or that they have been exposed to contagion, or that any one has contracted such disease from them, or that they have committed acts of prostitution.

The question before us is not whether, by reliance upon the portions of the record before us there may now be found some possible justification for the detention of petitioners, but whether upon competent evidence before us, we, as finders of fact, are satisfied that respondent has shown reasonable cause to believe (not suspect) that these petitioners are infected with a venereal disease in an infectious stage.

Even a prostitute is entitled to the protection of those fundamental principles of liberty which are the basis of our civil and political institutions; and the zeal of an officer ought never to be permitted to transcend the constitutional rights of an accused. The petitioners should be discharged.

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83 Cal.App.2d 143

JENNINGS v. ARATA.

Civ. 13445.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1948.

Hearing Denied March 4, 1948.

1. Automobiles 🔑246(28)

In action for injuries sustained in collision between plaintiff's motorcycle and defendant's automobile when defendant attempted to leave the highway and enter a road which was an extension of the highway which curved away at that point, instruction submitting to jury Code section governing left-turn signals was not erroneous under the evidence that defendant had entered the curved portion of the highway from whence an angle turn would be required to enter the road. Vehicle Code, §§ 86, 550(c).

2. Automobiles 🔑171(9)

A motorist need not turn at right angles in order to turn left, but any change of direction in front of vehicles approaching in left lane of highway constitutes "left turn" requiring proper signals. Vehicle Code, § 550(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Left Turn".

3. Automobiles 🔑246(9)

An instruction on necessity of left-turn signals by motorist leaving main highway and causing hazard to vehicles approaching from opposite direction, though without actually changing his direction, is not erroneous as matter of law. Vehicle Code, § 550(c).

4. Trial 🔑255(1)

The court may instruct jury of its own motion as to all matters of law thought necessary for jury's information in giving verdict. Code Civ.Proc. § 608.

5. Trial 🔑263

Instructions to jury are those of court, regardless of their authorship.

6. Appeal and error 🔑1068(1)

The giving of instruction requested by plaintiff's counsel after hearing and argument to jury was not prejudicial to defendant, who was in no worse position than if court had given instruction without such request. Code Civ.Proc. §§ 607a, 608.

7. Evidence ⚷145

The question of remoteness of testimony is addressed to trial court's discretion.

8. Automobiles ⚷243(7)

In action for injuries sustained in collision between plaintiff's motorcycle and defendant's automobile, testimony of head of state highway maintenance crew, working on road about half mile from scene of accident, that defendant ignored 25-mile an hour sign and almost struck workmen when he passed them about one minute before accident, was not so palpably remote as to render its admission an abuse of discretion, though accident occurred beyond range of witness' vision.

◆

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Harold E. Jennings against Eugene Arata for injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

Cooley, Crowley, Gaither & Dana and Dana, Bledsoe, & Smith, all of San Francisco, for appellant.

Nichols, Richard & Allard, of Oakland, and Thomas Hart Kennedy, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal is taken from a judgment on the verdict for the plaintiff awarding damages for injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile.

The accident occurred at the junction between Peabody Road and Highway 4 at a point where the Highway and Peabody Road are mutually an extension of each other in a straight line, and Highway 4 curves slowly in a northwesterly direction away from Peabody Road.

The defendant was proceeding westerly along the straight portion of Highway 4 toward Peabody Road while the plaintiff was approaching from the opposite direction around the curved part of Highway 4 opposite Peabody Road. There is no question of obstructed visibility of either party.

As the defendant attempted to leave Highway 4 and enter Peabody Road the collision occurred. There was a sharp conflict of evidence as to the point of impact, i.e. whether the defendant had entered the curved portion of the highway or had proceeded in a perfectly straight line.

During the trial the plaintiff was allowed, over objection, to introduce the testimony of Mr. Barnes of the Highway Maintenance Division who with his crew was working on the road some half mile from the scene of the accident and separated therefrom by an intervening hill. This testimony was to the effect that the defendant at the time he passed the highway crew ignored the twenty-five mile an hour sign there posted and almost struck the workmen.

It further appears that during the giving of instructions to the jury the plaintiff's attorney approached the bench and indicated to the trial judge section 550, subsection (c) of the Vehicle Code governing left-turn signals, and then and there requested that the same be included in the jury instructions. The court assented and read the entire section as an instruction.

There are only three assignments of error: that the admission of the testimony of Mr. Barnes was prejudicial error; that the court erred in permitting counsel for the plaintiff to offer additional instructions after the hearing; and that the giving of an instruction on left turns was, in any event, erroneous.

[1-3] We shall discuss these assignments in inverse order. The appellant contends that the giving of a left-turn instruction was error because it would be impossible from the contour of the highway to make a left turn at the junction in question. While admittedly a court shall not blind itself to "physical facts," (Waizman v. Black, 101 Cal.App. 610, 281 P. 1087),

we do not find the instruction here erroneous.

The portion of subsection (c), section 550, Vehicle Code so given to the jury reads as follows: "[Vehicles approaching from opposite directions.] This section shall not apply to vehicles approaching each other from opposite directions, when the driver of one of such vehicles is intending to or is making a left turn."

Section 86 of the Vehicle Code provides: "'Intersection' is the area embraced within the * * * lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways *joining at any other angle may come in conflict*." (Emphasis ours.)

The appellant predicates his contention on the theory that one must turn at right angles in order to turn "left." Patently this argument is fallacious. Any change of direction in front of vehicles approaching in the left lane must be construed as a "left turn" requiring proper signals; and where the vehicle, even without an actual change of direction, is leaving the main highway and may cause a hazard to vehicles approaching from the opposite direction it cannot be said as a matter of law that an instruction on left-turns is erroneous. This is particularly true in the instant case, since there was evidence which would have entitled the jury to find that the defendant had actually entered the curved portion of Highway 4, from whence an angle turn would be required to enter Peabody Road.

[4] The second assignment to be discussed is that concerned with the method of giving instructions. Appellant contends that Code Civ.Proc. sec. 607a gives an absolute right to inspect instructions before argument. In charging the jury the court may of its own motion instruct them as to all matters of law which it thinks necessary for their information in giving their verdict. Code Civ.Proc. sec. 608; James v. Myers, 68 Cal.App.2d 23, 156 P.2d 69; 24 Cal.Jur. 794.

[5, 6] Since, regardless of authorship, it is well settled that the instructions are those of the court, the appellant is in no worse position here than he would have been had the court given the instruction objected to without any request by respondent's counsel. However, this is not to be taken as an approval of such conduct on the part of counsel during the course of a trial.

Coming to the last assignment of error the appellant's contention is that the evidence of Mr. Barnes was so remote that to admit it was error and being error it must be deemed prejudicial.

[7] We are satisfied that the rule adopted in California, irrespective of the contrary rule in some other jurisdictions, is that the question of the remoteness of testimony is addressed to the discretion of the trial court. Lundgren v. Converse, 34 Cal.App.2d 445, 93 P.2d 819; Mathews v. Dudley, 212 Cal. 58, 297 P. 544; Wigmore on Evidence, sec. 382.

[8] The evidence showed that the accident occurred about one minute after this incident in point of time, and about a half mile in point of distance and beyond the sight of the witness. The fact that the accident occurred out of the range of vision does not preclude the testimony. In Mathews v. Dudley, supra, the witness testified to the manner of driving of the defendant around several curves until he was lost from sight. The accident followed "but a short space and a few seconds" thereafter. In the Mathews case the appellant raised the identical contention as the appellant here, i.e. that the testimony was too remote. The court said (212 Cal. page 60, 297 P. page 545): "We can perceive no merit in this contention, since the testimony of this witness had relation to a course of conduct which was being pursued by the driver of the truck for a considerable distance in the course of its descent along said highway and up to within a very short distance and a very brief space of time before his truck collided with the car in which the plaintiff was riding * * * and the question of its remoteness, in view of the fact that the witness did not see the collision, was one which rested in the sound discretion of the trial judge as to the admission or rejection of such evidence."

From the evidence in the instant case it clearly appears that the collision occurred less than a minute from the time that the witness was last able to see the defendant's automobile and *less* than a half mile from the hill which obstructed the witness' view.

While the evidence might have had little weight, that question was not for the court. We are unable to say as a matter of law that there was such a palpable remoteness between the incident testified to and the accident as to require a declaration that the trial judge abused his discretion. Hence, there being no abuse of discretion, the question of prejudice is not involved.

The judgment of the trial court is affirmed.

DOOLING, J., concurs.

Hearing denied; SCHAUER, J., dissenting.

83 Cal.App.2d 288

DE FLON v. VAN LUE.

Civ. 15940.

District Court of Appeal, Second District,
Division 3, California.
Jan. 16, 1948.

1. Taxation 🔑789(3)

In establishing title based upon a tax deed, a prior deed to the state is a necessary part of the proof required as well as proof of deed from state to purchaser at tax sale. Revenue and Taxation Code, § 3711.

2. Taxation 🔑788(4, 5)

The provision of the Revenue and Taxation Code to the effect that deed from state to purchaser at tax sale is conclusive evidence of regularity of all proceedings from assessment of assessor to execution of deed does not mean that deed from state to purchaser is conclusive evidence that there was a prior deed to the state, since such provision is in the chapter dealing with sale to private parties after deed to state. Revenue and Taxation Code, § 3711.

3. Quieting title 🔑10(1)

In action to quiet title, plaintiff must recover upon strength of his own title and not upon weakness of defendant's claim.

4. Taxation 🔑789(3)

Where plaintiff in quiet title action relied solely upon a deed to him from state at a tax sale without showing a prior deed to state, plaintiff failed to establish title in himself and was not entitled to judgment, notwithstanding that record did not indicate basis upon which defendant claimed title to property. Revenue and Taxation Code, § 3711.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by James De Flon against W. Arthur Van Lue, as administrator of the estate of William T. Coats, deceased, to quiet title to real property. Judgment for plaintiff, and defendant appeals.

Reversed.

Porter C. Blackburn, of Los Angeles, for appellant.

No appearance for respondent.

WOOD, Justice.

Defendant appeals from a judgment in favor of plaintiff in this action to quiet title to real property. The complaint alleged that plaintiff was the owner and in possession of the property, that defendant claimed an interest therein adverse to plaintiff, and that the claim was without any right whatever. The defendant denied those allegations, except the one as to the interest claimed by him; and he alleged in his answer that "this defendant admits that the said estate claims title thereto." At the trial plaintiff offered in evidence a tax deed executed by the tax collector of Los Angeles County, as grantor, purporting to convey the said property to the plaintiff, as grantee. Defendant objected to that offer on the grounds that it was incompetent, irrelevant and immaterial, and that no proper foundation had been laid. The court overruled the objection and received the deed in evidence. Thereupon plaintiff rested his case, and then the defendant, without offering any evidence, rested his case. Findings were not made, and were not waived.

Defendant contends that a tax deed from the State to a purchaser at a tax sale is insufficient to establish title in the purchaser. Plaintiff did not file a brief on appeal.

[1] As above stated, the only evidence presented by plaintiff was the tax deed from the State. There was no evidence that the property had been conveyed by deed to the State. A deed to the State is a necessary part of the proof required in establishing title based upon a tax deed. Jones v. Luckel, 174 Cal. 532, 534, 163 P. 906; County Bank v. Jack, 148 Cal. 437, 441, 442, 83 P. 705, 113 Am.St.Rep. 285; Swann v. Carson, 56 Cal.App.2d 502, 132 P.2d 863.

In the case of Jones v. Luckel, supra, defendant attempted to prove title to land by introducing in evidence the tax deed from the State to himself. In that case the court stated, 174 Cal. at page 534, 163 P. at page 907: "He introduced no deed whatever in evidence to show that the state had ever acquired any title to the land from the predecessor in interest of plaintiff, or from herself, or at all. This could only be shown by the production of a deed to the state made on a sale to it after delinquency by the owner in the payment of his taxes assessed against it. As there was no such deed to the state produced in evidence, there was no sufficient showing that the defendant had ever acquired title to the property against plaintiff."

The case of Swann v. Carson, supra, 56 Cal.App.2d 502, 132 P.2d 863, is similar to the present case. The plaintiff therein, who claimed title under a tax deed, introduced in evidence a deed from the State, then rested, and on appeal did not file a brief. The court therein held that plaintiff failed to establish title in himself because there was no evidence that the property had been conveyed by deed to the State. See also, Johnson, Inc., v. Warden, 76 Cal. App.2d 697, 173 P.2d 838.

[2] The provision of Section 3711 of the Revenue and Taxation Code, to the effect that the deed from the State is conclusive evidence of the regularity of the proceedings, does not mean that the deed from the State to the purchaser is conclusive evidence that there is a deed to the State. That section (enacted in 1939) provides: "Except as against actual fraud, the deed [from the State to the purchaser] duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." That section is in Division 1, Part 6, Chapter 7, of said code, which chapter is entitled "Sale to Private Parites After Deed to State." In the case of Roma v. Elbert, Ltd., 73 Cal.App.2d 338, at page 340, 166 P.2d 294, 295, in referring to said section, the court stated: "That section refers only to the regularity of the taxing procedure and does not purport to declare that the deed received by a purchaser from the State is evidence that the property had previously been deeded to the State. The legislature cannot make a tax deed conclusive evidence of matters that are essential to the exercise of the taxing power, that is, as to the steps that are jurisdictional in their nature. [Citing cases.] The State cannot convey title that it does not possess. A deed to the State is a jurisdictional prerequisite to its right to execute a deed to a purchaser at a tax sale. Appellants made no offer of proof that the State had received a deed to the property in question. If such a deed existed it was a matter of public record and could have been readily produced and offered in evidence. The record does not disclose that any request was made to the court for an opportunity to produce the missing document." In that case, 73 Cal. App.2d at page 340, 166 P.2d at page 294, the court held that the trial judge properly refused to receive in evidence the tax deed from the State on the ground that the proper foundation had not been laid, in that, it had not been shown that the State had acquired title to the property.

[3, 4] The record herein does not indicate the basis upon which defendant claims title to the property. The burden, however, was upon plaintiff to establish title in himself. "In an action to quiet

title, the plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's claim." Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383, 389. Plaintiff failed to establish title in himself.

By reason of the above conclusion, it is not necessary to discuss the other contentions of appellant regarding the failure to make findings, and regarding plaintiff's failure to allege and prove that he paid the taxes levied subsequent to the purchase at the tax sale.

The judgment is reversed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

83 Cal.App.2d 197

CALIFORNIA INTELLIGENCE BUREAU v. CUNNINGHAM.

Civ. 15853.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1948.

1. Trade-marks and trade-names and unfair competition 🔑93(3)

Evidence that former employee of plaintiff's fund-raising investigation service established a competing business which operated in the same manner and which made use of information obtained while in the employ of plaintiff sustained finding that defendant engaged in competing business and used plaintiff's confidential information.

2. Trade-marks and trade-names and unfair competition 🔑77

Whether employer is entitled to enjoin operations of former employee who has established a competing business depends upon whether former employee is using secret and confidential knowledge gained in the employment, and, if so, its use will be enjoined.

3. Trade-marks and trade-names and unfair competition 🔑77

An employee, after cessation of employment, may use anything derived from employment that is not property of his employer, but trade and business secrets and confidential information are employer's property and cannot be used by employee for his own benefit. Labor Code, § 2860.

4. Trade-marks and trade-names and unfair competition 🔑77

A list of subscribers of a service built up by ingenuity, time, labor and expense of owner over many years is his property, and knowledge of such list acquired by employee during employment may not be used by employee after termination of employment as his own property or to former employer's prejudice. Labor Code, § 2860.

5. Trade-marks and trade-names and unfair competition 🔑77

Information acquired by plaintiff during 23 years' investigation of fund-raising schemes, techniques developed and list of subscribers to such information constituted property of plaintiff who was thereby entitled to enjoin operations of former employee who, with aid of information and knowledge of techniques, set up a competing business and used list of subscribers. Labor Code, § 2860.

6. Trade-marks and trade-names and unfair competition 🔑77

Where questionnaire composed by plaintiff for distribution to subscribers to plaintiff's fund-raising investigation service contained questions which any ordinary person would propound to a solicitor for funds, injunction restraining operations of plaintiff's former employee who set up competing business should not have enjoined use of any questionnaire containing questions similar to those in plaintiff's questionnaire.

7. Trade-marks and trade-names and unfair competition 🔑77

Where former employee of plaintiff's fund-raising investigation service set up a competing business using confidential information obtained in former employment, decree restraining such operations improperly enjoined former employee from soliciting persons who subscribed to plaintiff's service after employee's discharge.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by the California Intelligence Bureau against Warren T. Cunningham to enjoin the defendant from engaging in unfair trade practices. Judgment for the plaintiff, and the defendant appeals.

Judgment modified, and as so modified, affirmed.

Frank M. Benedict, of Los Angeles, for appellant.

Joseph D. Taylor and Paul Taylor, both of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Appeal from a judgment enjoining defendant from engaging in unfair trade practices.

Plaintiff or its predecessor for more than 23 years has been engaged in a unique business in Los Angeles. According to the evidence, it is now and during the years has been the only concern engaged in a similar business in Los Angeles. The business consists in procuring, digesting and analyzing information concerning solicitations of funds for charity, for philanthropic, commercial or civic enterprises, benefits, campaigns, drives of all sorts, sales of tickets and advertising space by various organizations, particularly concerning those which canvass for funds in the name of charity, patriotism or civic pride. The information so acquired, after it is digested and analyzed, is distributed by bulletins to subscribers for the purpose of protecting them from false, fraudulent and unworthy promotion and solicitation. The subscriber pays plaintiff an annual fee for the service. The subscribers are generally persons, firms and corporations subject to the kind of solicitation described. Throughout the years plaintiff has accumulated a great amount of information with respect to the nature of such solicitations, the persons making them, those that are worthy and those that are not. Plaintiff also, at the request of a subscriber or upon employment by a non-subscriber, investigates a particular institution, individual or periodical claiming to be of benefit to, or sponsored by, or devoted to, charitable, patriotic or civic endeavors. The information which is furnished to subscribers (also called customers and members), is confidential and is not published or distributed to others, except that at times it has been made available confidentially to interested government officials in the public interest. The subscribers receive a bulletin every 15 days, which is a digest and a report of most recently acquired information. An opinion as to the merits of a solicitation is rendered to a subscriber upon request as part of the service.

In October, 1944, plaintiff employed defendant as a solicitor of new subscribers. Plaintiff furnished defendant with an accumulation of bulletins previously sent to subscribers, reports on solicitations, questionnaires, applications for advertising, copies of letters, advertising literature and a complete list of plaintiff's subscribers. The bulletins given defendant went back about a year and a half and contained data theretofore furnished subscribers with respect to persons, firms and corporations that plaintiff had investigated. Plaintiff also gave defendant a list of prospective subscribers and from time to time furnished him with new lists of subscribers to plaintiff's service. During the period of his employment defendant secured 125 new subscribers for plaintiff.

Defendant was discharged by plaintiff on April 20, 1945. At the time of his discharge defendant told plaintiff's president that he, defendant, would see to it that plaintiff would not renew one percent of the accounts that defendant had sold and that he had more than one way to approach those members whom he had sold without committing slander; that he would see to it that the accounts he had sold were not renewed and that the life of those accounts would not be long. A short time later defendant told a former employee of plaintiff that he was unable to obtain a license for conducting investigations but that after all of the months of his connection with plaintiff he had accumulated quite a little information; that he had it in his head;

that he was still getting plaintiff's reports from people whom he had sold.

On November 1, 1945, defendant set himself up in a competing business. For a short time he called himself "Merchant's Investigation Bureau," and thereafter "Merchant's Advertising Bureau." The business operated by defendant after November 1, 1945, was substantially the same type of business, operated in the same manner, as that of plaintiff. Within a short time after defendant began the competing business, about 84 of the persons whom defendant had obtained as subscribers to plaintiff's service cancelled their subscriptions. It may be inferred that these cancellations were the result of defendant's efforts. Defendant sold his service to about 80 of the persons who had cancelled.

In connection with the operation of its business, plaintiff furnishes its subscribers with a questionnaire, consisting of a list of questions. The subscriber is told to hand one of the questionnaires to a solicitor whenever he is solicited for funds and ask him to answer the questions on the questionnaire. The idea it to discourage unworthy solicitors upon the theory that a worthy one will fill out a questionnaire while an unworthy one will not. While in the employ of plaintiff, defendant secured one or more copies of plaintiff's questionnaire. After defendant began operation of his own business he prepared and distributed a similar questionnaire to his subscribers.

The trial court found the facts in accord with the foregoing statement. The court enjoined the defendant from (1) soliciting plaintiff's subscribers by use of any questionnaire containing questions designed to obtain from solicitors information as to whether the organization for which the solicitation is made is legitimate, (2) using plaintiff's compiled information, (3) soliciting plaintiff's subscribers for any service operated by defendant by use of plaintiff's secrets and confidential information, (4) divulging to defendant's subscribers any information of a confidential nature obtained while in the employment of plaintiff, (5) soliciting subscribers of plaintiff who were subscribers during defendant's employment by plaintiff to subscribe to any service similar to plaintiff's service, (6) using any questionnaire containing questions of like import to those contained in the questionnaire used by plaintiff.

Defendant makes four claims upon appeal. First, that the evidence is insufficient to support the findings in that there is no evidence that defendant has engaged in a business similar to that of plaintiff. Second, that if the evidence is sufficient to support the finding that defendant was engaged in a business similar to that of plaintiff that there is no evidence to support a claim that he engaged in unfair trade practices or competition. Third, that the decree is erroneous in enjoining the use of a questionnaire by defendant. Fourth, that the decree is too broad because it enjoins defendant from soliciting the customers of plaintiff regardless of whether or not they may have become such since defendant's employment terminated.

[1] Appellant's first contention need receive but scant attention. The record contains abundant evidence that defendant, after termination of his employment with plaintiff, set himself up in a similar business and made use of the secrets and information that he had obtained while in the employ of plaintiff. In fact, defendant so admitted. He intentionally set out to injure plaintiff's business. He sold his service to customers he had obtained for plaintiff while employed by plaintiff. He admitted that he rendered his subscribers counsel and advice on advertising and various mediums. The nature of defendant's testimony was such that the trial judge was warranted in concluding that defendant was engaged in a business similar to and competing with plaintiff and that he used plaintiff's methods, confidential information and secrets in the operation thereof.

Appellant's next point depends for its determination upon whether the facts of this case, as found, bring it within the line of cases exemplified by George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399; Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340; Scavengers Protective Ass'n v. Serv-U-Garbage Co., 218 Cal. 568, 24

P.2d 489; Fidelity Appraisal Co. v. Federal Appraisal Co., 217 Cal. 307, 18 P.2d 950; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann.Cas.1914C, 628; Riess v. Sanford, 47 Cal.App.2d 244, 117 P.2d 694; and Wallich v. Koren, 80 Cal. App.2d 223, 181 P.2d 682, or whether the facts bring the case within the line of decisions illustrated by Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9; Theodore v. Williams, 44 Cal.App. 34, 185 P. 1014; Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485; and Cohn v. Clare, 6 Cal.App.2d 504, 44 P.2d 634.

In the first group of cases it is held that equity, at the instance of a former employer, will enjoin a former employee from using knowledge or information gained while in the employ of the former employer, and by reason of such employment, to the former employer's detriment, if: (1) the former employee is in possession of trade or business secrets or confidential information, or the like, not readily accessible to others; (2) the former employee solicits the customers of his former employer in a competing business with intent to injure his former employer's business; (3) the former employee solicits the customers of his former employer, who comprise a list of preferred customers whose trade is profitable to a supplier of a service, knowledge of whom is a trade secret and confidential; (4) one concern is usually patronized by a customer and the lists and names and addresses of the customers are considered secret and have the character of property; (5) there is an established business relationship between the customer and the former employer which, unless interfered with, normally continues.

In the second group of cases it is held that equity will not enjoin a former employee from using knowledge or information gained while in the employ of a former employer, and by reason of such employment, even to the detriment of the former employer, if: (1) the customers solicited (a) do not constitute a trade secret, or confidential information, or a confidential list in which a proprietary interest might be claimed, or (b) are commonly known to the trade and are called upon by salesmen for various companies, or are wholesale buyers whose names appear in directories and are so few in number that anyone might readily discover them, and the list of them is not secret or confidential; (2) the former employer is in open competition with others engaged in similar business, selling in an open, competitive market; (3) the former employee was a salesman of his former employer in a commercial field where there was no assurance of an order unless he could satisfy his customer that his product was better, cheaper, or more salable than that of his competitor, where the customer usually desired to examine, inspect and compare the product and prices offered to him and each sale was a distinct transaction, not necessarily implying that another will follow; (4) no secret or trust reposed in the former employee in the course of his employment is violated and no trade or business secret or confidential information is used by the former employee.

Defendant contends that the facts of this case bring it within the second group of cases, while plaintiff contends that they bring it within the first group.

[2-4] The fundamental difference in the decisions, as we read them, is whether in a given case the knowledge gained by an employee is secret and confidential. If it is, its use by a former employee will be enjoined. If it is not, its use by a former employee will not be enjoined. Some knowledge gained by an employee is of such a general character that equity will not restrict its later use. An employee has a right, after cessation of employment, to use anything that is not the property of his employer. Trade and business secrets and confidential information are the property of the employer and cannot be used by the employee for his own benefit. A list of subscribers of a service, built up by ingenuity, time, labor and expense of the owner over a period of many years is property of the employer, a part of the good will of his business and, in some instances, his entire business. Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee

as his own property or to his employer's prejudice. It is this wrongful use by the former employee which constitutes an injury to the employer which equity will restrain. In Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9, one of the cases upon which appellant relies, it is noted that the use by an employee to the prejudice of his former employer of confidential information gained by the employee during his prior employment as to the business secrets of his employer is unfair competition and will be enjoined. The principle is statutory law in this state. Labor Code, section 2860 provides: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

[5] In our opinion there can be no question but that the facts of this case bring it within the first group of cases listed supra. During the many years plaintiff has been in business it has acquired and retains a vast amount of information relative to those who solicit funds. It knows the worthy and the unworthy. It has developed superior methods of investigation of newcomers in the field. It has evolved methods of analyzing and digesting the results of its investigations. It tersely supplies its conclusions to its subscribers. From the exhibits it is apparent that such conclusions are of inestimable value to one solicited for funds. All of this, including plaintiff's list of subscribers, is a trade secret, confidential information, property of plaintiff. Plaintiff's list of customers is a preferred list, a list of persons, firms and corporations willing to pay for confidential, difficult to obtain, information about persons soliciting funds. Defendant, as we have said, gained knowledge of all these matters while in the employ of plaintiff and with intent to injure plaintiff's business, to his own profit, used the information in a competing business. The evidence warrants the conclusion that the acts of defendant were done in carrying out a preconceived plan to injure the business of plaintiff. Under the law, as stated in the first group of cases, defendant was properly enjoined.

[6] Appellant's third and fourth points are, in part, well taken. The decree is too broad. It enjoins defendant from: (1) using any questionnaire "containing questions similar or of like import to questions contained in plaintiff's questionnaire," including "questions designed to obtain from solicitors information as to whether the organization for which solicitation is made is legitimate, charitable, philanthropic, commercial, civic or otherwise"; (2) soliciting subscribers of plaintiff's service under any circumstances, regardless of whether they may have become such since defendant's employment terminated. The questions asked in the two questionnaires are those which any sensible person would propound to a person, unknown to him, who came to him soliciting funds. There is nothing in the nature of the questionnaire which gave plaintiff any property right therein. The use by defendant of the same or similar language in his questionnaire as that used by plaintiff in his does not constitute an unfair trade practice or unfair competition, except as he may use it in solicitation of persons who were subscribers of plaintiff during the period of defendant's employment by plaintiff. Cf. International Heating Co. v. Oliver Oil Gas Burner & Machine Co., 8 Cir., 288 F. 708, 30 A.L.R. 611; Riess v. Sanford, 47 Cal.App.2d 244, 117 P.2d 694; Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946, 22 L.R.A.,N.S., 599, 131 Am.St.Rep. 446, 16 Ann.Cas. 807, and other cases, cited by respondent, do not justify the decree in this respect. There is no basis in law for a decree restraining defendant from using a questionnaire containing questions similar or of like import to questions contained in plaintiff's questionnaire as long as defendant does not distribute such questionnaire to subscribers of plaintiff who were subscribers during the period of defendant's employment by plaintiff.

[7] The provision of the decree enjoining defendant from soliciting subscribers to plaintiff's service who became such after the termination of defendant's employment so long as he does not use any of

plaintiff's trade secrets or confidential information cannot be justified on any theory.

The judgment is modified as follows: Paragraph numbered "(1)" to read thus: "(1) Soliciting subscribers, customers and members of the plaintiff's service who were subscribers, customers, or members during defendant's employment by plaintiff by use of any questionnaire containing questions designed to obtain from solicitors information as to whether the organization for which solicitation is made is legitimate, charitable, commercial, civic, or otherwise"; paragraph numbered "(6)" is stricken therefrom. As thus modified the judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

31 Cal.2d 341

CARTER et al. v. CITY OF LOS ANGELES et al.

L. A. 20289.

Supreme Court of California, in Bank.
Jan. 20, 1948.

1. Municipal corporations 🔑205, 206

Suspension of two female civil service employees who had attained permanent status as field collectors in Department of Water and Power of City of Los Angeles for lack of work in the class following redistribution of duties performed by them to employees in general clerk and junior clerk typist classes was not an abuse of discretion, where female employees did not perform all of the duties which attached to position of field collector but performed only desk duties, which could properly be performed by persons employed in classes other than that of field collector.

2. Officers 🔑69

A change of duties of civil service employees does not necessarily amount to reclassification of the position.

3. Mandamus 🔑172

In mandamus proceeding by suspended city civil service employees to compel reinstatement, inquiry into extraneous facts merely to determine motive in suspending employees would not be proper.

4. Mandamus 🔑168(4)

In mandamus proceeding by suspended civil service employees against City of Los Angeles and others to compel reinstatement as field collectors in Department of Water and Power, evidence supported finding that petitioners were regularly laid off pursuant to city charter and that their suspension was not arbitrary, or capricious or unlawful, so as to entitle them to reinstatement to their positions.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Mandamus proceeding by Ruby Carter and others against City of Los Angeles and others, to compel the reinstatement of petitioners as suspended civil service employees and the payment of salaries from date of suspension. From judgment denying the petition, the petitioners appeal.

Affirmed.

Prior opinion, 181 P.2d 103.

Jerrell Babb, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., A. L. Lawson and Wendell Mackay, Deputy City Attys., all of Los Angeles, for respondents.

SHENK, Justice.

The petitioners were classified civil service employees in the Department of Water and Power of the City of Los Angeles. They have appealed from an adverse judgment in a mandamus proceeding wherein they sought reinstatement to their positions as field collectors, with the payment of salary from December 31, 1940, the date of their alleged wrongful suspension. The respondents defended in the proceeding on the grounds that the appointment of the petitioners to the positions they occupied was not in conformity with the provisions of the state Constitution and the charter of the City of Los Angeles and was therefore illegal; and that their suspension on the ground of lack of work in class was in accordance with the provisions of the charter, therefore regular and valid. A contention is also made by the respondents that the petitioners have not complied with the charter requirements for the filing of a demand for reinstatement and a claim for compensation.

This is the second appeal in the proceeding. On the first appeal a judgment, likewise for the respondents, was reversed and the case remanded for further trial. Carter v. City of Los Angeles, 67 Cal.App.2d 524, 154 P.2d 907. Thereafter pursuant to stipulation the respondents filed an amended answer. After trial the court made findings of fact and concluded that the certification and appointment of the petitioners to the position of field collector were contrary to law and that each of the petitioners was unlawfully employed by the Department of Water and Power; also that each was laid off in accordance with the provisions of the city charter, and was not entitled to reinstatement or to the recovery of compensation.

The petition herein was filed on November 7, 1942. It was alleged therein, and found by the court, that demand and claim were filed on March 10, 1941, which was within 90 days from December 31, 1940, the effective date of suspension. The suspensions were sustained by the Board of Civil Service Commissioners on July 7, 1941. No further claim or demand was filed.

Section 112½ of the Charter of the City of Los Angeles requires that demand for reinstatement be filed with the Board of Civil Service Commissioners, and that claim for compensation be filed with the City Clerk, "within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged." Failure to file such demand and claim within the stated time is made a bar to any subsequent action for judicial relief.

No contention was made on either trial, or on the former appeal (decided January 12, 1945) that the foregoing requirements of the charter were not complied with. That contention is made for the first time on the present appeal and is based on the decisions in Steen v. Board of Civil Service Commissioners, 26 Cal.2d 716, 160 P.2d 816, decided in June, 1945, and Tennant v. Civil Service Commission, 77 Cal.App.2d 489, 175 P.2d 568, decided December 31, 1946. (The judgment from which the present appeal is taken was rendered on Jaunary 7, 1946.)

In the Steen case it was held that the filing of the demand for reinstatement and the claim for compensation within ninety days from the date of sustaining the order of discharge (although more than ninety days from the effective date of suspension or discharge pursuant to the notice served on the employee), was in compliance with the provisions of section 112½ of the charter. In the Tennant case, the District Court of Appeal in applying that holding arrived at the conclusion that the filing of demand and claim within ninety days of service of notice and effective discharge, but before the final action of the board in sustaining the discharge, was premature and ineffective.

In the present proceeding, as in the Tenant case, there was not an entire failure to file a demand and claim. See Johnson v. County of Fresno, 64 Cal.App.2d 576, 149 P.2d 38; cf. Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. Suitable demands and claims, as the court found, were filed on March 10, 1941, and it may be assumed continued to remain on file during and after the investigation and final action sustaining the suspensions, and are still on file. The respondents' contention purports to present to this court the question whether the decision in the Tennant case was proper. It may be noted that the result in that case is sustainable on another ground, namely, that the petitioner therein was guilty of laches in seeking judicial relief. In the present proceeding, however, because the appeal must be disposed of adversely to the petitioners on other grounds, we deem it unnecessary to pass upon the question of the timeliness of the filing of their demands and claims.

The principal contention of the petitioners on this appeal is that the trial court's conclusions are unsupported by the findings or the evidence; therefore that their suspension was arbitrary, capricious and unlawful.

The record shows the following:

The petitioners commenced their employment in the Commercial Division of the Department of Water and Power of the City of Los Angeles in 1933 under temporary emergency appointments without civil service examination, and continued to be employed in the same division until the time of their suspension. The petitioner Baltes received emergency appointments as information assistant on September 29, 1933; as field collector on August 23, 1934; as clerk-typist on July 31, 1936; and as typist on September 1, 1936. The petitioner Carter received emergency appointments as information assistant on December 6, 1933; as field collector on August 31, 1934; as typist on January 1, 1936;

and as general clerk-typist on July 31, 1936. About January 30, 1936, a bulletin was posted announcing an examination to be given in the civil service class of field collector in the Department of Water and Power, with a monthly salary range of $135 to $190. The announcement specified the qualifications of applicants as minimum age 21 years, education equivalent to high school, one year of experience as collector, credit man, clerk, or employee engaged in meeting and dealing with the general public, thorough knowledge of the geography of the city of Los Angeles, firmness and tact, good address and good physical condition. The duties specified were, under general supervision, to route the daily collection work (arranging the delinquent, closing and returned bills in street and number order); to present bills for collection to and collect monies from consumers; to trace consumers who moved; to follow up unhonored checks; to present charity bills for verification of occupants; to obtain contracts from consumers for water and light; to make shutoffs on account of unpaid bills and apply lock fuses to services shut off; to turn in collections, bills, etc.; to make daily reports of collections; and to perform related work as required. The test was in writing and by personal interview to determine the qualifications.

The petitioners took the test on February 15, 1936, and passed both branches. On May 14, 1936, the Civil Service Commission established an eligible list of 398 persons in the class of field collector, including three women, one in addition to the petitioners. The petitioners were number 76 (Baltes) and 216 (Carter) on the list. Shortly prior to November 6, 1936, the Department of Water and Power requested the Board of Civil Service Commissioners for certification of two women from the list of eligibles for the position of field collector. On November 6th the board certified the names of the only three women on the list. The petitioners were appointed to the position of field collector at a salary of $135 per month, and they continued at their desks in the Commercial Division at the same salary until suspension. At the time of their appointment the last person regularly certified and appointed as field collector was number 28 on the eligible list.

Admittedly the petitioners did only desk work up to the time of their suspension. Both men and women performed clerical duties in the Commercial Division in various classes. The petitioners did work which was common to all classes employed at desk work in the division; but there is evidence that some duties performed by the petitioners were not discharged by others, such as preparing letters for collections through the mail or attempting collections by telephone before they were followed up in the field, and processing for the next step after field attempts failed. The trial court found that from the time of their appointment on November 6, 1936, duties performed by the petitioners applied to the class of field collector; also that their duties were not such as could only be properly, efficiently, reasonably or satisfactorily performed by a female person, but, on the contrary, that the duties of the position at all times could have been performed properly, efficiently, reasonably and satisfactorily by either men or women. The record supports the foregoing findings.

Section 18 of Article XX of the California Constitution reads: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Section 424 of the Charter of the City of Los Angeles provides: "In the employment of persons in the service of the city, where sex does not actually disqualify and where the quality and quantity of service is equal, there shall be no discrimination in selection or compensation, on account of sex." Section 109 of the Charter requires the head of a department in which one or more classified positions are to be filled, to notify the Board of Civil Service Commissioners, which is then required to certify for each position the names of not more than three candidates who stand highest on the eligible list. The section also provides: "In making such certifications, sex shall be disregarded, except when some statute, the rules of said board, or the appointing power specify sex."

The petitioners rely on the last six words quoted to support the legality of their appointment out of the prescribed order. They refer to the fact that in the request for certification the appointing power specified sex, namely women. However, conformance with the anti-discrimination clauses of the Constitution and the charter was equally obligatory upon the appointing power. The appointing power had no authority to request certification of women under the facts and circumstances presented by the record and found by the court. Furthermore, if women were especially desirable in the particular duties to be assigned, there was no indication thereof in the request. The request did not state that the appointments were to be made in the Commercial Division or in the Special Collections Unit thereof where the petitioners were employed. Had such statement been made, it is inferable that certification from a different class might have followed. The request made was in violation of the provisions noted, and tainted the certification with the same illegality. From the record it is clear that the petitioners should not, and in fact they do not, claim that they were unaware of their appointment out of regular order. The evidence supports the trial court's findings and conclusions on this ground of the respondents' defense.

But, the petitioners assert, the foregoing was not made an express ground of the cause for suspension, nor was that ground of defense asserted until the filing of the amended answer prior to the second trial. Assuming the truth of these assertions, there is no necessity to prolong the discussion in order to determine what, if any, favorable advantage might thereby ensue to the petitioners, since there is also support in the record for the trial court's conclusion that the petitioners were duly and regularly laid off for the cause stated in the notice of suspension.

During the years 1939 and 1940 a resurvey was made of the civil service classifications in the Department of Water and Power, and of the duties assigned to each. In October, 1939, during this survey and in response to request, each of the petitioners made a detailed report (introduced in evidence by her) of the duties assigned to and performed by her, and each stated that her enumerated duties remained substantially the same for approximately the preceding five years. Beginning January 1, 1940, the regular monthly salary of field collector was $175 (and from September 1, 1942, to March 5, 1944, $195; from March 6, 1944, to March 31, 1945, $200; from April 1, 1945, to October 16, 1945, $220). In 1940 the field collection work was redesigned, changes were made in the procedure for collection, and the amount of work in the class was thereby reduced. As a result of the changes and reduction of work, sixteen lay-offs occurred between October 31, 1940, and February 21, 1941. The petitioners were thirteenth and fourteenth on the lay-off list. The suspensions were based on "lack of work in the class, in accordance with Section 125 of the City Charter", and the notices received by the petitioners, effective December 31, 1940, so stated. Lay-offs were made in the inverse order of seniority, and two men laid off after December 31, 1940, had seniority in the class over the petitioners.

Subsequent to the petitioners' suspension, the duties formerly performed by the petitioner Baltes were assigned to Grace Sparks, a general clerk, and the duties theretofore performed by the petitioner Carter were assigned to Teresa Towles, junior clerk typist, each of whom was regularly employed in the Commercial Division in the indicated classes at the time of the petitioners' suspension, and each continued to perform those duties in her respective class thereafter.

Section 112(a) of the Charter of the City of Los Angeles provides that no person employed in the classified civil service of the city shall be removed, discharged or suspended except for cause which shall be stated in writing and filed with the Board of Civil Service Commissioners together with a certificate of service thereof upon the affected employee. Section 125(a) of the Charter empowers the Board of Civil Service Commissioners to provide by its rules for the manner and order of suspension and restoration where suspension results from lack of work, lack of funds, abolishment of position, or other cause than personal delinquency. Section

125(a) (1) provides that suspension other than for personal delinquency shall be based upon seniority in the class-group, that is, that the person having the shortest length of service in the class shall be suspended first. The petitioners were not entitled to invoke the further provisions of that subdivision to the effect that a suspended person might displace a person having a shorter length of service in a class-group in which a regular position was formerly held by the suspended person. There are no facts showing that the petitioners could have established a possible line of demotion.

It is contended that although the rules relating to suspensions for lack of work in the class were technically complied with, there was in reality no lack of work in the class because the petitioners' positions were merely reclassified, and for that reason their suspension was unlawful. The petitioners point to the admitted reassignment of their duties to employees in two other classes, namely, general clerk and junior clerk typist, as evidence of the alleged arbitrary nature of their suspension. In the decision on the prior appeal (Carter v. City of Los Angeles, supra, 67 Cal.App.2d 524, at page 530, 154 P.2d 907), it was said that the reclassification of positions following the survey in 1940 could not justify the removal of the petitioners from a position which they had obtained after civil service examination. The court did not however hold that the evidence required a conclusion that reclassification had taken place. The case was remanded for further trial because of error in receiving the opinions of experts upon that question and related issues, matters which it was held were for the court and not expert witnesses to determine.

[1-3] Based upon the evidence in the present record the trial court found favorably to the petitioners that the duties assigned to them were duties proper to the class of field collector. The court, however, did not find that the duties actually performed by the petitioners were not proper for performance by persons employed in the Commercial Division in classes other than that of field collector. In fact the evidence is to the contrary. It is unquestioned that the petitioners did not perform all of the duties which attached to the position of field collector. It may fairly be said that they performed none of the duties specified for field collector—which viewed in the aggregate were typical of work to be performed by persons operating in the field rather than exclusively at a desk—with the possible exception of the preparatory routing of bills, and the typing of daily reports. The performance of incidental clerical work, such as checking for paid and unpaid bills, writing of form letters and special letters regarding delinquent bills, handling of mail and telephone calls, filing and the like, the petitioners justified under the specification of "related work as required". But there would be no justification for a conclusion that the Department of Water and Power could not redistribute the desk duties performed by the petitioners to other classes suitable for inclusion therein in the first instance. So to do is not to reclassify the petitioners' positions. Not every change of duties amounts to a reclassification of the position. A clear abuse of discretion must be shown. Otto v. Reardon, 21 Cal.App.2d 260, 266, 69 P.2d 185. No such abuse of discretion is apparent. This is not a case like Winslow v. Bull, 97 Cal.App. 516, 276 P. 974, where an employee from a lower class was *promoted* to do the work of the dismissed employee. There was not involved in that case a redistribution of duties which would have been proper, as here, and in accord with permissible power under the charter provisions. Neither is there here any charge of nonconformance with charter regulations in making the changes in the collection procedure. There was no showing of fraud or bad faith in making such changes, nor of any facts which could be translated as a torturing of the changes into a mere instrumentality to effect the discharge of an employee protected by the salutary provisions of civil service regulations. See Livingstone v. MacGillivray, 1 Cal.2d 546, 553, 36 P.2d 622. Inquiry into extraneous facts merely to determine motive would not be proper. Kennedy v. State Personnel Board, 6 Cal.2d 340, 57 P.2d 486. Furthermore, each of

the petitioners was subsequently given a temporary appointment in the class of field collector and assigned to performance of duties in the field at the higher wage scale.

[4] The trial court's conclusion that the petitioners were regularly laid off pursuant to section 125 of the Charter is supported by the findings and the evidence.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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31 Cal.2d 300

UNION OIL CO. OF CALIFORNIA v. UNION SUGAR CO. et al.

L. A. 19660.

Supreme Court of California.
Jan. 16, 1948.
Rehearing Denied Feb. 9, 1948.

1. Evidence 🔑450(4), 458

Where original oil and gas lease provided that drilling might be suspended when value of oil fell to 60 cents a barrel and that drilling requirements should be suspended in case of strikes, accidents, etc., beyond lessee's control, supplemental contract providing that all obligations to drill additional wells, except setoff wells, were suspended for two-year period and that at expiration of such period lessee must complete three wells a year, was ambiguous, and therefore extrinsic evidence of negotiations of parties and of surrounding circumstances was admissible in declaratory judgment action for purpose of determining drilling obligations of lease as modified by a supplemental contract. Code Civ. Proc. §§ 1856, 1860.

2. Appeal and error 🔑931(8)

Where trial court found that it was untrue that claims of defendant had created an ambiguity or that any ambiguity was apparent on face of original oil and gas lease as modified by supplemental contract, but trial court admitted extrinsic evidence with reference to negotiation on ground that there was ambiguity, and made extensive findings thereon, Supreme Court would assume in favor of judgment for defendant that finding meant that trial court concluded that contract, considered with reference to extrinsic evidence of negotiations, was susceptible of only one interpretation, which was the interpretation relied on by defendant.

3. Evidence 🔑458

In action for declaratory judgment for determination of drilling obligations under oil and gas lease as modified by ambiguous supplemental contract, letters which were mailed and received, and which related to negotiations leading up to supplemental contract, could not be disregarded in interpreting the supplemental contract. Code Civ.Proc. §§ 1856, 1860.

4. Appeal and error 🔑931(5)

Where trial court made extensive findings and conclusions of law with respect to negotiations, including letters, and letters were virtually incorporated into court's findings, it could not be assumed that letters were not considered in order to sustain judgment which was incompatible with the letters.

5. Appeal and error 🔑934(1)

Judgment for defendant, in action for declaratory relief to obtain a determination of drilling obligations under oil and gas lease as modified by supplemental contract, was not supported by statutory rule of construction that language of a contract should be interpreted more strongly against party who caused uncertainty to exist, where evidence was without conflict that ambiguous language in supplemental contract was suggested by defendant's president, in language that was copied almost verbatim into the contract. Civ.Code, § 1654.

6. Mines and minerals 🔑59

Supplemental agreement modifying oil and gas lease was not required to be interpreted in favor of lessor because contract was drawn up by lessee's attorney, where there was no reason to assume that lessee's attorney was any more aware of possibility of ambiguity than lessor's attorney who suggested terms of contract and who signed the contract without suggesting any changes in ambiguous provision.

7. Mines and minerals ⚷59

In action for declaratory judgment for determination of drilling obligations under oil and gas lease as modified by ambiguous supplemental contract, extrinsic evidence required finding that provision in supplemental contract that all obligations to drill additional wells, except set-off wells, were suspended for a two-year period and that at expiration of such period, lessee must complete three wells a year, modified provision in lease that drilling might be suspended when value of oil fell to sixty cents a barrel. Code Civ.Proc. §§ 1856, 1860.

SCHAUER, SCHENK, and CARTER, JJ., dissenting.

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Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by the Union Oil Company of California, against the Union Sugar Company, a corporation, and the Pacific Coast Railway, a corporation, for declaratory relief to obtain a determination of plaintiff's drilling obligations under an oil and gas lease, as modified by supplemental agreement between the parties. From a judgment in favor of the Union Sugar Company, the plaintiff appeals.

Judgment reversed.

Prior opinion 173 P.2d 700.

L. A. Gibbons, Jerry H. Powell, and Douglas C. Gregg, all of Los Angeles, and Brobeck, Phleger & Harrison, Maurice E. Harrison, and Moses Lasky, all of San Francisco, for appellant.

Cross & Brandt and Arthur H. Brandt, all of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action for declaratory relief to obtain a determination of its drilling obligations under an oil and gas lease as modified by a supplemental agreement between the parties. Plaintiff appeals from a judgment entered in favor of defendant, Union Sugar Company.

The original lease was executed in 1936 between defendant, Union Sugar Company, a lessor, and Sovereign Oil Corporation, as lessee. E. H. Moore, Inc., a one-man corporation, hereinafter referred to as Moore, succeeded to the rights of the lessee. Subsequently, plaintiff acquired the lease from Moore. The original lease gave the lessee the right to extract oil and gas from a tract of land containing approximately 6,700 acres for twenty years and for as long thereafter as hydro-carbon substances were produced from the land. The lessee agreed to pay the lessor a royalty of one-eighth of the proceeds from the sale of the oil and gas. Paragraph 7 of the lease provided that after the discovery of oil and gas in paying quantities, the lessee would continue to drill additional wells until it had drilled one well for each ten acres held under the lease. It also specified the rate of drilling required of the lessee:

"After the discovery of oil or gas in paying quantities on the demised premises, Lessee agrees to continuously operate one string of tools with due diligence for the first year after such discovery, two strings of tools for the second year after such discovery, three strings of tools for the third year after such discovery, four strings of tools for the fourth year after such discovery, and five strings of tools thereafter until the drilling requirements herein specified are complied with. Lessee may defer the commencement of the next well to be commenced with each string of tools to be operated hereunder for a period of not to exceed three months after the completion of the well next preceding the well drilled with that particular string of tools. The lessee shall be entitled to drill as many additional wells on said land and premises as it desires."

The original lease contains three clauses suspending the drilling requirements of paragraph 7. Paragraph 7, in addition to its other provisions, provides:

"Drilling and producing operations hereunder may also be suspended while the value of oil of the quality produced from said land, as defined in paragraph One hereof is Sixty Cents or less per barrel at the well, or when there is no available market for the same at the well at such price."

Paragraph 10 of the lease contains a force majeure clause providing that the drilling requirements shall be suspended whenever the lessee is prevented from complying with the lease because of strikes, lockouts, actions of the elements, accidents, rules and regulations of any federal, state, municipal or other governmental agency, or because of other matters or conditions beyond the lessee's control.

Paragraph 33 provides that the lessee may suspend drilling operations if it is obligated to curtail production by reason of any valid order, rule, law or regulation of any federal, state or other governmental subdivision and such curtailment makes it impossible for the lessee to produce oil at a profit.

Two other provisions of the original lease are pertinent. Paragraph 9 of the original lease provides that the lessee agrees to drill offset wells whenever a well on adjoining property within 250 feet of the limits of the land contained within the lease is producing oil or gas in paying quantities. Paragraph 25 of the original lease provides that the lessee may surrender all or any part of the acreage and thus reduce the number of wells to drill.

Soon after the lease was executed, the Pacific Coast Railway Company, which owned a strip of land extending across part of the leased premises, became a party to the lease. This company was named as a defendant in the present action, but permitted its default to be entered and is not a party to this appeal.

In September 1939, the price of oil produced at the wells on the leased premises dropped below 60 cents a barrel, and Moore, who was then the lessee, suspended drilling operations in accord with the provisions of paragraph 7. By this time, the lessee had spent over a million dollars in drilling twelve wells, two of which were dry, three wholly unprofitable, and the rest of moderate production. In October the price of oil of the quality produced by these wells was from 45 to 46 cents a barrel at the wells. In that month Moore and the Union Sugar Company commenced negotiations for a modification of the lease. In 1940 the defendant Union Sugar Company entered into a formal agreement with Moore. The agreement was entitled "Supplemental Contract" and was executed as of February 1, 1940, by defendant, Pacific Coast Railway Corporation, and Moore. By the terms of this agreement the parties agreed that the original lease "be and the same is hereby, modified in the following respects, to wit:

"(1) All obligations to drill additional wells, except off-set wells, are hereby suspended for a period of two years from February 1, 1940.

"(2) At the expiration of said two year period, Moore shall be obligated to complete three wells per year.

"(3) Numerical paragraph (9) of the lease of April 8, 1936, [with respect to off-set wells] shall be modified by striking out '250 feet' wherever the same appears therein, and inserting in lieu thereof '330 feet.'

"(4) Commencing from the date of this supplemental contract, Moore agrees to pay a minimum royalty of $25,000.00 per year, payable monthly in advance, and said royalty shall be charged against the total oil reserves during the course of the life of the lease; that is to say, Moore shall be entitled to all oil and/or gas produced from said lease, or the proceeds thereof, until it is fully reimbursed from lessors' one-eighth royalty interest for the minimum royalty so paid.

"(5) Except insofar as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect."

In 1940, plaintiff acquired the rights of Moore as lessee. On June 22, 1942, defendant served on plaintiff a notice of default reciting that plaintiff was not operating two strings of tools on the leased property and was therefore not complying with the terms and conditions of paragraph 7 of the original lease, since the price of oil was then over 60 cents a barrel. The notice also recited that if this failure continued for 90 days after the date of the notice, the lease would terminate and the lessee's rights to drill additional wells would be forfeited. A controversy having arisen concerning the extent to which the supplemental contract modified the drilling obligations of paragraph 7 of the original lease, this action was brought. Plaintiff alleged that clause 2 of the "Supplemental Contract" modified paragraph 7 so that the lessee after February 1, 1942 is only obligated to drill three wells a year regardless of the price of oil.

When the case first came on for trial the court sustained defendant's objection to the introduction of any extrinsic evidence with reference to the negotiations and circumstances surrounding the execution of the supplemental agreement. The complaint was amended, and when the case came on for trial the second time defendant's objection to the introduction of this evidence was overruled and the evidence was admitted. The trial court, however, found that the drilling obligations of paragraph 7 were not modified by the "Supplemental Contract so as to obligate plaintiff only to complete three wells each year in lieu of the continuous operation of any specified number of strings of tools." Accordingly, the trial court concluded that the plaintiff, after February 1, 1942, and during the remainder of the terms of said lease, is bound by the drilling requirements of paragraph 7 of the original lease, and construed the modification clause as binding the plaintiff, "after February 1, 1942 * * * to complete in *any event* at least three wells each year on the premises described in said lease." (Italics added.)

This requirement, however, was held subject to the provisions of paragraph 10 of the original lease and "plaintiff is not required to perform the same if and while plaintiff is prevented from complying therewith in whole or in part by reasons of strikes, lockouts, action of the elements, accidents, rules and regulations of any Federal, State Municipal or other governmental agency or other matters or conditions beyond the control of the plaintiff."

From a judgment for defendant entered in accord with this conclusion, the plaintiff appeals, on the ground that the trial court erroneously construed the "Supplemental Contract" as not modifying the drilling requirements of paragraph 7 of the original lease. The first question presented by this appeal is whether the trial court acted properly in admitting evidence of negotiations between the parties as an aid to the interpretation of the supplemental contract. Both parties contend that apart from these negotiations the contract is susceptible of only one interpretation. They disagree, however, as to what that interpretation should be. Defendant contends that the trial court's interpretation must be sustained because the supplemental contract on its face provides that "All obligations to drill additional wells * * * are hereby suspended for a period of two years from February 1, 1940. * * * At the expiration of said two year period, Moore shall be obligated to complete [in any event at least] three wells per year." Plaintiff contends that the provision in question is clear on its face and reasonably susceptible of only one construction, namely "At the expiration of said two year period, Moore shall be obligated to complete [only] three wells per year." The basis of plaintiff's contention is that since the provision contains the word "obligated," it was intended to measure the obligation of the lessee and thus replaces the drilling requirements of paragraph 7 of the original lease. An examination of both the lease and the "Supplemental Contract" makes it clear that they cannot be construed together without reading words into clause 2 of the latter instrument.

[1] Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining "to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists." Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 562, 147 P.2d 84, 88. Moreover, the construction advanced by the defendant would not support the decision of the trial court. Merely reading the words "in any event" into the clause in question was not sufficient to clarify the meaning of the lease as modified,

for the trial court held that plaintiff was not obligated to drill wells in any event. Paragraph 7 was not the only provision of the original lease providing for a suspension of drilling requirements. The trial court held that plaintiff's obligation to drill was subject to suspension in the event of strikes, accidents and other conditions specified in the provisions of paragraph 10 of the original lease but such obligation to drill would not be suspended by reason of the conditions specified in paragraph 33. This construction, if based only on the express wording of clause 2 of the "Supplemental Contract," would be unreasonable, for it would require the court to read the clause as if it provided that "Moore shall be obligated to drill three wells per year [under all circumstances except those provided in paragraph 10 of the original lease but not including the provisions of paragraphs 7 and 33 thereof]."

It is thus apparent that the contract is not clear on its face, and under the theory of the parol evidence rule that has been accepted by the majority of this court,[1] evidence of the negotiations of the parties and of surrounding circumstances was admissible for the purpose of determining the meaning of the lease as modified by clause 2 of the "Supplemental Contract." Code Civ.Proc., secs. 1856, 1860; Universal Sales Corp. v. California Etc. Mfg. Co., 20 Cal. 2d 751, 761, 128 P.2d 665; Wachs v. Wachs, 11 Cal.2d 322, 326, 79 P.2d 1085; Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 223, 41 P. 876; Weinstein v. Moers, 207 Cal. 534, 540, 279 P. 444; McNeny v. Touchstone, 7 Cal.2d 429, 433, 60 P.2d 986; Body-Steffner Co. v. Flotill Products, supra, 63 Cal.App.2d 555, 561, 147 P.2d 84; McBaine, California Evidence Manual, §§ 408, 409.

This conclusion does not run counter to the provision of the "Supplemental Contract" that "Except insofar as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect." It is clear that before this general provision can be applied, the meaning of the specific provisions of the agreement must first be ascertained in order to determine the extent to which they conflict with the original lease.

The question remains whether the trial court's conclusion as to the meaning of clause 2 of the supplemental contract can be affirmed on the basis of the extrinsic evidence. This evidence consisted of various letters between the representatives of the parties to the modification agreement and testimony with reference to a conference, during the course of negotiations, between Moore's representative and the president and two directors of defendant corporation. The evidence with reference to the letters is not in conflict. The trial court made specific findings as to what occurred at the conference and found that the letters were properly mailed and received.

In October 1939, Mr. Villard Martin, Moore's attorney, entered into negotiations with Mr. T. A. Twitchell, attorney for defendant, for the purpose of modifying the original lease. The evidence regarding these negotiations and the tentative plan agreed upon by the two representatives is contained in a letter written on October 14, 1939, by Mr. Twitchell addressed to Mr.

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[1] The view has been expressed that the requirement of ambiguity involved in the admission of extrinsic evidence "simply means that the language used by the parties must be susceptible to the meaning claimed to have been intended by the parties." (Dissenting opinion in Re Estate of Rule, 25 Cal.2d 1, 22, 152 P.2d 1003, 1013, 155 A.L.R. 1319.) Under this theory, extrinsic evidence is generally admissible to show the sense in which the parties used language embodied in the contract, whether or not the words appear ambiguous to the reader. (See concurring opinion in Universal Sales Corp. v. California etc. Mfg. Co., 20 Cal.2d 751, 776, 128 P.2d 665; Rest. Contracts, sec. 242, comment a; Holmes, The Theory of Legal Interpretation, 12 Harv.L.Rev. 417, 420; Wigmore on Evidence, 3rd ed., secs. 2458–2478; McBaine, The Rule Against Disturbing Plain Meaning of Writings, 31 Calif.L.Rev. 145.) In view of the fact that the instrument involved in this case is not free from ambiguity, it is unnecessary to consider the applicability of this interpretation of the extrinsic evidence rule. (See Body-Steffner Co. v. Flotill Products, supra, 63 Cal.App.2d at 562, 147 P.2d at page 84.)

Edmunds Lyman, then president of defendant corporation, for the purpose of having Mr. Lyman submit the proposed plan to defendant's board of directors. The letter stated that "Mr. Moore desires to construct a topping plant to handle the oil from the lease, but does not desire to spend the money required to build this plant if he has to comply with the existing drilling requirements of the lease." The plan tentatively agreed upon by the two attorneys is outlined in the letter as follows:

"1. The Union Sugar Company shall agree to suspend all drilling obligations for a period of two years, except the obligation to drill offset wells. At first glance, this may appear to be too much of a concession, but on the other hand, at the present price of oil, Moore is not obligated to drill. Based upon my conversations with operators in the field, I do not believe that the price of this grade of oil is going above 60¢ per barrel within the next two years. Of course, no one can foresee the future market conditions, and if oil should go to 60¢ or more per barrel, the Company would lose the royalty on the allowable production from the wells which Moore would be required to drill if the lease was not modified. To offset this, the Company would begin to receive royalty from the lease immediately if the lease is modified and Moore constructs a topping plant.

"2. The existing proven area, comprising some 400 acres, would be zoned and in that zone, after two years, Moore would be required to drill 3 wells per year, provided that the price of oil is 60¢ or more per barrel at the well, excepting when the following circumstances existed: * * * [at this point the letter contains further limitations on the requirement of drilling three wells a year which are not material to the case since they are not covered in the contract.]

"The provision calling for three wells per year was inserted because three wells per year would be all that Moore would be required to drill, assuming that he was operating with one string of tools. Martin said he might desire to drill three wells all at one time under contract rather than to allow 90 days to elapse between wells, as provided in the lease.

"3. Moore should not be obligated to drill any additional wells on any part of the leased property outside of the proven area, unless oil should be discovered in the property or adjacent property at such locations that it would appear probable that oil could be discovered and produced from a portion of the unproven area."

This plan was rejected by defendant's board of directors. The negotiations leading to it are important, however, for they indicate that at that time Moore was interested in building a refinery; that he wished to be relieved of drilling obligations for two years; and that thereafter he was to drill only three wells per year when the price of oil was over 60 cents. The letter is also relevant to show the connection between the requirement of paragraph 7 of the original lease that the lessee operate a certain number of strings of tools and the requirement of clause 2 that the lessee drill three wells since one string of tools will ordinarily drill one well a month. In view of the ninety day interval between the completion of one well and the beginning of another provided for in the original lease, one string of tools would apparently drill about three wells each year.

After entering into the foregoing negotiations with Mr. Twitchell, Moore's attorney returned to Tulsa, Oklahoma. The trial court found that, "in December 1939 [Mr. Martin] again went to California; that upon his return to California he had a conference with Roland E. Tognazzini, Francis L. Cross and Fred Cooke respecting a possible modification of said Original Lease; that said Roland E. Tognazzini was then President and said Francis L. Cross and said Fred Cooke were then directors of the defendant Union Sugar Company; That during said conference said Villard Martin stated to said Roland E. Tognazzini that said E. H. Moore, Inc. considered the drilling requirements of said lease of April 8, 1936, as prohibitive and desired some relief therefrom and that said E. H. Moore, Inc. desired to have said drilling requirements modified so as to provide for a complete suspension of drilling operations for two years.

"That it is true that said Roland E. Tognazzini stated to Villard Martin that defendant Union Sugar Company 'had a situation where the Company because of a posted price of oil being less than 60¢ which was the figure in this particular lease stood not to receive revenue for a great many years to come' and that if said E. H. Moore, Inc. desired relief upon the drilling requirements of said Lease it would be necessary for them to pay an adequate consideration for it.

"That it is true that said Villard Martin returned to Tulsa, Oklahoma, and on January 11, 1940 wrote and sent to said Roland E. Tognazzini and said Roland E. Tognazzini in due course received the letter dated January 11, 1940. * * *" This letter repeated substantially the plan that had been submitted to defendant in Twitchell's letter of October 14, 1939.[2] By a letter dated January 16, 1940, and addressed to Martin, defendant's president, Tognazzini, again rejected this proposal and made a counter offer. This letter reads as follows:

"In response to yours of the 11th, may I first advise that the terms and conditions contained therein are unsatisfactory.

"It was my impression from past conversations you had with my predecessor, and more recently, with Messrs. Cooke, Cross, and me that it was the desire of E. H. Moore, Inc. to obtain a modification of the present oil and gas lease existing between E. H. Moore, Inc. and the Union Sugar Company. In this connection, I expressed to you at our recent meeting that Union Sugar Company was desirous of cooperating with E. H. Moore, Inc., but only to the extent that both parties were to benefit mutually by said modification.

"I gathered definitely that the main desire for a modification on your part was *to eliminate what you consider an onerous drilling clause. In this connection I stated that we would be willing to modify said drilling clause after due and proper consideration were given therefor.*

"As I see the problem, it resolves itself down to a very simple one, to-wit: your desire to be released of the present drilling clause and be permitted to drill after a two year suspension of all drilling requirements, three wells per year. We on the other hand, desire to obtain a minimum royalty throughout the duration of the lease. In view of the fact that the present lease ties up some 6700 acres and further, in view of the fact that E. H. Moore, Inc. has arbitrarily determined that 400 acres are proven, in spite of the fact that it is the consensus of opinion that considerably more acreage is oil bearing, it necessarily follows that to determine a minimum royalty based upon the unit plan as you have indicated in yours of the 11th, cannot logically follow.

"Both you and I, in obtaining a modification, desire to reduce it to its simplest form and to this extent I suggest the following, to-wit:

"(1) *the suspension of all obligation to*

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[2] With respect to the modification of drilling requirements of the lease Mr. Martin's letter of January 11, 1940 contained the following proposal:

"All obligation to drill additional wells, except offset wells, are hereby suspended for a period of two years from the date of this contract.

"At the expiration of said two year period, Moore shall be obligated to drill three wells per year in any area consisting of approximately 400 acres, being that part of the leased premises which is considered proven territory and identified by a plat attached hereto as Exhibit A, provided that the price of oil is sixty cents per barrel, or more, at the well, except that Moore shall not be obligated to drill during the existence of either of the following conditions:

"(a) If Moore is unable to market oil to be produced from said property;

"(b) If operators in the field are unable to market 100 barrels, or more, per day from wells capable of producing 1500 barrels, or more, per day, and Moore would be unable to market 100 barrels, or more, per day from any well to be drilled by it on said property;

"(c) If Moore is unable to market any oil in addition to the quantity of oil produced from wells already drilled by Moore while said wells are being operated in compliance with good oil field practice."

drill additional wells, except offset wells, for a period of two years from date of the modification,

"(2) the modifying of the paragraph 9, by striking out 250 feet and inserting in lieu thereof 330 feet, and in addition thereto, appropriate language to provide that when offset wells are being produced within said range, more or less, E. H. Moore, Inc. likewise produce,

"(3) *at the expiration of the two year period, E. H. Moore, Inc. shall be obligated to drill three wells per year.*

"The consideration for the above will be the paying of a minimum royalty of $25,000 per year, said royalty payable monthly in advance." (Italics added.)

It is notable that the wording of clause (1) of this proposal is almost identical with paragraph (1) of the modification agreement and that there is no substantial difference between the wording of clause 3 of the proposal and paragraph (2) of the agreement. See McNeny v. Touchstone, 7 Cal. 2d 429, 435, 60 P.2d 986.

The proposal contained in the foregoing letter was eventually accepted by Moore but not without further negotiations. Moore replied to Tognazzini's letter on January 25, 1940 stating that clauses (1) and (2) were acceptable but that "there should be some conditions attached [to clause (3)] that would provide for an exemption from drilling obligations under certain possible market conditions and the price of oil." Moore also stated that the consideration asked by Tognazzini was not satisfactory, and Moore offered to pay $1000 a month minimum advance royalty beginning February 1, 1940.

In a letter dated January 27, 1940, Tognazzini rejected this counter offer and again offered the terms contained in his letter of January 16, 1940. He stated in his January 27th letter:

"It has been the policy of this company to cooperate to the fullest with its lessees, whomsoever, and it shall continue that policy in the future. In this particular case you have asked for concessions which in the final analysis operate exclusively unilaterally in your behalf.

"Because of your past financial performance on our property and the anticipated future performances in the same connection, we have been willing to entertain such a unilateral arrangement solely because of our desire to be cooperative. *In entertaining such a modification, we have asked only for a nominal sum of $25,000 per year, payable monthly in advance.* Said consideration is really not a consideration, but merely a payment, monthly in advance, of a minimum royalty from presently known oil reserves; said royalty to be charged against the total oil reserves during the course of the life of the lease. So in effect any modification of this lease operates strictly to your added and new benefit and *without any added benefit to us.*

"You infer that the modification might commence as of February 1st. In this connection may I advise that the monthly meeting of the Board of Directors is to be held Wednesday, January 31st at 1:30 p. m. If you desire that I obtain from the Board at such meeting a ratification of the proposed modification, as contained in mine of January 16th, please notify me on or before said date. *If that be your desire, it will be a simple matter to draw up a modification as heretofore outlined, the language pertaining thereto to be satisfactory to both parties.*" (Italics added.)

This offer was accepted by Moore in a letter dated January 29, 1940. Moore wrote:

"Replying to your favor of the 27th inst., I beg to advise that I have decided to accept your proposition and pay you an advance royalty equalling $25,000.00 per year payable monthly in advance, beginning with the month of February. I am therefore enclosing herewith check for $2,083.33 being the first monthly payment on the proposed modification that you will submit to your Board of Directors on the 31st."

The letter continued with reference to matters not pertinent to this case. Moore concluded the letter as follows:

"I will request Mr. Martin to prepare a modification of the lease embodying the principles contained in our correspondence, and forward it to you within the next day or two. I would do it at this writing, but Mr. Martin is occupied now in the trial of a lawsuit that may cause a little delay, but if your Board authorized the modification, I think that is all that will be required."

Mr. Tognazzini acknowledged the check and reported that the proposal had been accepted by the Board of Directors of respondent in a letter dated February 1st, 1940, with the following language:

"In reply to yours of January 29th, I am pleased to advise that at the meeting of the Board of Directors yesterday afternoon the proposed modification of Oil Lease by and between Union Sugar Company and E. H. Moore, Inc., as contained in my letter to you of the 16th and accepted by you in yours of January 29th, was ratified.

"I am sure that Mr. Martin and I will be able to embody the principles agreed upon, to the satisfaction of all parties, and I shall do nothing further in this connection until I hear from Mr. Martin."

The trial court found that "thereafter and as of the date of February 1, 1940, defendant Union Sugar Company and the said E. H. Moore, Inc. entered into a written agreement entitled 'Supplemental Contract' * * *." The Pacific Coast Railway Corporation signed the "Supplemental Contract", thus making it a binding modification of the original lease.

Considering the correspondence quoted above and the specific findings of the trial court with reference to the negotiations, the conclusion is inescapable that, except for the provision in regard to offset wells, the parties intended to relieve the lessee of the obligation to drill more than three wells a year after the expiration of the two-year period of suspension of drilling. These letters and findings show that the lessee wanted a two year suspension of all drilling because he was contemplating the building of a refinery and that the defendant was willing to agree to this suspension because there was little likelihood that the lessee would be obligated under the lease to drill during that period in any event. The lessee also desired a modification of the drilling requirements of clause 7, subject to limitations, based on market conditions and the price of oil. On the other hand, the lessor wanted an assurance of annual income from the lease and insisted that Moore, after the end of the two-year suspension, be required to drill three wells a year regardless of market conditions and the price of oil. The parties finally agreed to terms suggested by defendant's president, which were proposed as a concession to the lessee without any substantial benefit to the lessor except for the advance royalties. Given the explanation of these terms by defendant's president, it is clear that the parties agreed that the lessee would be obligated to drill three wells a year regardless of the price of oil or other market conditions, and that this obligation was in lieu of the drilling requirements of paragraph 7 of the original lease. In consideration for this concession, the lessee agreed to pay advance royalties and to increase his drilling obligations in regard to offset wells.

The trial court nevertheless concluded not only that the parties did not intend to grant any concession to the lessee other than the two-year suspension, which the lessor's president had virtually admitted to be an unnecessary provision, but that the lessee had agreed to assume drilling obligations in addition to those under paragraph 7 of the original lease, to pay advance royalties, and to increase his obligations with respect to offset wells.

[2] It is contended that the trial court erroneously interpreted the contract without regard to the extrinsic evidence. The trial court found "That it is untrue that the claims of defendant Union Sugar Company have created an ambiguity or that any ambiguity is apparent upon the face of said Original Lease as modified by said Supplemental Contract." If this "finding" was intended as a finding that extrinsic evidence was inadmissible, it is of course an erroneous conclusion of law. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13; Wachs v. Wachs, 11 Cal.2d 322, 325, 79 P.2d 1085. The trial court, however, admitted evidence with reference to the negotiations between the parties and made extensive findings thereon. It must therefore be assumed that the finding merely means that the trial court concluded that the contract, considered with reference to

the evidence of these negotiations, was none the less susceptible of only one interpretation, namely, the interpretation relied on by defendant. Eastman Oil etc. Corp. v. Lane-Wells Co., 21 Cal.2d 872, 875, 136 P.2d 564. The question remains, therefore, whether there was any evidence from which a reasonable inference could be drawn to support this conclusion. Eastman Oil Corp. v. Lane-Wells Co., supra; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; In re Estate of Rule, 25 Cal.2d 1, 10, 152 P.2d 1003, 155 A.L.R. 1319.

Defendant contends that the evidence with reference to the conference in San Francisco between Martin, as Moore's representative, and three directors of defendant corporation is in conflict and that a reasonable inference can be drawn from the evidence in defendant's favor, supporting the conclusion that the contract means that the drilling requirements of paragraph 7 of the original lease were not modified by the supplemental agreement.

Tognazzini testified that when Martin came to California after the submission of the plan outlined in the Twitchell letter of October 14th, 1939, the witness informed him that the proposal had been rejected by defendant's board of directors. The witness also testified that he stated at the conference that because of the price of oil, defendant, under the original lease, stood not to receive revenue for a great many years to come; that defendant was willing to agree to a two-year suspension of all drilling requirements; that "they were under no obligation to drill anyway;" but that thereafter there should be a requirement that the lessee drill three wells a year when the price of oil was below sixty cents, as well as some provision for advance royalties. Tognazzini testified further that "Clause 7 [of the original lease] as such, or any other numerical paragraph was never mentioned" and that nothing was said at the conference as to what the drilling requirements would be after the two-year suspension whenever the price of oil should be above sixty cents; but on cross-examination, the witness admitted that Martin had stated that the drilling requirements under the original lease "were burdensome and prohibitory" and that Martin "in substance * * * again submitted the proposition that had been turned down which called for the drilling of three wells at the expiration of the two years if the price were sixty cents. * * *" According to the witness, the answer to this request was "that at the expiration of two years I would require that even though the price of oil be under sixty cents, there would have to be three wells drilled."

The director who testified at the trial, Francis L. Cross, testified that at the conference "Mr. Tognazzini and Mr. Martin did all the talking, Mr. Cooke and I merely sat in and listened to the conversation." His recollection of the discussion between Martin and Tognazzini was substantially the same as that of Tognazzini. This witness also testified that Martin brought up the question of a modification of the drilling requirement after the end of the two-year suspension period in the form of the plan outlined in the Twitchell letter, but that "Mr. Tognazzini told him unequivocally that that was out."

The deposition of the third director, F. O. Cooke, who did not testify at the trial, remains for consideration. He stated that paragraph 7 of the original lease was not mentioned at the conference; that Martin did not state that the lessee wanted, in addition to a two-year suspension, "a modification of the lease so that they would [thereafter] only be required to complete three wells a year." When asked on cross examination whether Martin suggested a modification along the lines of the Twitchell plan, Cooke stated that "I don't recollect. I think I will stand on that."

The foregoing evidence shows that there is support either for the conclusion that the question of modification of the drilling requirements after a two year suspension of drilling was not raised at the San Francisco conference or for the conclusion that Martin suggested at the conference that the original lease should be modified along the lines outlined in the previous tentative understanding between Martin and Twitchell and that this suggestion was rejected.

In any event the points to be covered in a supplemental agreement were not decided upon in San Francisco. The negotiation continued by letters thereafter, and those letters comprehensively cover all the points finally agreed upon by the parties. The evidence is without conflict that the parties were unable to agree on the question of drilling requirements until some time after the San Francisco meeting.

The Twitchell plan should not be confused with the modification of drilling requirements proposed by Tognazzini in his letters of January 16, 1940 and January 25, 1940, accepted by Moore in his letter of January 29, 1940. The Twitchell plan reduced the drilling requirements to three wells a year when the price of oil was over 60 cents a barrel and suspended all drilling requirements except with respect to offset wells when the price of oil was below 60 cents a barrel and when other market conditions prevailed. This is the plan rejected by defendant. The counter proposal by Tognazzini was essentially different from the Twitchell plan in that Moore's drilling obligation (except for offset wells) was reduced to the drilling of three wells a year after two years and Moore was to drill these three wells regardless of the price of oil and other market conditions. This plan was not immediately accepted by Moore, for he wanted more concessions. (Moore's letter of January 25, 1940.) The concessions were refused, and in his letter of January 25, 1940 Tognazzini repeated the offer of January 16, 1940. This offer was accepted by Moore in his letter of January 29, 1940.

Defendant contends that a general finding that all allegations of plaintiff's complaint not found to be true are untrue, is in effect a finding that at the San Francisco conference modification of the drilling requirements of the lease after a two-year suspension was not discussed because plaintiff alleged that it was discussed. Defendant cannot rely on the specific findings of the trial court with reference to this conference, however, for there is nothing in those findings to indicate that the parties agreed that clause 7 was not to be modified, and nothing therein from which a reasonable inference could be drawn in conflict with the letters. The evidence as to what occurred at the San Francisco conference was in conflict, and the findings may be construed to the effect that there was no discussion at that time of any modification of the drilling requirements of the lease after a two-year suspension. It does not follow, however, that it is reasonable to draw an inference that the modification of the drilling requirements was never discussed by the parties or their representatives. The evidence is without dispute that the modification of the lease was discussed by Martin and Twitchell before the conference, but that the plan for a modification was rejected. The evidence is without dispute that on Martin's return to California to continue negotiations, he was informed by Tognazzini before the conference in question that this plan was rejected. A few days after the conference, he wrote a letter again proposing a modification of paragraph 7. The proposal was again rejected, but the modification of the drilling requirements of paragraph 7 was considered in virtually every letter between the representatives of the parties. All this evidence is without conflict.

[3, 4] Only if the letters are disregarded could an inference be drawn from the testimony with respect to the San Francisco conference, that the parties never considered the modification of paragraph 7 and consequently did not intend clause 2 of the Supplemental Contract to be the measure of the lessee's drilling obligations. The letters cannot be disregarded, for the trial court found that they were mailed and received. There is no authority for the proposition that such an inference must be drawn to sustain the judgment. The defendant relies on the majority opinion in Re Estate of Rule, 25 Cal.2d 1, 10, 11, 152 P.2d 1003, 1007, 155 A.L.R. 1319, but that case is not authority for such a conclusion. The doctrine of the Rule case is that, "*in the absence of findings of fact and conclusions of law,* every intendment is in favor of the judgment or order appealed from and it is presumed that every fact or inference essential to the support of the order and *warranted by the evidence* was found by the court. * * * The rule is that an 'appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court—and not substitute another of its own— * * * where parol evidence

was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.'" (Italics added.) It is clear that this doctrine is inapplicable to the present case, for the trial court made extensive findings and conclusions of law with respect to the negotiations, including the letters and the intervening conference, and it cannot be assumed that the letters were not considered, for they were virtually incorporated into the findings. To apply the doctrine of the Rule case it would be necessary to infer that because there was no discussion of the modification at the San Francisco Conference such a modification was never considered by the parties, and then to infer further that the parties did not intend such a modification. Since the letters, which show that the parties considered such a modification, were found by the trial court to be mailed and received, the evidence is not reasonably susceptible of an inference that would support the judgment. See In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Eastman Oil etc. Corp. v. Lane-Wells Co., 21 Cal.2d 872, 875, 136 P.2d 564.

[5] The defendant also contends that the judgment of the trial court is supported by the rule of construction embodied in Civil Code section 1654 that "In cases of uncertainty not removed by the preceding rules [including section 1647 that a contract may be explained by reference to the circumstances under which it was made], the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party * * *." This rule on its face cannot support the judgment in the present case. Clearly it cannot be applied against the lessee as the promissor, for a basic issue in the case is who was the promissor. Nor can it be said that the lessee caused the uncertainty to exist, for the evidence is without conflict that the precise modification was suggested by defendant's president in language that was copied almost verbatim into the formal document.[3]

[6] Defendant also contends that a reasonable inference might be drawn in support of the trial court's conclusion from the fact that the formal document was drawn up by Moore's attorney. The basis for this contention seems to be that Martin as a competent attorney should have known that the lease would be interpreted in favor of defendant, and that, therefore, unless he intended that interpretation, he would have inserted certain words that would have removed any uncertainty. Such an inference, however, assumes that Martin was aware of the ambiguity. The provision in question was taken from Tognazzini's letter of January 16th. That letter seems clear and unambiguous, and when considered in the context thereof, the provision itself likewise appears clear and unambiguous. There is no reason to assume that Martin was any more aware of the possibility of this ambiguity than Tognazzini, who suggested the modification and who signed the formal document without suggesting any changes in the disputed provision. There is no reason to assume that Tognazzini is any less competent that Martin, and it is difficult to comprehend why he did not insert into his proposal or into the formal document the words that defendant now claims must be read into the instrument. It certainly is not reasonable to support the judgment of the trial court on the basis of some appraisal of the relative competence of these two men.

[7] The determination of the trial court that the lease as modified is capable of only one construction and that the parties intended that the drilling requirement of paragraph 7 would not be modified by clause 2 of the "Supplemental Contract" are without support in the evidence or any reasonable inference from the evidence. The specific findings as to the negotiations, and the evidence, which is without conflict in any essential element and not reasonably

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[3] It has been suggested that this modification was proposed by Martin in a letter dated January 11, 1940. An examination of that letter, however, see footnote 2, supra, reveals that the modification there suggested, based on the price of oil and other market conditions, was clearly not the modification incorporated into the "Supplemental Contract."

susceptible of conflicting inferences, show clearly that the parties intended to modify paragraph 7 of the original lease. It follows that the trial court's construction of the lease is erroneous.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. In the briefs of the parties, the opinion of the District Court of Appeal (173 P.2d 700) and the majority opinion of this court, we find an aggregate of hundreds of pages of legal discussion. And, unfortunately, all of it together is of little benefit to the parties or to the law because in the final analysis the sole determinative question, in the view of the majority of this court, at least, relates only to sufficiency of the evidence to support findings of the trial court and its construction of a written agreement. Apologetically I add to the fruitless discussion, impelled thereto by the unrelenting conviction that the loser in any lawsuit on appeal is entitled to an adequate and fair factual statement by the reviewing court and to a decision which reckons with the record as it is.

Reading of the entire record convinces me that in reality the majority of this court reach their result not because the evidence as a matter of law is insufficient to sustain any essential finding of fact or the trial court's construction of the agreement but because, after weighing the sharply and substantially conflicting evidence, they have concluded that, as they view it, the greater weight of the evidence favors plaintiff and, hence, that the justice of the cause demands a reversal of the judgment. I am unable to concur in a judgment of reversal which on any fair statement of the evidence can be supported on no other theory.

The facts essential to an adequate understanding of the controversy are few and simple. The plaintiff oil company is lessee by assignment under an oil lease executed by defendant owner-lessor; the lease was modified and augmented by a supplemental agreement affecting the drilling obligations of the lessee; a dispute subsequently arose as to whether the provisions of the original lease relative to the number of strings of drilling tools to be operated continuously were abrogated and replaced by a provision of the supplemental agreement relative to a minimum number of wells to be *completed* each year. To determine that dispute this action for declaratory relief was brought.

Since, as above indicated, the issues in this case are either actually factual or are made so by the majority opinion, it becomes important at once to recognize what those issues are, what the evidence is, and, in particular, to set out *in haec verba* the language which the parties used and which is the subject of construction.

Plaintiff in its petition for hearing declares that "The heart of the controversy is the clause of the original lease fixing the lessee's drilling obligations after the discovery of oil and gas in paying quantities. That clause, No. 7, specified (1) the total number of wells that the lessee was to drill —one well to each ten acres [of a 6700 acre lease]—and (2) the rate at which the lessee was to drill this number, namely: 'Lessee agrees to continuously operate one string of tools with due diligence for the first year after such discovery, two strings of tools for the second year after such discovery, three strings of tools for the third year after such discovery, four strings of tools for the fourth year after such discovery, and five strings of tools thereafter until the drilling requirements herein specified are complied with.'" The foregoing requirement for operating, progressively, one to five strings of tools "imposed on the lessee the burden of spending from $180,000 the first year to $900,000 in the fifth and each subsequent year." The lease, as previously indicated, covers some 6700 acres of land and, hence, unless surrendered in whole or in part, will entail the drilling of some 670 wells plus, possibly, conditionally required offset wells. Such original lease does not appear on its face to be unfair in any respect; it sets up various reciprocal rights and obligations in considerable detail; the drilling schedule above quoted is not an absolute obligation of the lessee; it can be relieved therefrom at any time by surrendering the lease and its rights thereunder; there is provision also for temporary suspension of its drilling obligations under certain specified conditions.

The actual nub of this controversy lies in the present lessee's claim that the "Supplemental Contract" eliminates completely and permanently the above quoted original contract provisions relative to the number of strings of tools to be operated in developing the property. The language of the "Supplemental Contract" so relied upon by the plaintiff-lessee, and now by the majority of the court, is as follows: "It is agreed between Union Sugar Company * * * and E. H. Moore, Inc., * * * that oil and gas lease dated April 8, 1936, from Union Sugar Company, lessor, to Sovereign Oil Corporation, lessee * * * be, and same is hereby, modified in the following respects, to-wit:

"(1) All obligations to drill additional wells, except offset wells, are hereby suspended for a period of two years from February 1, 1940.

"(2) At the expiration of said two year period, Moore shall be obligated to complete three wells per year.

"(3) Numerical Paragraph Nine (9) of the lease [relating to offset wells] of April 8, 1936, shall be modified by striking out '250 feet' wherever the same appears therein, and inserting in lieu thereof '330 feet.'

"(4) Commencing from the date of this supplemental contract, Moore agrees to pay a minimum royalty of $25,000.00 per year, payable monthly in advance, and said royalty shall be charged against the total oil reserves during the course of the life of the lease; that is to say, Moore shall be entitled to all oil and/or gas produced from said lease, or the proceeds thereof, until it is fully reimbursed from lessors' one-eighth royalty interest for the minimum royalty so paid.

"(5) Except insofar as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect."

Particularly is it to be noted that the above quoted supplemental agreement is utterly silent as to the number of strings of tools to be operated after the drilling holiday. It provides that "(1) All obligations to drill additional wells, except offset wells, are hereby *suspended for a period of two years* from February 1, 1940." (Italics added.) The holiday, according to its terms, is a temporary suspension or moratorium, not an abrogation for the entire remaining term of the lease. But the effect of the majority holding is not to enforce any two year suspension of the terms of the original lease; it is rather to permanently abrogate, insofar as the terms of the original lease are concerned, "All obligations to drill additional wells, except offset wells"; that is to say, by the majority holding the drilling obligations (other than for offset wells) declared in the original lease are completely eliminated and the only drilling obligation (except for offset wells) now operative is that stated in the "Supplemental Contract," which is to "*complete* three wells per year." (Whether in the view of the majority any offset wells completed during a year should be credited on the "complete-three-wells" program does not clearly appear.) The supplemental agreement language is: "(2) At the expiration of said two year period, Moore shall be obligated to *complete* three wells per year." (Italics added.) This language, viewed in its context, would seem to me to mean that "at the expiration" of the *two year suspension* of "All obligations to drill additional wells, except offset wells," the lessee was to be obligated, regardless of the price of oil, of the number of strings of tools otherwise required to be operated, of the depth of hole required, of the character of formation encountered, or, etc., to, *at the least, "complete* three wells per year." (The same paragraph of the lease (No. 7) which provides for the number of strings of tools to be *continuously operated* after discovery of oil also provides that "The Lessee shall be entitled to drill as many additional wells on said land and premises as it desires.")

Certainly it cannot successfully be contended that the language of the Supplemental Contract precludes the meaning above suggested. If that meaning is not precluded by such language we are bound to accept it for it was found by the trial court to be the true meaning of the language and the true agreement of the parties and such finding is amply supported by both direct and circumstantial evidence. As recounted hereinafter in more detail the record shows that Mr. Cooke, a director of defendant-lessor who participated in the negotiations leading up to the modification agreement, testified in respect to the terms agreed upon that "if we were going to give them a release on drilling of wells for two years * * * that they had to start and drill at least—I want to make particular emphasis on that word 'at least' —three wells a year. * * * [And] *if the price of oil was more than 60 cents* * * * *we expected them to go ahead on the original lease, under that Clause Seven.* * * * (Italics added.) [T]hree wells were to be drilled [per year]. * * * Regardless of whether the price of oil was 60 cents or less." Likewise, as hereinafter shown in more particularity, the witness Cross testified as to the terms of modification agreed upon that "if they were given a two year suspension, would have to agree to drill and complete at least three wells per year if the price of oil was under sixty cents. * * * There was absolutely no discussion of Paragraph seven of the lease. * * *" Any failure to discuss paragraph seven at this time would seem to me to indicate that the repeated earlier refusals of defendant's directors to modify the drilling covenants beyond the two year moratorium were accepted by Mr. Martin as final; and insofar as Martin may have again attempted to bring the subject up the positive refusal by defendant's directors to give it further consideration (as suggested by evidence hereinafter quoted) is likewise suggestive that the supplemental agreement means what it says rather then what the majority now interpolate into it.

I look in vain to the supplemental agreement for a provision saying that "the suspension of 'All obligations to drill additional wells, except offset wells' is hereby made permanent"; or that "the provisions of the original lease requiring the continuous operation with due diligence of five strings of tools 'until the drilling requirements herein specified [one well to each 10 acres] are complied with,'" are suspended and inoperative not only for two years but for the entire remainder of the term of the lease. I look in vain for the above but I find, "(5) Except insofar as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect."

It is obvious from an inspection of the original lease and of the supplemental agreement that the latter on its face, construed as it must be with the document which it avowedly supplements, does not purport to support the theory of, or the result reached in, the majority opinion; it does not appear to be ambiguous or uncertain or to admit of the construction or effect now urged by plaintiff; on its face it does appear to fully sustain the construction given it by the trial court. Nevertheless, says plaintiff, if the extrinsic evidence is considered,[1] the only reasonable conclusion which can be drawn from it is that the parties to the lease really agreed to modify and supplement it in one element at least which is drastically different from any thing which the language used seems calculated to delineate. In fact, the plaintiff urges, and the majority opinion now argues, that the major object which the plaintiff[2] sought to obtain in consenting to any change in the original lease was a *permanent* release, rather than a *two year suspension*, of its drilling obligations as provided in the original lease. The vast difference between a two year suspension of the agreed drilling obligations and complete release therefrom with substitution of a mere three-well yearly *completion* schedule will at once be apparent to anyone who has any intimate acquaintance with the oil production business and who pauses to consider the facts of this case.

Here we have a 6700 acre lease with the lessee obligated, by the terms of the lease as originally executed, to develop the land with reasonable expedition by continuous operation during the fifth and subsequent years after discovery of oil or gas in paying quantities, of five strings of tools "with due diligence." How many wells might be completed each year by the operation of five strings of tools is, of course, a variable. Whether one hole can be completed in three weeks, three months or three years depends not only on the diligence and skill of the workers but also on the type of equipment used, the character of the geological formations encountered and the depth of the oil sand from which production, if any, eventually is obtained. There is evidence here that the operation of five strings might produce as many as 15 wells a year; it, could, of course, *complete* less than three. At 15 wells a year to fully develop the lease (without allowance for unusual delays) would require approximately 45 years. If plaintiff prevails and can maintain the lease by completing only three wells a year—if that is tantamount to saying it need drill only three holes a year—it will require 223 years to put defendant's land on full production! With such a seemingly absurd result, from defendant's standpoint, to be made possible from the interpretation urged by plaintiff, and with that interpretation to be read into language with does not, by itself, even remotely suggest it, one should expect that the evidence requiring such a construction (if, indeed, there be any known theory of law which permits it) must indeed be overwhelming and without conflict. But in truth the most that can be said for plaintiff is that the evidence is in sharp conflict.

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[1] For the purposes of this dissent the admissibility of such extrinsic evidence is assumed but this does not imply accord with the holding that it was properly admitted.

[2] The word plaintiff is used herein interchangeably as denoting either the present plaintiff or its predecessor in interest under the lease from defendant.

The majority opinion on its very face recites evidence which, if fairly analyzed, according to all heretofore accepted standards would require that the findings of the trial court and its construction of the contracts be sustained. Such discussion of the evidence as appears in the majority opinion, insofar as it is objective, is obviously argumentative as to the differing inferences which may be drawn from the evidence. In other words the thesis of the majority opinion constitutes a mere argument on the weight of the evidence, the resolution of its conflicts, and the selection of inferences to be drawn therefrom, matters which are no concern of a reviewing court. But my greatest quarrel with the majority opinion comes not from evidence which it discusses but, rather, from evidence which it leaves unquoted.

The record discloses that at the time of the negotiations for the modifications to the lease the following circumstances existed: The then lessee, E. H. Moore, Inc., a one-man corporation, was dissatisfied with marketing conditions at the defendant's field. Moore was dissatisfied largely because the present lessee (plaintiff, here) was the only crude oil-purchaser available and, as such, had fixed an arbitrarily low price which Moore had no alternative but to accept if he was to produce and market oil in that field. By way of remedying that situation Moore conceived the plan of building a refinery at the field so that he could handle his own production. According to the record a two year moratorium or "holiday" in drilling requirements would enable him to devote toward the building of a refinery some $1,800,000 in cash which otherwise might have to be expended in drilling new wells. Although at that time the oil company was offering less than 60 cents a barrel for the oil being produced by Moore from defendant's field, and although the obligation of the lessee to operate the five strings of tools was suspended while the price was below 60 cents, there was, of course, nothing to prevent the oil company from raising the price to 60 cents or more at any time it saw fit so to do. To the end of securing some modification in the drilling program—at least security against having to drill any but offset wells for a two year period during which a refinery might be built—Moore commenced negotiations with representatives of defendant. In most of these negotiations Moore was represented by Mr. Villard Martin, an attorney at law. In the initial negotiations Mr. Martin broached the matter to Mr. Edmunds Lyman who was then president of the defendant lessor; Mr. Lyman referred Mr. Martin to Mr. T. A. Twitchell, an attorney at law; Mr. Martin thereupon conferred with Mr. Twitchell and stated the desires of the Moore company; Mr. Twitchell then prepared a memorandum of the proposition suggested by Martin and forwarded it to the offices of the lessor at San Francisco. This proposition is sometimes referred to in the record and herein as the "Twitchell deal" or proposal and because of the repeated references to it by some of the witnesses at the trial its substance is of importance to bear in mind in any appraisal of the sufficiency or weight of the evidence relative to supporting or failing to support the judgment.

Mr. Twitchell, in his report to the lessor (under date of October 14, 1939, received in evidence as plaintiff's exhibit No. 5) said: "Mr. Villard Martin, attorney for Mr. Moore, was here Thursday discussing the possibility of modifying the oil and gas lease between the company as lessor, and Mr. Moore as lessee. Mr. Moore desires to construct a topping plant to handle the oil from the lease, but does not desire to spend the money required to build this plant if he has to comply with the existing drilling requirements of the lease. If Moore constructs a topping plant it will be to the advantage of the Union Sugar Company because it will create an outlet for oil, and this in turn will mean immediate revenue for the company as lessor. * * *

"I informed Mr. Martin that I would submit the proposal to you, and that you in turn would submit it to the Board of Directors.

"Mr. Martin originally proposed to modify the drilling requirements so that Mr. Moore would only be required to develop the lease in accordance with good oil field practice. Many old oil leases did not contain any express drilling requirements, and in those leases the Courts uniformly held that there was an implied obligation to drill when conditions warranted further drilling. * * *

"I informed Mr. Martin that I could not recommend that the lease be modified in this way. After discussion, we arrived at the following tentative plan:

"1. The Union Sugar Company shall agree to suspend all drilling obligations for a period of two years, except the obligation to drill offset wells. * * *

"2. The existing proven area, comprising some 400 acres, would be zoned and in that zone, after two years, Moore would be required to drill 3 wells per year, provided that the price of oil is 60¢ or more per barrel at the well. * * *

"The provision calling for three wells per year was inserted because three wells per year would be all that Moore would be required to drill, assuming that he was operating with one string of tools. Martin said he might desire to drill three wells all at one time under contract, rather than to allow 90 days to elapse between wells, as provided in the lease.

"3. Moore would not be obligated to drill any additional wells * * * outside of the proven area, unless oil should be discovered on the property or *or* adjacent property at such locations that it would appear probable that oil could be discovered and produced from a portion of the unproven area. * * *

"I also believe that it would be advisable to provide that the agreement would be null and void if Moore assigned or transferred the lease to some third person. * * *"

It is obvious from mere perusal of the above quoted report that even the "Twitchell deal," although it definitely called for a modification of the five-strings-of-tools development program, certainly contemplated more extensive drilling obligations than the three-wells-a-year now held by the majority to have been agreed upon. But as will appear from evidence hereinafter quoted the "Twitchell deal" was rejected by the defendant's directors because they would not grant such an extensive release from the drilling obligations declared in the original lease. Following the Twitchell report Mr. Lyman was succeeded by Mr. Tognazzini as president of the Union Sugar Company, and Mr. Martin arranged for a conference directly with Mr. Tognazzini. The latter called in Mr. Cooke and Mr. Cross, directors of the defendant company, and the conference was held at the Stock Exchange Club in San Francisco, on December 20, 1939.

According to Mr. Tognazzini's testimony Mr. Martin "asked me about the modification, what action had been taken on the proposal that had been submitted to us by Mr. Twitchell * * *. And I told him that the proposition had been turned down cold by the Board of Directors. * * * Mr. Martin opened up the subject again about a modification and he elaborated at length on the large amount of money that had been expended by E. H. Moore, Incorporated, and the difficulties that they had encountered in disposing of the oil, stating that the arrangements as they existed in the Santa Maria Field by virtue of the only outlet being that of the Union Oil Company, had made it unsatisfactory. * * * He stated that they needed to obtain an outlet and one method would be to establish a refinery or some similar institution of their own; that they had gone to the expense of discussing the same with a firm of engineers in Los Angeles; that they were prepared to go ahead with that, but in view of the large sum of money that would have to be expended for the erection of a refinery, and that he thought there was a possibility of the price of oil going up again, that he wished to have the lease modified so that there would be a complete suspension of drilling operations for two years. * * * I told him that most of the leases in the Santa Maria Valley Field were more favorable to the lessor than that which the Union Sugar Company had. * * * I told him further, as I recall, that the Union Oil Company controlled that field, that I was indignant over the attitude of the Union Oil Company who had had a posted price of seventy cents in that field; * * * that any analysis disclosed that there were twenty-three or twenty-four oil fields throughout the State of California the price on which oil of comparable gravity was within a few cents of this seventy cent range; that the Union Oil Company, for reasons best known to themselves, arbitrarily reduced the price of oil in this particular field which they controlled to below fifty cents; that in no other field in the State of California would you find a comparable reduction or price for comparable oil. * * * I told him further that he might be of the opinion that the price of oil would go up, which would necessitate a resumption of drilling, but I was going to protect the interests of the Union Sugar Company in the event the price of oil did not go up. So I made it very clear to him that so far as we were concerned, we would permit, if all parties could agree upon the terms and conditions of this two year suspension. They were under no obligation to drill anyway. It was only on a basis of an anticipated increase in the price of oil that they might have to drill at this particular stage of the game. I told him that in the event we could agree that there must be a provision whereby there would be the drilling of three wells per year when the price of oil was below sixty cents. We did not arrive at that particular meeting at the monetary consideration to be paid to us. I advanced the theory that there was proven production and whatever monetary consideration would be given to us was really not a consideration for the reason that it would be only an advance of money to us on our own production or proven oil reserves to be charged against those reserves as time went on. That statement came about in answer to this unit plan or some such plan that had been discussed in the Twitchell letter and again had been discussed almost verbatim at this meeting. * * *

The witness continued, "Since Twitchell's letter is in the testimony, I guess we can refer to it. In the Twitchell letter there was a statement made that they be permitted, or that there be a suspension of drilling requirements for two years and at the expiration of that time, if the price of oil be sixty cents or more, that three wells be drilled.

"Q. Yes? A. At this meeting I took just the opposite position because we turned down that proposition cold, that at the expiration of two years three wells must be completed if the price of oil be below sixty cents. That's all we were talking about. That's all that I was talking about, and that there be this minimum revenue coming in, not only during the two years which was a condition for the suspension for a two year period in order to give relief in the event the price of oil went up, in view of the contemplated erection of a refinery, that at the expiration of that two year period if the price of oil still be below sixty cents, then I wanted three wells to be drilled on that property per year. * * *

"Q. Was anything said during that discussion as to what drilling requirements would be if the price of oil was above sixty cents after the expiration of the two year period? A. No, nothing whatsoever. We had down the proposition that there be three wells drilled if the price were over sixty cents. The lease provisions prevailed if the price were over sixty cents. What was being asked was a respite for two years because of the fear that the price of oil was going to go up again which then would require the drilling and producing of that field. Now that's what the whole discussion was about at this particular meeting and the proposition was made, or the play on our sympathies was made, showing how much money had been expended, how they were unable to have an outlet because of the activities of the Union Oil Company in that particular field and how therefore it was necessary for them to erect a refinery in order to obtain an outlet of their own. And while they were erecting all that, going to all that further expense, Mr. Martin stated definitely he anticipated an increase in the price of oil. In that respect he was correct, because there was an increase in the early part of 1941.

"Q. Did they, as a matter of fact, erect a refinery? A. No."

In corroboration of the testimony of Mr. Tognazzini we find the testimony of Mr. Cooke:

"As I say, we were gathered downstairs, and Mr. Martin said he had come here at the instance of Mr. Moore to see if something could not be done to help out the situation, which was getting rather critical at that time.

"Q. Did he explain in what respect the situation was getting critical, do you recall? A. Yes, the oil situation had changed there and he found he needed relief, one way or another; had to have relief from drilling some oil wells he should have to drill under his contract, and he stressed quite a point on that; that he would like us to consider making some change in that, and that he would probably have to put in a refinery. That was the thing that struck me. There were two or three things Martin had on his mind. One was, he figured, he tried to get it over to all of us, that Mr. Moore would have to spend a lot of money for this refinery, and if he did that he felt he should have some relief on the drilling of the wells.

"Q. Did he explain why he thought he would have to have a refinery? A. Yes, there was no way of getting his oil out at that time; the marketing conditions bothered him. Mr. Tognazzini did most of the talking to him at that time. We really sat back and listened, except when it got near the end we went in on a few things, made some suggestions and worked them out, and as far as I remember—do you want me to try and dig up some of the statements?

"Mr. Brandt: As far as the sum and substance of it goes.

"A. (Continuing:) The sum and substance was: You must realize we had had nothing under this oil business, and we felt that we should have an adjustment made there that was fair to us and fair to the Moore people. If I remember rightly, they started to and drilled approximately, when they asked for this meeting, I think it was twelve wells, and out of these 12 wells, I think 10 were operating and 2 were dry, or not in good condition. I don't know the technical condition, but they were not on production, let's say that, and he, Mr. Martin, seemed to feel that we should give them this 2-year extension whereby they didn't drill any wells. They wanted relief. Well, we didn't give them any definite answer at that time, because there were other things he was going to bring up—Mr. Tognazzini was going to bring up—and that was the matter of us getting some money on a royalty basis. We felt we should have that, and also we felt if we were going to give them a release on drilling of wells for two years, that under no circumstances were we going to allow them at the end of that time not to live up to their agreement, that they positively had to live up to their agreement, which was, in fact, that they had to start and drill at least—I want to make particular emphasis on that word 'at least'—three wells a year.

"Q. At the end of the two years? A. At the end of the two years. * * *

"Q. Did Mr. Tognazzini in the conversation refer to the extent of the acreage leased? A. Yes, I think he mentioned that we had leased Mr. Moore some 6700 acres.

"Q. That they were included in the lease? A. Included in the lease.

"Q. Do you recall whether anything was said concerning the then price of oil? A. He was very insistent on that point, because, as I remember, he made the statement that no matter what the price of oil was, that the Moore Company were still obligated to drill three wells—at least three wells—a year, irrespective of the price of oil. * * *

"Q. And did Mr. Martin, as you recall, mention the possibility that oil might increase in price while building their refinery? A. Yes, he did.

"Q. What did he say in that connection? A. He said that he would like to have two years and be released from that drilling, but he said the oil might go up—I don't think he said any particular price as to what the oil might go up to—but we came right back to the same thing, that irrespective of the price of oil we still say you will have to drill at least three wells a year.

"Q. Now, during the conversation was there anything that you recall, Mr. Cooke, mentioned concerning the number of drilling rigs at any time? A. No, no.

"Q. Was there any mention that you can now recall concerning Paragraph Seven of the lease as such? A. I think that was a clause—Seven, was it?

"Q. Clause Seven? A. Clause Seven; no, no mention at all.

"Q. Was there any discussion about the number of rigs that were to be used after the expiration of the 2-year period? A. No sir.

"Q. Did Mr. Martin state to you people, you directors there and to Mr. Tognazzini, that he wanted a suspension of drilling operations for two years, and on top of that wanted a new agreement with respect to future operations? * * * A. No.

"Q. Did Mr. Martin ask that in addition to suspension, that the lease be modified to reduce the number of strings of tools required to be used or the number of wells to be drilled? A. No.

"Q. Did Mr. Martin say at that time that it was his purpose to secure a complete suspension for two years, and thereafter secure a modification of the lease, so that they would only be required to complete three wells a year? A. No.

"Q. Did he say, did Mr. Martin say, he wanted to get the lease modified so that they would not be required to keep the number of strings of tools busy as provided in Paragraph Seven of the lease? A. No."

On cross-examination of Mr. Cooke by plaintiff's counsel, he was shown a copy of Mr. Martin's testimony as given in a deposition and an effort was made to break down his testimony. The record reflects the following:

"Q. I will again refer to Mr. Martin's deposition on page 70. Mr. Martin stated: 'I told them I was up there to get a modification of that lease.

"'Q. What kind of a modification did you tell them you were after? A. I told them I wanted to get that lease modified so that we would not be required to keep the number of strings of tools busy that are provided for in Paragraph Seven of the lease.'

"A. My answer to that is 'no.'

"Q. That he didn't make that statement? A. No, he did not make that statement. * * *

"Q. And I will also ask you, then, if you recall, or if you are prepared to state, that he didn't state at the conference as follows: * * * 'The discussion there was that after the expiration of the 2-year period under this proposal that we made there and this supplemental agreement we had submitted, we were going to have to drill three wells each year, regardless.

"'Q. It was your proposition, then, to them that you have a limit as to the number of wells after the expiration of the two years?'

"The Witness: No, no.

"Mr. Powell: I am just reading, I have not come to the point as yet in the question asked Mr. Martin in his deposition.

"'A. That is right, three wells a year after the expiration of the two years was the limit of our drilling requirements.'

"The Witness: Oh no, no.

"Mr. Powell: Q. You are prepared to say definitely? A. He is confused on that.

"Q. Are you prepared to say that Mr. Martin did not make that statement? A. Yes. * * *

"Q. Then I will ask you, Mr. Cooke, if at this conference Mr. Martin stated that the only change in the lease they wanted was a suspension of two years in drilling? A. Two years?

"Q. A two years' suspension in drilling obligations? A. I think that is correct, yes.

"Q. He stated that was all that he was seeking? A. At that time yes.

"Q. A two years' suspension in drilling, nothing else? A. No. * * *

"Q. What was to happen if the price was more than 60 cents? A. That wasn't referred to at all. We expected them to go ahead on the original lease, under that Clause Seven that you speak of, but Moore never mentioned Clause Seven.

"Q. You stated just now that three wells were to be drilled regardless of the price of oil, I think that is your precise language. Do you mean regardless of whether the price was less or more than 60 cents a barrel? A. Regardless of whether the price of oil was 60 cents or less."

The foregoing quoted matters from the testimony of the witness Cooke are only a part, but a fairly illustrative part, of his positive and material testimony which the majority opinion dismisses as insufficient to create a substantial conflict in the evidence of surrounding circumstances from which circumstances such opinion interprets the "Supplemental Contract" to mean what the witness Martin asserts he asked for but which the contract does not state and which the witness Cooke, as well as the witness Tognazzini, testified Martin in part did not ask for and in part asked for but was refused.

And the gist of the testimony of the witnesses Tognazzini and Cooke is corroborated by another witness, Mr. Francis L. Cross, a member of the State Bar and a director of the defendant-lessor. Mr. Cross was among those present at the San Francisco conference, which lasted "from around noon to three-thirty, a quarter to four, sometime there." The transcript shows:

"Q. Now can you give us, in substance, Mr. Cross, your recollection of that discussion? What did Mr. Martin, in substance say, and what did Mr. Tognazzini, in substance say? A. Well sir, Mr. Martin discussed the question of the oil lease he had with us and that at the time it was very onerous; that they had spent a substantial amount of money on this lease and they weren't very happy in that regard. That was the sum and substance of what he had to say.

"Q. Did he say anything about a refinery? A. Yes, he spoke of building a refinery in rather positive terms, had an engineering architect who was going ahead with this refinery.

"Q. Yes, well, did he make any suggestions as to what he wanted? A. Mr. Martin spoke of these matters first and stated that they wanted a two year suspension of a drilling clause.

"Q. Yes? A. They wanted relief for two years from having to drill. That was the sum and substance of his entire conversation, the crux of it.

"Q. What, if anything, did Mr. Tognazzini say? A. Well, Mr. Tognazzini did quite a bit of talking and told Mr. Moore that he was new in the Union Sugar Company, which was a fact, and was looking after the interests of the Union Sugar Company and he went into great lengths to show what had happened in the Gato Ridge to his cousin, Lario Tognazzini, and he was not going to allow the Union Sugar Company to get in that same position; that he wanted some payment. No payment was mentioned,—no specific payment was mentioned but that he wanted some payment and that in any event the Oil Company, E. H. Moore, Inc., if they were given a two year suspension, would have to agree to drill and complete at least three wells per year if the price of oil was under sixty cents.

"Q. And was there any discussion as to what drilling would be required at the expiration of the two year period, during the period when the price was above sixty cents? A. There was absolutely no discussion of that at all. It wasn't mentioned.

"Q. Was there any discussion that you recall concerning Paragraph Seven of the lease? A. There was absolutely no discussion of Paragraph Seven of the lease.

"Q. Was there anything said that you recall at that conference concerning the number of drilling rigs to be used? A. No, I don't recall any mention of any drilling rigs or anything like that."

It is also significant to note that on cross-examination of Mr. Cross the following appears: "Now, Mr. Cross, I understand from you that all Mr. Martin wanted was a two year suspension in drilling; nothing else? A. Mr. Martin talked about getting relief for two years. It is true that during this conversation he brought up the Twitchell deal, that they had been trying to put through with Twitchell. Mr. Tognazzini told him unequivocally that that was out." The unequivocal refusal to consider "the Twitchell deal" imports a refusal by defendant-lessor to consider the three-well a year proposal *as a substitute* for the more specific drilling operations provided for in the lease.

Again on cross-examination Mr. Cross was asked, "Now did Mr. Martin ask for any reduction in the drilling requirements at the expiration of the two years?" And he answered "No," with the explanation that "He * * * tried to bring it [the Twitchell deal] up again, the deal that he wanted to put over with the Union Sugar Company that was turned down. He again brought that up and was again turned down. * * *"

In what is essentially an argument directed at the weight of conflicting evidence Justice Traynor declares, "Only if the letters are disregarded could an inference be drawn from the testimony with respect to the San Francisco conference, that the parties never considered the modification of paragraph 7 and consequently did not intend clause 2 of the Supplemental Contract to be the measure of the lessee's drilling obligations. The letters cannot be disregarded, for the trial court found that they were mailed and received. There is no authority for the proposition that such an inference must be drawn to sustain the judgment." The above quoted argument misses the point completely. The evidence in the record which I have above referred to and quoted in part was not relied on by the trial judge, as "support for an inference that the parties never considered such a modification." Exactly the contrary is true. The evidence is positive to the point that Mr. Martin, representing Mr. Moore, requested "such a modification" *originally and repeatedly* and that such request *was rejected and refused* by the directors of defendant corporation. Only in the sense that they absolutely refused such proposal by Mr. Martin did they decline to "consider" it. They did so refuse to consider it, in that sense, and apparently they continued to so refuse down to and including the time when the modification agreement was executed.

The oral testimonies of the directors show the terms of the agreement which were discussed and tentatively accepted; such testimonies show what was refused and what was not refused; their version of the conference corresponds with the terms of the "Supplemental Contract" as it actually was finally drafted and executed, not as plaintiff would now have us "construe" or interpolate it. Obviously the inferences to be drawn from such evidence, within all reasonable limits, were for the trial court, not this court, to determine; and surely it is within reasonable limits to draw the inference that a proposed modification which was requested by Mr. Martin and absolutely and positively rejected and refused by the three directors of defendant corporation at the principal conference held would not be gratuitously or otherwise revived and granted by those same directors when they came to actually authorizing the amending contract. And, furthermore, if

Tognazzini, acting alone, did talk about the matter further, by letters or otherwise, it was for the trial judge to determine from all the evidence (if any was admissible under the circumstances) what terms were finally agreed upon. The contract is itself evidence of its terms and of what the parties intended; in its final form it was drafted by Martin; the language was in large part the same as he had previously proposed; language which he previously had proposed to secure more extensive modifications, or an abrogation, of the drilling requirements of paragraph 7, significantly, was omitted from the final draft. The weight of the contract itself as evidence is completely ignored in the majority opinion but its significance as evidence is corroborated by the testimonies of Cooke and Cross and Tognazzini and by circumstantial evidence.

The fact that the court found that certain letters "were mailed and received" does not appear to me to add anything to the significance of these letters as evidence. Their weight or significance here depends not on the fact of their having been mailed and received but on what the trial court believed, and was supported by the evidence in believing, the writer of the letters and their recipient understood was being agreed upon by way of modification of or supplement to the original lease. Just why statements in letters by Mr. Tognazzini should be overwhelming in weight while the oral testimonies of Mr. Tognazzini, Mr. Cooke and Mr. Cross *as to what was tentatively agreed upon and what was positively rejected* should be entitled to no weight at all is beyond me. The fact is that the testimonies of Mr. Cross and Mr. Cooke support strongly (and amply as regards the duty of an appellate court to affirm) the terms of the agreement as stated in the language of the contract as executed and as found by the trial court. The letters are not the contract which was executed. They are in evidence, like the oral testimony, simply as parts of the surrounding circumstances. The letters themselves are not free from ambiguities and self-contained conflicts. They are entitled to no greater weight than the trial judge, in the light of all the evidence including his view of the parties, gave to them. Surely the formally executed contract, supported by the oral testimonies of the several witnesses, should be as competent evidence of what was meant by the letters as the letters are of what was meant by the contract. Surely, also, the persuasiveness of such evidence was a question for the trial court, not for us. The oral testimony is entitled to just as much weight, as far as we are concerned, as the written letters. The oral testimony strongly indicates that the true contract is that which was actually reduced to writing rather than that which is now by judicial fiat interpolated therein.

A further example of weakness in the majority opinion is found in its effort to explain away application of section 1654 of the Civil Code providing that "In cases of uncertainty not removed by the preceding rules [including section 1647 that a contract may be explained by reference to the circumstances under which it was made], the language of a contract should be interpreted most strongly against the party who caused the uncertainy to exist. The promisor is presumed to be such party * * * ." After quoting the section as above, Justice Traynor's opinion asserts that "This rule on its face cannot support the judgment in the present case. Clearly it cannot be applied against the lessee as the promissor, for a basic issue in the case is who was the promissor. Nor can it be said that the lessee caused the uncertainty to exist, *for the evidence is without conflict that the precise modification was suggested by defendant's president* in language that was copied almost verbatim into the formal document." (Italics added.) It is true that the language "almost verbatim" is to be found in the letter written by "defendant's president." But it requires very little more diligence in examining the record to ascertain that an earlier source of the same language is a letter written by plaintiff's Mr. Martin to defendant's Mr. Tognazzini. Mr. Martin there says: "Dear Mr. Tognazzini: Delay in writing you has been due to Mr. Moore's and my absence from Tulsa. * * * I reported to him the substance of my conversation with you and Messrs. Cooke and Cross, and he asked that I write you outlining briefly the terms of a supplemental contract along the line of my conversation with you.

"We propose to embody the following in said supplemental contract: * * * All obligations to drill additional wells, except offset wells, are hereby suspended for a period of two years from the date of this contract.

"At the expiration of said two year period, Moore shall be obligated to drill three wells per year in any area consisting of approximately 400 acres, being that part of the leased premises which is considered proven territory * * * except that Moore shall not be obligated to drill during the existence of either of [certain enumerated conditions]. * * *

"There shall be no obligation to drill any additional wells on that part of the leased property outside of the proven area * * unless oil is discovered on said property. * * *

"Except insofar as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect."

Mr. Tognazzini replied as follows: "In response to yours of the 11th, may I first advise that the terms and conditions contained therein are unsatisfactory.

"It was my impression from past conversations you had with my predecessor, and more recently, with Messrs. Cooke, Cross, and me that it was the desire of E. H. Moore Inc. to obtain a modification of the present oil and gas lease existing between E. H. Moore Inc. and the Union Sugar Company. In this connection, I expressed to you at our recent meeting that Union Sugar Company was desirous of cooperating with E. H. Moore Inc., but only to the extent that both parties were to benefit mutually by said modification." It is only after the above quoted introductory statements, and in the light of all the preceding negotiations of the parties, that Mr. Tognazzini went on to summarize what he understood to be Mr. Martin's "desire" and what he understood was the "desire" of the defendant lessor, and after such statement of what obviously had been largely opposing "desires," he concluded with the following suggestion: "Both you and I, in obtaining a modification, desire to reduce it to its simples [sic] form and to this extent I suggest the following, to-wit:

"(1) The suspension of all obligation to drill additional wells, except offset wells, for a period of two years from date of the modification,

"(2) The modifying of the paragraph 9, by striking out 250 feet and inserting in lieu thereof, 330 feet, and in addition thereto, appropriate language to provide that when offset wells are being produced within said range, more or less, E. H. Moore Inc. likewise produce,

"(3) At the expiration of the two year period, E. H. Moore Inc. shall be obligated to drill three wells per year.

"The consideration for the above will be the paying of a minimum royalty of $25,000. per year, said royalty payable monthly in advance."

Regardless of who originated the form of language used in the "Supplemental Contract" it was Mr. Martin, acting for the plaintiff's predecessor, who finally drafted the contract; and it was the same Mr. Martin, acting in the same capacity, who was at all times the moving and pressing party in seeking a lease modification. Concerning Mr. Martin, and in the exercise of those fact finding prerogatives which are properly a function of the trial court, rather than of this court, the learned trial judge, in his memorandum opinion, says: "As the Court has intimated, it is inconceivable to it that E. H. Moore's Inc. able and experienced counsel would fail to provide, in plain and unambiguous terms, the present contentions of the plaintiff herein, *had* they been those now contended for." Certainly the quoted observation of the trial judge indicates not misconduct or error, as suggested by the majority opinion, but, rather, an entirely proper appreciation of the significance of circumstantial as well as direct evidence. And, in truth, the letter from Mr. Tognazzini to Mr. Martin, which Justice Traynor seizes upon as overwhelming substantially all other evidence in the record, is but a part—a greater part or a lesser part, as various fact finders might respectively view it—of a record which discloses with absolute certainty, to a reviewing court, only one thing: a substantial conflict in the evidence.

I have not herein, by any means, related every detail of evidence, either direct or circumstantial, which supports the trial court's findings and construction but what has been set forth above is ample, under any pertinent rules of law which ever heretofore have been followed in this state, not only to support, but to demand that we sustain, the lower court in its findings and conclusions.

For adequate treatment of those of the points briefed which I have not found it necessary or desirable to discuss in a dissenting opinion reference is made to the opinion prepared by Mr. Justice Wilson for the District Court of Appeal, Second Appellate District, Division 2, reported in 173 P.2d 700.

The judgment should be affirmed.

SHENK and CARTER, JJ., concur.

Rehearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

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83 Cal.App.2d 322

In re DE LA MONTANYA'S ESTATE.
DE LA MONTANYA v. PACIFIC NAT. BANK OF SAN FRANCISCO.

Civ. 13553.

District Court of Appeal, First District,
Division 1, California.

Jan. 22, 1948.

Hearing Denied March 18, 1948.

1. Trusts 🔑200(2)

Though decree of settlement of account and final distribution gave testamentary trustee and his successors in trust the power, in his discretion, to sell any or all trust property without approval of any court, sale of trust realty was subject to confirmation by the court, where contract of sale provided that it was made on condition of confirmation of sale by court. Probate Code, § 1120.

2. Appeal and error 🔑185(1)

Generally, the question of a court's jurisdiction is not waived by failure to plead it or to raise objection until the case reaches a court of review.

3. Trusts 🔑200(2)

Statute providing that when a trust created by will continues after distribution, superior court shall retain jurisdiction after distribution of estate for purpose of passing on acts of trustee, gave superior court jurisdiction to determine whether proposed sale of trust realty should be approved. Probate Code, § 1120.

4. Trusts 🔑298

Statute providing that when a trust created by a will continues after distribution of the estate by final distribution, superior court shall retain jurisdiction after distribution of estate for purpose of passing on acts of trustee, is broad enough to give jurisdiction over all controversies arising between a trustee and a beneficiary where the method of operation or the good and sound judgment of the trustee is involved. Probate Code, § 1120.

5. Trusts 🔑172

The powers of a testamentary trustee attach to the office unless the terms of the trust provide otherwise.

6. Trusts 🔑200(2)

Where testamentary trustee, after final distribution, sought confirmation of proposed sale of trust realty, and third person in open court made a higher bid than proposed purchaser, and court then asked if there were any higher bids, procedure was governed by section of Probate Code dealing with jurisdiction of a court over administration of trusts after final distribution of an estate, and not by section of Probate Code dealing with higher offer on hearing for confirmation of private sale of realty. Probate Code, §§ 785, 1120.

7. Trusts 🔑203

Where prospective sale of trust realty by trustee was on condition that the sale should be confirmed by court, and sale was not confirmed by the court, title to the realty remained in the estate. Probate Code, § 1120.

8. Trusts 🔑200(2)

Evidence sustained court's determination that sale of trust realty, which had been appraised at $130,000, for $150,000, was for the best interests of the testamentary trust. Probate Code, § 1120.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of trust estate of Sarah Jane de la Montanya, deceased, wherein Jacques de la Montanya filed objections to proposed sale of realty belonging to the trust by the Pacific National Bank of San Francisco, as trustee of the trust estate of Sarah Jane de la Montanya, to Joseph W. Harris for $130,000. The court refused to confirm such sale, but did accept an offer made in open court by one Hirschberg to purchase the realty for $150,000, and Jacques de la Montanya appeals.

Order affirmed.

James E. Colston, Richard O'Connor and A. C. Wollenberg, all of San Francisco, for appellant.

Schofield & Hanson, Allison E. Schofield and Raymond L. Hanson, all of San Francisco, for respondent.

WARD, Justice.

Jacques de la Montanya, one of the beneficiaries under a testamentary trust provided for in the will of Sarah de la Montanya and made a part of the decree of distribution in that estate, appeals from an order made on April 7, 1947 which plaintiff designates as an order "confirming sale of certain real property therein described belonging to the trust estate, to A. Hirschberg."

Sarah de la Montanya was a widow and all the property of her estate was her separate property. Among her survivors appear Sarah J. Dorn, Jacques de la Montanya and Lorraine S. Crittenden. In 1919 the decree of settlement of account and final distribution in the estate of Sarah Jane de la Montanya was ordered closed and Sarah Dorn, the executrix of the estate, discharged upon the payment of certain legacies. Certain parcels of land, under the terms of the will, were distributed to Frank R. Wehe "as trustee, and his successors, in trust * * *." The trustee was given unlimited power to manage the property, to invest any sums received and "The trustee herein named, shall have power to sell the whole or any part of the property hereinbefore described, or hereafter acquired under the terms of this instrument, at public or private sale or with or without notice, as the said trustee may determine, and the said trustee, in the execution of the trusts herein created, shall have full power and authority to grant, bargain, sell and dispose of any and all of the property held by him in trust and to hold and manage all of the said property and to control all of the income arising therefrom, and to collect all insurance in case of loss and invest and reinvest the same in the same manner that he is hereby empowered to invest other funds of said trust and to pay all of the expenses advisable in and about the management thereof or its maintenance and improvements, and he is hereby further empowered from time to time in his discretion to sell, mortgage, hypothecate, dispose of, license any act in relation to and convey any or all of the trust property or any interest therein received or held by him without the order, aid, intervention, approval, or confirmation, of any court or any judge of any court * * *." The Probate Court in 1919 in the decree of settlement of account and final distribution provided:

"The said trustee shall after paying all of the expenses and other charges or sums in this instrument provided for and after setting aside and accumulating as much as he may deem necessary at any time for the purpose of paying for repairs and making improvements, or for any other purpose contemplated hereby, pay the net income of said trust property to Lorraine S. Crittenden and to Jacques de la Montanya, Jr. or such part thereof as they may require and apply for; one-half to each of the said parties, for the support of the said Lorraine S. Crittenden, and for the support and education of Jacques de la Montanya, Jr., who is now a minor. * * *

"That the said trust is upon the conditions that if the said Lorraine S. Crittenden should die without heirs of her body before the said Jacques de la Montanya, Jr., that this trust should cease without any act on the part of the trustee or any other person, and that all of the said property shall immediately vest in fee simple in the said Jacques de la Montanya, Jr." When read in conjunction with other provisions the trust appears to be a spendthrift trust. Restatement of the Law, Trusts, sec. 152. This is a possible explanation of the general and extensive power conferred on the "trustee and his successors."

Trustee Wehe resigned in 1925. His accounts were approved, his resignation accepted, and Sarah Jane Dorn, the aunt of Lorraine Crittenden and grand-aunt of Jacques de la Montanya, was appointed trustee. In 1929 Sarah J. Dorn rendered a report which was approved. At the same time she resigned as trustee and was succeeded by the Pacific National Bank of San Francisco.

The Pacific National Bank of San Francisco, as trustee, filed interval reports which were approved by the court. On July 16, 1946, the bank as trustee filed its seventeenth annual report and account. On February 14, 1947, the bank filed a document entitled Return of Sale and Petition for Order Confirming Sale of Real Estate, which contained the following: "That by the terms of the order of final distribution in said estate which includes the trust provisions under which the said trustee is now managing said trust estate, said trustee is given full authority to sell any or all property of said estate without notice, and at private sale. That pursuant to said authority, petitioner on the 7th day of February, 1947, sold certain real estate, which will be more fully hereafter described, at private sale, without notice, to one Joseph W. Harris for the sum of One Hundred Thirty Thousand Dollars ($130,000.00) on the following terms: —Five Thousand Dollars ($5,000.00) paid as a deposit upon the signing of said agreement, Twenty Thousand Dollars ($20,000.00) cash *on confirmation of sale by the above entitled court,* and the remaining One Hundred Five Thousand Dollars ($105,000.00), to be evidenced by a promissory note bearing interest at six and one-half (6½) percent per annum, and to be payable twenty-five (25) years from the date of sale. Said note is to be secured by a first deed of trust, and to provide that no payment of principal can be paid for a period of ten (10) years from the date of said note, and that thereafter the purchaser shall have the option of paying monthly principal payments not to exceed Three Hundred Fifty Dollars ($350.00) per month. The purchaser is to deposit as security for his payments as aforesaid, the sum of Twenty-five Thousand Dollars ($25,000.00), in United States Government Bonds, which said Bonds shall remain in the possession of the trustee until such time as the purchaser shall have spent the sum of Twenty-five Thousand Dollars ($25,000.00) or more on improvements to said property, or paid the promissory note in full." (Emphasis added.) Jacques de la Montanya filed objections upon the following grounds:

"That said sale is not for the best interest of the estate, or for the beneficiaries under said trust, neither is said sale to the advantage of the estate, nor for the benefit of the beneficiaries therein named.

"That said sale was not legally made or fairly conducted.

"That the funds to be received by the estate for the sale of said property cannot be invested in either property or securities of equal safety that will bring returns equal to the present or future earnings of said real property."

The trustee bank, through its legal representatives at the opening of the court proceedings, stated its position as follows: "This is an application for an order confirming a sale of real property in a testamentary trust. This is not a probate sale. The trust provides that the trustee—and the Pacific National Bank is the successor trustee—has full power to sell any and all of the assets of the estate, so that we didn't have to come here at all. But it has been the custom of the Pacific National Bank to come to court—ever since they undertook the administration of the trust—and seek the Court's approval of all their acts, without waiting for the annual accounting." The trust officer of the bank testified:

"Primarily, it is a question of income, and of the condition of the property. It is a very old building, constructed, as we understand it, sometime between 1860 and 1870, and not in good condition. It is under lease to some very good tenants at the present time, but one lease expires in 1951 and the other in 1953, and we are led to believe that at the expiration of those leases, in order to renew the main lease, or get the same class of tenant who are now in the building, a large expenditure will be required at that time to renovate the building. The trust has no funds except cash in the sum of $1,200 or $1,500, and we would be in no position to renovate the building, if that occurred, without borrowing. * * *

"The terms of the offer are $130,000, of which $25,000 is to be paid in cash, and the balance over a 25-year period, no principal payments over the first ten years, and then payments in a small amount by the purchaser—not compulsory—all deferred payments to bear interest at 6½ percent. The purchaser has also agreed to put up $25,000 in Government bonds to insure his carrying out the terms of the trust, which deposit is to be released when he makes improvements to the property, subject to our approval, of a like amount."

[1] The record shows that the property had been appraised at $130,000 and that the income in the previous year amounted to $6,999.97. There were many circumstances to consider. There was some evidence to the effect that it would cost at least $100,000 to make all the improvements necessary to re-lease the property. Smaller amounts appear as sufficient for less improvement. Jacques' interest should be considered, but likewise Lorraine Crittenden's. In the proposed sale $5,000 was to be paid upon the signing of the agreement; $20,000 upon confirmation of the sale, and the remaining $105,000 to be evidenced by a promissory note bearing interest at six and one-half per cent per annum, to be payable twenty-five years from the date of the sale. The note was to be secured by a first deed of trust, and no payment of principal was to be made for a period of ten years from the date of the note. It was agreed that $25,000 in United States Government bonds should remain in the possession of the trustee until the purchaser spent $25,000 in improvements to the property or until payment of the note in full. By agreement the proposed sale was subject to confirmation by the court. In addition, the court could have considered the following facts: That interest at 6½ percent on $105,000 would amount to a fair sum when divided between the beneficiaries; that the delay in the payment of any part of the principal for ten years, would, in the natural course of events, favor Jacques de la Montanya. He stands in the position of a prospective remainderman but without guarantee that he will so continue. According to statements made by his counsel during the court proceedings: "When his aunt and grand-aunt go he will own the property." The disposition of the property under the terms mentioned seems to accord with the evident purpose of the trust. The price and details in connection with the contract entered into between the trustee and the prospective purchaser Harris were matters to be determined by the trial court. The offer of Harris to buy, and the tentative acquiescence of the trustee bank to sell was *"on confirmation of sale by the above entitled court."* (Emphasis added.) Irrespective of powers granted to the trustee by the decree and final distribution in the original order of appointment of a trustee, or in the subsequent specific order appointing this bank as trustee, this particular transaction as agreed upon between the parties was subject to confirmation by the court.

[2-4] One difficulty in considering the merits of this appeal is the assumption of plaintiff that there is a lack of jurisdiction, and the statement that at the last session of the legislature a bill was introduced which would have "given successor trustees just the powers that the trustee here is trying to usurp." The senate bill need be given no further consideration by this court at it did not pass. The general rule is that jurisdiction is not waived by failure to plead it or to raise objection until the case reaches a court of review. Jurisdiction is given under Probate Code section 1120 which provides in part: "When a trust created by will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose

of * * * passing upon the acts of the trustee * * *. The trustee may also petition such court, from time to time, for instructions * * *." See Estate of White, 69 Cal.App.2d 749, 160 P.2d 204; Estate of Marre, 18 Cal.2d 184, 114 P.2d 586; Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 134 P.2d 800. The language is broad enough to give jurisdiction over all controversies arising between a trustee and a beneficiary where the method of operation or the good and sound judgment of the trustee is involved. Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565; Estate of Smead, 12 Cal.2d 20, 82 P.2d 182. In the present case the trustee decided to sell the property; one of the beneficiaries objected. It made little difference whether the petition was a petition to "confirm" or one for "instructions."

[5] The powers of a trustee attach to the office unless the terms of the trust provide otherwise. Restatement of the Law, Trusts, sec. 196; see, also, Fatjo v. Swasey, 111 Cal. 628, 44 P. 225; Estate of Canfield, 80 Cal.App.2d 443, 181 P.2d 732.

[6, 7] Plaintiff argues that as a matter of practice the court erred in proceeding under Probate Code sec. 785 to accept a higher bid in open court. It has not been made clear to this court that the lower court proceeded under sec. 785. The method used was a practical one under sec. 1120 to determine whether the bid of $130,000 should be affirmed. During the taking of such evidence a Mr. Hirschberg arose in open court and bid $150,000 under an agreement similar to the Harris contract, with acceptance of specified conditions and waiver of certain technical objections to title made in open court. It was then that the court, exercising jurisdiction under Probate Code sec. 1120, asked if there were any higher bids. This procedure may have reminded counsel of the method used under sec. 785, but the trustee and the subject matter, no matter what method was used or in what form the petition appeared, remained within the realm of the jurisdiction conferred by sec. 1120. It must be remembered that in the present case title did not pass to the man who made the original offer. The prospective sale to Harris was on condition that the sale should be confirmed by the court. The sale was not confirmed and title therefore remained in the estate.

In the order of instruction the court said: "That the said trustee is given full authority under the trust provisions of said trust to sell any or all property of said estate without notice and at private sale." The order also relates the Harris transaction and recited: "That by reason of the premises the original sale is not for the best interests of the trust nor for its advantage and benefit." The hearing is set forth including the Hirschberg offer. Thereupon the court instructed the trustee to accept the $150,000 offer.

It does not appear that there was any sound legal objection interposed. The trustee could have made the sale for $130,000 independently of the beneficiaries. It is hard to understand how a sound factual objection could be based upon the action of the court in obtaining $20,000 more than the original bid.

[8] It appears that the determinative question on this appeal is whether the evidence supports the findings in the order heretofore mentioned. As a matter of law we are not in a position to say that the trial court erred in determining that the sale was in the best interests of the trust.

The order appealed from, namely, the order of April 7, 1947, instructing acceptance of the offer to purchase the real estate, is affirmed.

PETERS, P. J., and BRAY, J., concur.

83 Cal.App.2d 256

In re DALIP SINGH BIR'S ESTATE.

HARNAM KAUR et al. v. BOYES.

Civ. 7454; Sac. 5882.

District Court of Appeal, Third District, California.
Jan. 13, 1948.

Descent and distribution ⟹3

Where intestate left surviving two wives married by intestate in foreign province allowing polygamous marriages, no public policy would be affected by dividing intestate's estate between surviving wives, particularly since neither wife contested the right of the other to share estate and they were the only interested parties, and the marriages would be held valid in California to extent of allowing wives to share intestate's estate equally. Civ.Code, § 63.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller and M. G. Woodward, Judges.

Proceeding in the matter of the estate of Dalip Singh Bir, wherein Harnam Kaur and Jiwi, by and through their agents (with written power of attorney, Winston C. Black and Maurice D. L. Fuller, filed a petition against Florence E. Boyes, administratrix, to determine heirship. From the order Harnam Kaur and Jiwi appeal.

Order reversed with directions.

Atherton & Dozier, of Stockton, for appellant.

Foltz & Rendon, of Stockton, for respondent.

ADAMS, Presiding Justice.

Dalip Singh Bir, a native of India, died intestate in San Joaquin County on April 18, 1945, and respondent Florence Boyes was appointed and qualified as administratrix of his estate. On April 4, 1947, two women named Harnam Kaur and Jiwi, both residents of India, joined in a petition to determine heirship, alleging in their petition:

"That your petitioners were, at the time of the death of the deceased herein, the legally wedded wives of said deceased, having lawfully married said deceased in the Punjab over 50 years ago whilst all parties were domiciled in Punjab Province, British India, according to the law and manner of the Jat community, in which province and community said marriages are lawful and valid. As said widows of deceased, petitioners are entitled to distribution of his estate."

Their petition further alleged that the residue of the estate consists of approximately $1,450 in cash and that in India petitioners would be entitled to share equally in the estate.

The record before us contains the following stipulation signed by counsel for the respective parties:

"It is hereby stipulated between counsel for the petitioners and the Administratrix herein, that the Petition for Determination of Heirship of Harnam Kaur and Jiwi was presented to the court as a joint petition requesting solely a judgment of an undivided one-half interest to each petitioner as the legal widows of Dalip Singh Bir, and that the judgment rendered was based upon said petition as so amended in open court, and the findings of fact and conclusions of law heretofore rendered may be deemed the final judgment herein denying said petition."

The trial court found that decedent, while domiciled in the Punjab Province of India, there married and was possessed of two wives, the petitioners above named, and that petitioners were legal spouses of decedent under the laws of the Punjab Province of India; that thereafter decedent emigrated to the United States and established residence in California, and that the money belonging to his estate was community property; that neither of said marriages had been dissolved prior to decedent's death but that no satisfactory proof was introduced as to which of the marriages was first performed.

Upon these findings of fact the trial court concluded that under the laws of California and the public policy thereof, only the first wife of decedent can be recognized as his legal widow. It therefore entered an order continuing the matter awaiting proof as to which of the marriages was first performed and which of the two petitioners was the initial wife of decedent. From that order the two wives have appealed.

Appellants rely on the provisions of section 63 of the Civil Code which reads:

"All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted are valid in this state."

In The Conflict of Laws, by Beale (1935), Vol. 2, page 666, the text reads:

"The American courts both those of the United States and those of Canada, have been much more liberal than those of England in recognizing and giving effect to a polygamous marriage or to a marriage which permits free divorce. Thus they have recognized a marriage of native tribes, and have given widows of polygamous marriages the legal rights of a widow. * * * Thus in a case decided in British Columbia it appeared that a Chinaman, domiciled in China, and legally having two wives under the law of China, died while temporarily in British Columbia, leaving property there. By his will he left the property to his two wives. The question was whether the succession duty should be that due on a gift to a wife. Held, that it should be: that, he being validly married by the law of his domicile, the validity of the marriage should be recognized in matters of succession."

The Canadian case above referred to is Yew v. Attorney General for British Columbia, 1 Dominion Law Reports 1166, British Columbia Court of Appeal (1923); and in that case many cases on the subject are cited. The conclusion there reached was that the law of China controlled, and since that law permitted the decedent to have more than one wife, the wives had the civil status of wives in China and must be so recognized in Canada in all matters of succession to property in respect to movables.

In 48 Law Quarterly Review 341 (Oxford, 1932) will be found an exhaustive treatise on the subject in which both English and United States decisions are cited. There at page 348 it is said:

"It does not appear, therefore, that the reported decisions of the English Courts really afford any support for the view that polygamous marriages must in all cases be regarded as void in contemplation of English law and the issue as illegitimate. Such inferences as can be drawn from them are rather in the contrary sense. As, however, there is a singular absence of direct authority on the question in the English cases, the decisions of American Courts in other parts of the British Empire would presumably in a matter of this kind have a considerable persuasive authority in so far as they are decisions of Courts applying a law which is either based on English law or which, like English law, does not allow of polygamy."

Also at pages 350–358:

"There are a number of decisions of the United States Courts. In an early case in the Courts of North Carolina (Williams v. Oates, 27 N.C. 535; 5 Iredell 535) Ruffin C.J. states: * * * (b) that if a Turk with two wives were to come to the United States 'we would not refuse to administer to them the justice due to the relations contracted by them.' The view expressed upon point (b) by Ruffin, C.J. is confirmed by the judgment in Polydore v. Prince [Fed.Cas. No. 11,257] (Beale's Cases on the Conflict of Laws, Vol. III, p. 2) where the following dictum occurs: 'If a Turkish or Hindue husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them. * * *' These statements are, indeed, 'obiter dicta,' but there are also two decisions in which the wives of potentially polygamous Red Indian marriages have been recognized as acquiring the status of a wife, and as therefore being incapable (as married women) of instituting an action while the marriage subsisted (Wall v. Williamson, 8 Ala. 48, confirmed on appeal, 11 Ala. 826, and Morgan v. McGhee, 1844, 24 Tenn. 13, and in 5 Humph. 13, and in each of these cases disapproval was *expressed of the view that polygamous marriages could not be recognized at all,* while in a third case of 1860 (Johnson v. Johnson's Adm'r, 30 Mo. 72, 77 Am.Dec. 598) the issue of a potentially polygamous Indian marriage were held to be legitimate *for the purpose of succession.*

"These five American cases (and I have been unable to find any decisions in a contrary sense) therefore strongly support the view that it is not correct to say that English law can in no case recognize polygamous marriages as valid, or the issue thereof as legitimate. * * *

"It is now possible to begin the examination of the principles to be applied to determine the cases in which polygamous marriages can and cannot be recognized in English law, so as to confer on the 'wives' the status of a wife, for the purposes of section 10 of the British Nationality and Status of Aliens Act *or for the purposes of succession,* and upon the children the status of legitimacy.

"The general principles of Private International Law applied by the English Courts to determine the validity of marriages in general are (as stated in Dicey, Conflict of Laws—passage quoted on p. 4 above) that the marriage is valid if, and is not valid unless,

(i) the parties possessed the capacity to marry each other according to the law of their domicil;

(ii) and the marriage was a valid one under the *lex loci contractus."* (Italics added.)

Polygamous marriages among Indians have been held valid, and in Rogers v. Cordingley et al., 212 Minn. 546, 4 N.W.2d 627, 629, the court said:

"Hallowell v. Commons, 8 Cir., 210 F. 793, recognizes even polygamous marriages contracted by Indians according to their laws, and cites with approval from Ortley v. Ross, 78 Neb. 339, 110 N.W. 982, 983: 'Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the state of Minnesota, where the parties then resided, nor in the state of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages.'"

To the same effect are numerous cases cited in the Rogers case. See, also, 38 C.J., p. 1278. Since polygamous marriages between tribal Indians are given validity for purposes of succession, it would seem there is no reason why the polygamous marriages in the instant case should not be held valid for succession purposes.

A good illustration will be found in Illustration 1 to section 134 of Restatement of the Law, Conflict of Laws, at page 202:

"A, domiciled in state X, validly marries B and C in X. By the law of Y, a polygamous marriage is void. A brings B and C to state Y; *Y may refuse to permit him to cohabit with them.* A and B die; Y may grant a widow's allowance to C." (Italics added.)

Succession of Caballero v. Executor et al., 24 Ann. 573, was a case where deceased, Caballero, lived with a Negro woman in Louisiana and had several children by her. Prior to his death he married the Negro woman in Havana, Cuba, where marriages between whites and Negroes are valid, and thus legitimated the children. From Cuba he moved with his family to Spain where his children remained. Upon Caballero's death a dispute arose as to inheritance, the executor of decedent's will claiming the children were illegitimate since Louisiana declared all marriages between whites and Negroes to be void. The court held in favor of a child claimant as to her right to succeed to her father's estate on the theory that the marriage in Havana, Cuba, was valid in Louisiana in so far as the right to succeed to decedent's property was concerned. The court said:

"We understand the rule to be well settled that marriages valid by the laws of the country where they are entered into, are held valid in any other country to which the parties may remove, unless there exists, from reasons of public policy, in the country to which they remove, some impediment by the laws of that country, or that such marriages are in derogation of good morals. In such exceptional cases comity could not be invoked to recognize their validity. How stands the matter in regard to the rights of Mrs. Conte, the plaintiff in this case? Here we may notice that this person, after her parents removed from Louisiana to Spain, never returned to Louisiana to live, and that she is a subject of the government of Spain. At the time of her legitimation by the marriage of her parents, marriage between white persons and free persons of color was prohibited by our law. The Louisiana law would not have recognized as valid in Louisiana the marriage of Caballero in Havana. * * * Thus far would our law have extended and had effect when Caballero returned to Louisiana, but no further. Its edict, so far as it bore upon his marriage, was of local and limited effect. It existed for a purpose local and special in this country. That purpose could not have been more effectually carried out by withholding from persons abroad, legitimate by the laws of the country where they lived, *the right of inheriting property* in this State. * * * The policy of this State had no broader extent, because there was no reason why it should have." (Italics added.)

The decision of the trial court was influenced by the rule of "public policy"; but that rule, it would seem, would apply only if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, "public policy" is not affected. It was so held in the Succession of Caballero, supra. On the authority of Beale on Conflict of Laws, Yew v. Attorney General of British Columbia and Succession of Caballero, supra, the two wives of decedent should share equally in the money in question. No case has been found that is opposed to those authorities. True, there are cases holding invalid polygamous marriages entered into in places where such marriages are legal, but in each such case found, all the parties were living and no question of succession to property was considered. Therefore, it would seem that the above cited authorities which actually considered the right of succession and granted such succession in cases growing out of marriages legal where entered into but illegal in the place where probate proceedings are being had, are controlling. "Public policy" would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties.

The order appealed from is therefore reversed with directions to the trial court to enter a decree in accordance with the views herein expressed.

PEEK and THOMPSON, JJ., concur.

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83 Cal.App.2d 153

KING v. MORTIMER et al. (two cases).

Civ. 13304, 13305.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1948.

Rehearing Denied Feb. 7, 1948.

Hearing Denied March 8, 1948.

1. Pleading 🔑225(2)

Denial of leave to amend in sustaining demurrer to original complaint constituted abuse of discretion, regardless of whether leave to amend was requested, unless complaint showed on its face that it was incapable of amendment. Code Civ.Proc. § 472c.

2. Building and loan associations 🔑41(6)

Unless complaint could be amended so as to show affirmatively wherein transaction by which building and loan association reacquired its own deposit accounts at a discount were void and not merely voidable, any recovery in action by assignee of depositors for difference between face value of accounts and amounts received by depositors therefor must be on theory that the transactions were voidable because induced by fraudulent misrepresentations and in order to recover on such theory, plaintiff must rescind the transactions and restore everything of value received thereunder or plead facts showing that his assignors were entitled in any event to retain what they had received. Civ.Code, § 1691.

**3. Building and loan associations 🔑41(6)
Pleading 🔑225(2)**

The promptness of depositors in rescinding transactions by which building and loan association reacquired its deposit accounts at a discount, knowledge of the right to rescind and necessity to restore everything of value received under transactions were questions of fact which good practice required to be pleaded in action to recover difference between face value of accounts and amounts received therefor by depositors, but absence of such allegations did not justify denial of leave to amend in sustaining demurrer to original complaint, since complaint could be amended to properly tender the issue of rescission for fraud.

4. Assignments 🔑119

Bare assignee of a tort claim, having no interest in the subject matter of the suit, may not maintain action thereon.

5. Assignments 🔑119

Assignee for collection, having apparent legal title to depositors' claim against building and loan association based on allegedly fraudulent transactions by which association reacquired its deposit accounts at a discount, could maintain action on such claims, even though assignments were without consideration.

6. Judgment 🔑948(2)

Objection that complaint showed on its face that a portion of the claim on which action was based was res judicata could not be raised by demurrer. Code Civ.Proc. § 430.

**7. Building and loan associations 🔑41(4)
Limitation of actions 🔑5(3)**

Action for difference between face value of deposit accounts in building and loan association and amounts received therefor by depositors as a result of allegedly fraudulent transactions by which building and loan association reacquired its own accounts at a discount was an "action to recover money deposited with building and loan association" within statute prescribing no time limitation on such actions and was not subject to three-year statute of limitations applicable to actions for fraud. Code Civ.Proc. §§ 338, 348.

See Words and Phrases, Permanent Edition, for all other definitions of "Action to Recover Money Deposited With Building and Loan Association".

8. Statutes 🔑181(1)

A statute will be given that construction which will effectuate rather than defeat it. Civ.Code, § 3541.

9. Building and loan associations 🔑41(4)

The statute providing for no time limitation on commencement of actions to recover money deposited with a bank, building and loan association, etc., prescribes a general rule and any claim for recovery of money deposited with institutions designated therein comes within its purview unless expressly excepted therefrom. Code Civ.Proc. § 348.

**10. Building and loan associations 🔑42(16)
Limitation of actions 🔑49(1)**

Allegation that building and loan commissioners had proceeded with liquidation of business, property and assets of building and loan association was sufficient to take claims for money deposited with association out of the statute providing no time limitation on commencement of such actions and subject them to general statute of limitations beginning to run when commissioner instituted liquidation proceeding. Code Civ.Proc. § 348.

11. Administrative law and procedure 🔑229

Where an administrative procedure is required by statute, the administrative remedy must be exhausted before courts will take jurisdiction of the same subject matter.

12. Building and loan associations 🔑42(16)

Under the Building and Loan Association Act, the right to sue on subsisting claims against an association in liquidation is suspended during period the claims are under consideration by building and loan commissioner, and four months period of limitations therein provided begins to run when schedule of approved and disapproved claims is filed as provided in the act. Gen.Laws, Act 986, § 13.16.

13. Building and loan associations ⚿42(16, 17)

Where building and loan commissioner seized assets of building and loan association and proceeded to liquidate it, former depositors claiming that association fraudulently reacquired its own deposit accounts at a discount must file claims with commissioner within time provided by Building and Loan Association Act and commence action thereon within four months after filing of schedule respecting such claims. Gen.Laws, Act 986, § 13.16.

14. Limitation of actions ⚿180(2)

A complaint is not vulnerable to attack by demurrer raising a specific statute of limitations, unless it affirmatively appears on the face of complaint that the whole of the cause of action is necessarily barred by the pleaded statute.

15. Building and loan associations ⚿42(16)

Complaint in action against building and loan association in process of liquidation should affirmatively show that claims on which action is based were filed with building and loan commissioner within the time prescribed by statute. Gen.Laws, Act 986, § 13.16.

16. Pleading ⚿8(6, 15), 243

In action against building and loan association in process of liquidation based on allegedly fraudulent reacquisition of its own deposit accounts at a discount, complaint alleging legal conclusions of both illegality and fraud without stating facts to support either conclusion should be amended so as to plead the facts upon which plaintiff relies to support either conclusion.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Consolidated actions by Wesley King, as assignee and on behalf of depositors, against Frank C. Mortimer, as Building and Loan Commissioner of the State of California, Pacific States Savings & Loan Company, and others to recover the difference between face value of deposit accounts in named company and the amounts paid by the company therefor. From a judgment for defendants sustaining their demurrers to the complaint without leave to amend, plaintiff appeals.

Judgment reversed with directions.

Erskine, Erskine & Tulley and Alden Ames, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Leonore Underwood, Deputy Atty. Gen., for Pacific States Savings & Loan Co.

Gardiner Johnson and Roy D. Reese, both of San Francisco, for other respondents.

NOURSE, Presiding Justice.

The plaintiff and appellant sued as assignee and "on behalf of" a number of depositors in the Pacific States Savings and Loan Co. A list of the various assignors and the amount of their claims was attached as an exhibit and made a part of the complaint.

The actions were consolidated for the purposes of the demurrer, and are treated together throughout.

The complaint is framed in two counts, differing in prayers only, as hereinafter mentioned.

After alleging the corporate existence of the defendant Pacific States Company and the official capacity of the defendant Frank C. Mortimer as building and loan commissioner the complaint sets forth a series of events which may be best summarized in chronological order.

Commencing early in 1931 and until March 4, 1939, when Ralph Evans, the then building and loan commissioner, seized the assets and properties of the defendant corporation, the said corporate defendant had embarked upon a dual program of widespread advertising and solicitation of business and a plan of systematically reacquiring its "fidelity" certificates or deposit accounts from its various depositors for a fraction of the face value thereof.

The advertising campaign was based on guarantees of interest of over 4% and the right of immediate withdrawal of funds or withdrawal on short notice.

The plan for reacquisition of the deposit accounts was accomplished by employing various agents and agencies, including, inter alia, the Pacific States Auxiliary Corporation, State Guaranty Auxiliary Corporation, and the Robert S. Odell & Company. The function of these agents and agencies was to importune the depositors of the Pacific States Co. "by various schemes, devices, threats and misrepresentations," to sell their deposit accounts to them for sums greatly less than the face value of the deposit certificates—in some cases for about 50 cents on the dollar.

From the period of 1931 to March 1939 inclusive, by the means aforesaid, the defendant Pacific States Co. was able to acquire deposit accounts having an aggregate face value of $26,632,004.01 for an amount not in excess of $17,336,896.46.

During the period from 1932 to 1936 the Pacific States Co. refused to pay its matured notices; that from February, 1934, "and from some time prior thereto and ever since said date" the corporate defendant was and is insolvent, as the defendants well knew. Since the corporation was seized by the building and loan commissioner the right to possession of the assets and properties of the defendant corporation was in litigation; but the building and loan commissioners, "and particularly the defendant Frank C. Mortimer, have proceeded with the liquidation of the business, property and assets of said defendant Pacific States Savings and Loan Company."

In 1932 the then building and loan commissioner had directed the corporate defendant to cease and desist from purchasing its own certificates at discount, and from then on the defendants persisted in their course of conduct knowing of its illegality.

The plaintiff's assignors filed timely claims with the building and loan commissioner but these claims were rejected in 1943. The complaint does not specifically allege when the payments were made to plaintiff's assignors. But from the exhibit attached showing the claims filed it appears that by far the greater portion of these payments were made in 1934-1936, which was the period of the alleged insolvency.

Upon the foregoing statement of facts the plaintiff alleges as a first cause of action that, because of the illegal conduct of the Pacific States Co., the transfers of deposit accounts to it by the plaintiff's assignors were void and that therefore the corporate defendant was unjustly enriched to the value of the difference between the face value of the said deposit accounts and the amounts paid therefor.

The second cause of action is predicated on the first and pleads a debt for money had and received in the amount of $672,680.

The defendants interposed general demurrers for insufficient facts and raised the bar of the statute of limitations as set forth in sec. 338 of the Code of Civil Procedure, and special demurrers on several grounds. The court entered judgment for the defendants, sustaining the demurrers without leave to amend.

[1] Since the demurrer went to the original complaint it would seem to follow under the recent decisions that, unless it shows on its face that it is incapable of amendment, denial of leave to amend constituted an abuse of discretion, (Davis v. Wood, 61 Cal.App.2d 788, 143 P.2d 740; Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 169 P.2d 1000; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Columbia Pictures Corporation v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867) irrespective of whether leave to amend is requested or not. Code of Civ.Proc. § 472c.

In support of the demurrer respondents contend that the acts complained of were only ultra vires and voidable rather than void; and being voidable a rescission must be shown.

[2] It must be conceded that the complaint does not plead sufficient facts upon which the transactions complained of could be held void. Heretofore the same parties representing some of the assignors in this action brought a similar action entitled King v. Pacific States, 26 Cal.2d 333, 158 P.2d 561, based on the charges of fraud and misrepresentations connected with the

sale of the assignors' interests. That case was founded upon charges of fraud. The Supreme Court held that the evidence of fraud was lacking and affirmed the judgment of the trial court and its findings that no fraud had been committed. The case we have here is also founded upon charges of fraud. Unless the plaintiff can amend his complaint to show affirmatively wherein the contracts involved were void and not merely voidable, we must assume that if the plaintiff can recover at all it must be on the theory that the transactions complained of were voidable because of the fraudulent misrepresentations which brought them about. On this theory it would become necessary for him to rescind the transactions and restore everything of value which he had received, or to plead facts showing that plaintiff's assignors were entitled in any event to retain what they had received. 4 Cal.Jur. pp. 767-769. This principle is found in section 1691 of the Civil Code which reads: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and, 2. He must restore to the other party everything of value which he has received * * *."

[3] However, the question of promptness in the act of rescission, knowledge of the right to rescind and necessity to restore are all questions of fact and, though good practice would dictate that these matters should be pleaded in the complaint, it is apparent that the complaint is capable of amendment to properly tender the issue.

[4, 5] The respondents next argue that it may be "inferred" from the complaint that the plaintiff is suing "on behalf of" his assignors, and hence may not maintain the action. This contention is predicated on the familiar rule that the bare assignee of a tort claim, having no interest in the subject matter of the suit, may not maintain the action. This is not the applicable rule here. The true situation of the plaintiff is an assignee for collection, and it is well settled that the assignee for collection, if he has the apparent legal title, may maintain the action (Hammell v. Superior Court, 217 Cal. 5, 17 P.2d 101; Morrison v. Veach, 190 Cal. 507, 213 P. 945; Bechtel v. Baglieto, 13 Cal.App.2d 495, 57 P.2d 192) even though the assignment is without consideration. Cohn v. Thompson, 128 Cal.App.Supp. 783, 16 P.2d 364.

[6] The argument that the complaint is fatally defective because it shows on its face that a portion of the claim is res judicata is untenable. Res judicata is not a matter to be raised by demurrer. Code Civ.Proc. § 430.

Since the complaint herein may be amended to state facts sufficient to constitute some cause for relief, the judgment of the trial court must stand or fall on the question of the statute of limitations.

The respondents urge that section 338 of the Code of Civ.Proc. is the applicable statute—providing that actions for fraud must be brought within three years after the discovery of the fraud.

On the other hand the appellant urges us to find that the applicable statute is section 348 of the Code of Civ.Proc.: "To actions brought to recover money or other property deposited with any * * * building and loan association, or savings and loan society there is no limitation." The further contention that the following language of the same section is inapplicable is hereinafter discussed: "This section shall not apply to * * * building and loan associations, and savings and loan societies which have become insolvent and are in process of liquidation and in such cases the statute of limitations shall be deemed to have commenced to run from the beginning of the process of liquidation; * * *."

[7, 8] The appellant is correct in his contention that this action falls within the scope of section 348 supra. While this section has been frequently referred to, there appears no case in which the precise point in question was involved. However it is a prime rule of statutory construction that that construction will be given which will effectuate, rather than defeat, the statute. Civil Code § 3541.

[9] It is conceded by the authorities that section 348 prescribes a general rule, and any claim for the recovery of moneys deposited with the institutions designated therein comes within its purview, unless expressly excepted therefrom. Glassell Development Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Merchants Nat. Bank of Los Angeles v. Continental Nat. Bank, 98 Cal.App. 523, 277 P. 354. "By the express provisions of section 348, Code of Civil Procedure, there is no limitation to the time within which an action may be brought to recover money deposited with a bank (or building and loan association). * * * by an amendment to section 340 of the same Code, * * * the Legislature made an exception to the general rule laid down in section 348, taking from its purview but one class of actions by depositors against banks (building and loan associations), namely, those 'for the payment of a forged or raised check,' and leaving all other classes of actions by depositors still without time limitation. * * * and it must be presumed that the Legislature in enacting the amendment to section 340 intended to create no exception (to sec. 348) other than that therein in terms specified (citing cases), since an express exception excludes all others. * * *" Merchants Nat. Bank of Los Angeles v. Continental Nat. Bank, supra, 98 Cal.App. page 532, 277 P. page 358.

There is nothing in the language of section 348 which distinguishes between actions ex delicto and ex contractu. Indeed, is may be assumed that the majority of cases involving suits by depositors to recover from the bank or other deposit company arise by reason of some fraud or breach of duty rather than arising solely on the contract of deposit. To give a more narrow interpretation of this section would be to deprive it of most of its effect.

[10] However, the appellant's assumption that the second paragraph of section 348, above quoted, which removes from the exception actions against building and loan associations which are in the course of liquidation, does not here apply, is erroneous. When a party seeks to avail himself of a part of a statutory provision, he is bound by the whole thereof. Here the complaint alleges, "that since the 4th day of March, 1939, the right to the possession of the said building and loan commissioners has been in constant litigation; but nevertheless, said building and loan commissioners, and particularly the defendant Frank C. Mortimer have proceeded with the liquidation of the business, property and assets of said defendant Pacific States Savings and Loan Company." This allegation, absent some other controlling factor, would clearly be sufficient to take the case out of the protection of section 348, and subject it to the general statute of limitations beginning to run on the day the commissioner instigated liquidation proceedings.

However, there is a further statutory provision which is mentioned by both parties and dismissed altogether too lightly. Section 13.16 of the Building and Loan Association Act, Deering's Gen.Laws, 1937, Act 986, provides: "* * * and upon the expiration of the time fixed for the presentation of claims, the commissioner shall prepare or cause to be prepared in duplicate a * * * complete schedule of all claims presented, specifying by classes those that have been approved and those that have been disapproved and shall file the original with the court and the duplicate in the office of the commissioner. * * * Action to enforce the payment of or to establish any rejected claim must be brought and service had within four months from and after the date of filing of the schedule of claims with the proper court; otherwise all such actions shall be forever barred."

Under this procedure, all parties with subsisting claims against a building and loan association, at the time that the association is seized by the building and loan commissioner, must present their claims to the commissioner for investigation and action.

[11] Where an administrative procedure is required by statute, the administrative remedy must be exhausted before the courts will take jurisdiction of the same subject matter. Jackson v. Howser, 66 Cal.App.2d 870, 153 P.2d 423; People v. Keith Railway Equip. Co., 70 Cal.App.2d 339, 161 P.2d 244; Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433;

Steen v. Board of Civil Service Commissioners et al., 26 Cal.2d 716, 160 P.2d 816.

[12] Under section 13.16 the right to sue on subsisting claims is suspended during the period in which the claims are under consideration by the building and loan commissioner. The statute of limitations begins to run at the time of the filing of the *schedule* as provided in the said section. Brashear et al. v. Intermountain Building and Loan Ass'n et al., 9 Cir., 109 F.2d 857.

It is the contention of the respondents that since the Building and Loan Association Act provides that the building and loan commissioner may "sue and defend" actions while in the course of liquidation, it follows that the statute of limitations runs from the time that the liquidation proceeding is commenced, and within that time suit must be brought.

[13] This argument is non-sequitur. It is expressly provided in section 13.16 of the Building and Loan Association Act, supra, that claims *must* be filed with the commissioner, except as to investors appearing on the books of the association at the time liquidation was begun. The pertinent language in answer to this contention is found in section 13.16, supra, "All claims, demands or causes of action of whatever nature, *and regardless of whether or not a suit shall be pending to enforce the same at the time of the taking possession of the assets of the association by the commissioner,* of creditors, and persons other than investors * * * must be presented to the commissioner in writing * * * and any such claim, demand or cause of action not so presented shall be forever barred. Any investor, without presenting a claim, shall be entitled, as to any dividends, hereafter declared, to share in such dividends to the extent * * * of any claim shown by the books of the association to exist in his favor against the association." Deering's Gen.Laws, 1937, Act 986. (Emphasis ours.) That parties in the position of these claimants must file claims to recover is concluded by Allen v. California Mutual Building and Loan Ass'n, 22 Cal.2d 474, 139 P.2d 321.

[14] In order that a complaint be vulnerable to attack by demurrer raising a specific statute of limitations, it must affirmatively appear on the face of the complaint that the whole of the cause of action is necessarily barred by the pleaded statute, Pike v. Zadig, 171 Cal. 273, 152 P. 923; Vassere v. Joerger, 10 Cal.2d 689, 76 P.2d 656; Antioch College of Yellow Springs, Greene County, Ohio, v. Barnhart, 49 Cal. App.2d 171, 121 P.2d 521; also Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 P. 444; Pedro v. Soares, 18 Cal.App. 2d 600, 64 P.2d 776, and hence the judgment cannot be sustained on that ground.

[15] However, the complaint is uncertain in that it fails to state clearly the date of the filing of the claims with the building and loan commissioner to make it affirmatively appear that the filings were "within the time prescribed by law."

[16] The complaint contains allegations of legal conclusions of both illegality and fraud but the facts to support either conclusion are not clearly pleaded. The complaint should be amended to plead the facts upon which plaintiff relies to support either conclusion.

The judgment is reversed with directions to give plaintiff a reasonable time within which to amend his complaint.

DOOLING, J., concurs.

Hearing denied; GIBSON, C. J., and SCHAUER and SPENCE, JJ., dissenting; SHENK, J., not participating.

GUERIN et al. v. KIRST.*

Civ. 16104.

District Court of Appeal, Second District,
Division 2, California.
Jan. 12, 1948.

Rehearing Denied Feb. 7, 1948.

1. Sales 🔑473(1), 480(1)

Where conditional buyer of tractor sold it without consent of conditional seller to innocent third party who had no knowledge of reservation of title by original seller until payment in full, surreptitious sale by conditional buyer constituted a "conversion", and original seller was entitled to judgment for possession of tractor or in lieu of its return reasonable value thereof with damages for its detention.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

2. Sales 🔑480(5)

Where surreptitious sale by conditional buyer of tractor without consent of conditional buyer of tractor without consent of conditional seller to innocent third party who had no knowledge of reservation of title by original seller constituted a conversion, original seller, in addition to recovering tractor or its value, was entitled to recover reasonable rental value as damages for detention of the tractor.

3. Replevin 🔑108

In claim and delivery action, owner may recover value of use of his property if amount thereof exceeds the interest on such value.

4. Evidence 🔑429, 433(1), 441(1)

Where all of the conversations preceding execution of written instrument were merged in the instrument, testimony that would vary terms of the instrument was not admissible in absence of a mistake or imperfection alleged in the pleading. Code Civ.Proc. § 1856.

5. Contracts 🔑153

Where unambiguous language of contract permits it complete fulfillment and promotes its object, that construction is to be preferred over one derived by elimination of or addition to its terms.

6. Contracts 🔑143

The making of a new contract for litigants or rewriting clear terms to which they have freely pledged their faith is not a proper application of the judicial function.

7. Evidence 🔑314(1)

In action in claim and delivery for recovery of tractor, hearsay testimony, concerning defendant's purchase of tractor in addition to one in question from third party and asserted payment to plaintiffs by third party of balance due on tractor in question out of money received from defendant, was erroneously admitted.

8. Estoppel 🔑75

Plaintiffs' placing of one in possession of tractor under lease with option to buy was not an act calculated to lead reasonable person to believe that one in possession was title owner of the tractor, so as to preclude plaintiffs from disputing title of innocent third party who purchased tractor and paid full purchase price to one in possession without knowledge of reservation of title by plaintiffs.

9. War 🔑4

Where plaintiffs in claim and delivery for recovery of tractor were not relying upon their contracts with one to whom they delivered possession of tractor under lease with option to buy to establish their right to possession, proof that such contracts were violative of Emergency Price Control Act was of no avail to defendant who had purchased tractor from one to whom plaintiffs had delivered possession without knowledge of plaintiffs' reservation of title. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action in claim and delivery by E. R. Guerin and others, copartners doing business as Guerin Brothers, against John M. Kirst for recovery of caterpillar tractor. From judgment for defendant, the plaintiffs appeal.

Reversed with instructions.

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* Subsequent opinion 192 P.2d 120.

Latham & Watkins, of Los Angeles (Richard W. Lund and James W. McNabb, both of Los Angeles, and John G. Evans, of San Francisco, of counsel), for plaintiffs and appellants.

Frank P. Doherty, William R. Gallagher, Frank W. Doherty, and James A. Doherty, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

By this action in claim and delivery appellants sought recovery of a caterpillar tractor which they had sold to one Vergil Grove in November, 1945. In May, 1946, they found it in the possession of respondent who asserted title as an innocent purchaser from Grove. The case was tried to a jury which rejected appellants' demands in toto. The grounds for reversal of the judgment are: (1) Insufficiency of the evidence; (2) misapplication of the Emergency Price Control Act, 50 U.S.C.A.Appendix, § 901 et seq.; (3) errors in admitting evidence; (4) misconduct of respondent's counsel, and (5) erroneous instructions to the jury.

On November 5, 1945, appellants as contractors were engaged in a general grading business and bought, used, repaired and sold tractors and kindred equipment. On that day one of the partners called upon Grove at Santa Monica and sold to him a used tractor bearing serial number 1H7401, herein referred to as tractor 7. The sale was evidenced by a conditional sale agreement whereby a second tractor and a carryall were included. The total payments for all, with the $2500 cash payment, aggregated $23,500, with 8 per cent on deferred payments. That agreement was written in longhand and signed by both parties. It is herein referred to as exhibit A.*

It was evidently intended by the parties that exhibit A should be reduced to typewritten form. After Grove had rejected two typed drafts of the agreement as prepared in the office of appellants, about December 15 they forwarded to him a third instrument (herein referred to as exhibit B) dated November 7, 1945, entitled "Agreement of lease of personal property (with option to buy)," and required that he sign it or return the equipment delivered to him in November. The pertinent portions of exhibit B are as follows:

"1. The lessor hereby agrees to lease to the lessee, and the lessee hereby agrees to rent from the lessors all of that certain personal property described as follows:

Equipment No.	Description
17	Caterpillar Tractor, Serial No. 1H7401
28	Caterpillar Tractor, Serial No. 1H 949
12	Carryall, R. U., Serial No. S 7747

"2. The period of this lease shall be for ten months commencing on the seventh (7th) day of November, 1945, and ending on the seventh (7th) day of August, 1946, and receipt of payments totaling the sum of $3,500.00 is hereby acknowledged to have been received up to December 14, 1945.

"3. The agreed monthly rental shall be the sum of $2,000 per month payable monthly in advance, commencing on the seventh (7th) day of November, 1945, and continuing on the seventh (7th) day of each and every succeeding month up to and including the seventh (7th) day of July, 1946, and the Balance of $1,075.00 shall be paid on the seventh (7th) day of August, 1946, and the total rentals for said period shall be the sum of $19,075.

"4. The lessor hereby grants to the lessee the option to purchase said equipment at the expiration of said rental period for a price of $4,425.00 provided that the lessee shall give notice in writing of his intention to exercise said option and which notice must be given to the lessor on or before the seventh (7th) day of August, 1946, and provided further that the lessee's right to so purchase said equipment shall be conditional upon a complete and full performance of his undertakings as herein provided, and also conditional upon the full payment by him to lessor of the rental herein above provided.

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* Exhibit A reads as follows:

"11-7-45.

"I Hereby agree to Buy one cat. & unit Serial 7401—to be bought as rent at Terms of $1,000 down and 1,000 each month for 7 months & one payment of $500, one cat. unit & 'A' frame Serial No. 1-H-949

1-H-949

and one R-U-Carry all for payment of $1,500 down and 13 payments of $1,000 and one payment of $500. R-U-7747—after Said payments have been made in full Said buyer H-T- and Guerin Bros' are to furnish me with Bill of Sale to all this Equipment. Interest of deferred payments at 8%.

"Guerin Bros.
"By H. T. Guerin
"Vergil Grove"

"5. That should lessee exercise said option to purchase said personal property, he shall pay to lessor, in addition to the other sums herein provided, interest at the rate of eight (8) per cent per annum on the sum of $21,000.00 from the seventh (7th) day of November, 1945, to and including the seventh (7th) day of August, 1946 on the basis of the monthly deferred balances, and provided further that in the event of such election, lessee will pay to lessor the amount of repairs and maintenance incurred or paid by lessor in connection with said personal property during the term of this lease.

"6. Payments shall be made to the lessors at their office at 208 South Linden Avenue, South San Francisco, California."

At the trial appellants proved without contradiction that they had purchased tractor 7 from Oilfields Trucking Company of Bakersfield on November 10, 1941, and received its bill of sale on the same day. Such document was received in evidence without objection. It was established also without contradiction that appellants had never sold tractor 7; that it was completely equipped; that they had had no transaction with respondent; that they had located it May 31 in the latter's possession with the plate containing its serial number removed and the holes filled in and painted; that the value of tractor 7 is $6000 or $7000. The answer admitted that its reasonable rental value was $825 per month.

[1] Upon the foregoing evidence appellants were entitled to judgment for the possession of the tractor or in lieu of its return the reasonable value thereof with damages for its detention. Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 297, 191 P. 524; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, 338, 284 P. 736, 285 P. 1048. Under such circumstances the conditional vendor is entitled to recover even though the subsequent purchaser had no knowledge of the reservation of title by the original vendor until payment in full, and the surreptitious sale by the conditional vendee constituted a conversion. First National Bank in Richmond v. Thompson, 60 Cal. App.2d 79, 82, 140 P.2d 75; Merrill Lodge No. 299, Independent Order of Good Templars, v. Ellsworth, 78 Cal. 166, 168, 20 P. 399, 2 L.R.A. 841.

[2, 3] Also appellants were entitled to recover damages for the detention of the tractor, the reasonable rental value of which was proved to be $11,770. In a claim and delivery action the owner may recover the value of the use of his property if the amount thereof exceeds the interest on such value. Drinkhouse v. Van Ness, 202 Cal. 359, 379, 260 P. 869.

Despite such state of the proof and the applicable law the trial court adopted respondent's special defenses, to wit: (1) That both exhibits A and B together, and each of them, constitute a contract of conditional sale; (2) that they are void in that they were in violation of the "Emergency Price Control Act of 1942, as amended, and the Rules and Regulations issued pursuant thereto."

[4-7] (1) Conceding, arguendo, it to be a fact that both writings constitute one agreement for the purchase of tractor 7 such fact could not avail respondent. Apparently his contention was made for the purpose (a) of defeating appellants' claim that the meaning and purpose of exhibit B were to make a lease out of the transaction instead of a contract of sale, and (b) of then maintaining (1) that as vendee in possession and not in default Grove could with impunity "sell his interest" to respondent, and (2) that the latter could by parol establish that appellants' purpose was to evade the federal statutes by making the agreement into a lease. Respond-

ent cannot thus dispose of exhibit B in the absence of appropriate pleading and proof. All of the conversations preceding the execution of exhibit A were merged in that document and all conversations and writings with respect to the sale or lease of tractor 7 prior to the execution of exhibit B were merged in that instrument. Therefore no testimony that would vary the terms of exhibit B was lawful, and no evidence of the terms of the agreement other than its own contents was admissible in the absence of a "mistake or imperfection [alleged] in the pleading." Code Civ.Proc., sec. 1856; In re Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055; Mulrooney v. Pietro, 79 Cal.App.2d 311, 180 P.2d 62. Where the plain and unambiguous language of a contract permits its complete fulfillment and promotes its object, that construction is to be preferred over one derived by the elimination of or addition to its terms. Winship v. Wilkes, 121 Cal.App. 44, 50, 8 P.2d 502. It is not a just or proper application of the judicial function either to make a new contract for litigants or to rewrite the clear terms to which they have freely pledged their faith. Nourse v. Kovacevich, 42 Cal.App.2d 769, 772, 109 P.2d 999. It follows that all of the hearsay testimony concerning respondent's purchase of another tractor from Grove and the asserted payment to appellants by the latter of the balance due on tractor 7 out of the money received from respondent was erroneously admitted.

[8] This leads to respondent's second contention whereby he undertook to establish that appellants, having placed Grove in possession of the tractor and held him out as the owner of the machine, are precluded from now disputing respondent's title which they allowed Grove to transfer to him by allowing Grove to appear to be in complete possession, citing Martin v. Hollins, 118 Cal.App. 561, 5 P.2d 899. But the successful maintenance of such contention involves more than the mere possession of the chattel. 10 Cal.Jur., p. 641. In the Martin case the plaintiff as original vendor had sold four generator sets on a conditional sale agreement to Hollins and Arrousez and thereafter consented to their sale of two of such sets. About six months later, without the knowledge of plaintiff, Hollins and Arrousez sold to appellant Waldorf Productions, Inc., the set involved in the action for $7000. The original vendees having become insolvent defaulted in making the final payment of $500 to plaintiff, who sued to replevin the set which was in the possession of Waldorf Productions. While the court found against the "subsequent purchaser on the defense of authorization of said sale by plaintiff and also on the defense of estoppel," yet it was determined that since Waldorf Productions, Inc., believed that Hollins and Arrousez were the actual owners of the set they had sold to it, and since also the corporation had no knowledge of the fact that plaintiff was the owner, the subsequent purchaser was entitled to possession in event it made the final payment of $500.00. Such equitable disposition of the controversy was approved by the appellate court. The effect of that holding is to forestall a vendor from depriving an innocent purchaser of a chattel bought from the original vendee, if payment of the balance due the original vendor will effect justice to the latter and at the same time prevent hardship upon the subsequent vendee. Of course where the amount due the vendor is the equivalent of the value of the chattel in dispute the innocent purchaser is without a remedy if, as in the instant case, the facts do not warrant an estoppel.

The case of United States Machinery Company v. International Metals Development, Inc., 74 Cal.App.2d 5, 168 P.2d 37, cited by respondent, is distinguished in that the defendant vendee under a conditional sale agreement established that it was entitled to damages for breach of warranty. Such sum when added to payments already made constituted substantially the balance due on the contract of purchase, thereby making applicable the equitable remedy announced in the Martin case. See Civil Code, section 1789.

Since appellants did no act calculated to lead a reasonable person to believe that Grove was title owner of the tractor the thesis of respondent has no support in law. Grove was in the position of a mere possessor and could convey no title, however innocent his vendee. Oakland Bank of

Savings v. California Pressed Brick Company, 183 Cal. 295, 297, 191 P. 524; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, 338, 284 P. 736, 285 P. 1048.

[9] (2) Respondent claims that appellants should be denied recovery on the ground that they based their right to possession of tractor 7 upon exhibits A and B which he contends are violative of the Emergency Price Control Act. Such claim is without lawful basis. While it is true respondent proved (1) that appellants sold the tractor to Grove for $8500; (2) that the maximum price to be charged for such used tractor not rebuilt and guaranteed is 55 per cent of its "base price" (Maximum Price Regulations, No. 136 of the United States Office of Price Administration, sections 12 (e) (g), 4) which is the price f.o.b. the manufacturer's plant, and (3) that the base price of tractor 7 was $10,171.21, exclusive of sales tax, yet such proof was wholly immaterial and incompetent by reason of the fact that appellants did not rely upon their contracts with Grove to establish their right to possession. Respondent acquired no rights by virtue of appellants' violation of the federal statute or of the regulations pursuant thereto.

In view of the conclusions above announced discussion of appellants' other points would be supererogatory.

It is therefore ordered that the judgment and the order denying plaintiffs' motion for judgment notwithstanding the verdict be and each is reversed with instructions that judgment be entered in favor of plaintiffs as follows:

"It is ordered, adjudged and decreed that plaintiffs have and recover of and from defendant the sum of $11,770 as damages for the detention of the tractor involved herein;

"It is further ordered, adjudged and decreed that plaintiffs have and recover possession of the tractor bearing serial number 1H7401 or, in the event possession cannot be restored, the value thereof in the sum of $6000.00;

"And costs, which are hereby taxed in the sum of $——."

McCOMB and WILSON, JJ., concur.

83 Cal.App.2d 210

LARSON v. ST. FRANCIS HOTEL et al.

Civ. 13573.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1948.

1. Appeal and error ⚷927(3)

In nonsuit cases every favorable inference fairly deducible from evidence must be drawn in favor of plaintiff, and all evidence must be construed most strongly against the defendants.

2. Innkeepers ⚷14¼

In pedestrian's action against hotel for injuries sustained when pedestrian, while passing hotel, was struck on head by a falling armchair, doctrine of res ipsa loquitur did not apply for want of showing of exclusive control of hotel over chair and because accident was not such that it would have been prevented in ordinary course of events by hotel's exercise of ordinary care.

3. Negligence ⚷121(2)

Plaintiff proceeding under "res ipsa loquitur" doctrine must prove an accident, that thing or instrument causing accident was under exclusive control of defendant, and that accident would not have happened in ordinary course of events if defendant had used ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Negligence ⚷121(2)

The res ipsa loquitur doctrine applies only where cause of injury is said to be under exclusive control of defendant, it can have no application to a case having a divided responsibility, and plaintiff must fail if evidence does not conclusively show that injury resulted from cause for which defendant was liable.

5. Trial ⚷163

In action by pedestrian against hotel for injuries sustained when pedestrian, while passing hotel, was struck on head by a falling chair, motion for nonsuit on ground that there was no evidence from which it might be inferred that hotel was guilty of any negligence which caused a chair to hit pedestrian, and that only evidence attempting to connect hotel with accident was fact that accident occurred in proximity of hotel, was sufficient under rule that motion for a nonsuit must point attention of court and counsel to precise grounds upon which it is made.

6. Innkeepers ⚷14¼

Where plaintiff alleged in a particular paragraph that defendants were engaged in hotel business on all the premises described and had right of control and management thereof, which allegation defendants denied followed by statement that in further answer to such paragraph defendants admitted that they operated hotel at time as copartners, such admission was not an admission that defendants had exclusive control and management of furniture of hotel so as to warrant application of doctrine of res ipsa loquitur.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Beulah Larson against St. Francis Hotel, etc., and others, for injuries sustained when plaintiff was struck on the head by an arm chair which had presumably been dropped from a window in defendant's hotel. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Harry G. Henderson, of San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion, all of San Francisco, for respondents.

BRAY, Justice.

[1] The accident out of which this action arose was apparently the result of the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day, August 14, 1945. Plaintiff (who is not included in the above description), while walking on the sidewalk on Post Street adjoining the St. Francis Hotel, just after stepping out from under the marquee, was struck on the head by a heavy, overstuffed arm chair, knocked unconscious, and received injuries for which she is asking damages from the owners of the hotel. Although there were a number of persons in the immediate vicinity, no one appears to have seen from whence the chair came nor to have seen it before it was within a few feet of plaintiff's head, nor was there any identification of the chair as belonging to the hotel. However, it is a reasonable inference that the chair came from some portion of the hotel. For the purposes of this opinion, we will so assume, in view of the rule on nonsuit cases that every favorable inference fairly deducible from the evidence must be drawn in favor of plaintiff, and that all the evidence must be construed most strongly against the defendants. 9 Cal.Jur. p. 551.

[2] At the trial, plaintiff, after proving the foregoing facts and the extent of her injuries, rested, relying upon the doctrine of res ipsa loquitur. On motion of defendant the court granted a nonsuit. The main question to be determined is whether under the circumstances shown, the doctrine applies. The trial court correctly held that it did not.

[3, 4] In Gerhart v. Southern California Gas Co., 56 Cal.App.2d 425, 132 P.2d 874, 877, cited by plaintiff, the court sets forth the test for the applicability of the doctrine. "* * * for a plaintiff to make out a case entitling him to the benefit of the doctrine, *he must prove* (1) that there was an accident; (2) that the thing or instrumentality which caused the accident was at the time of and prior thereto under the *exclusive* control and management of the defendant; (3) *that the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened.* * * * The doctrine of res ipsa loquitur applies only where the cause of the injury is shown to be under the exclusive control and management of the defendant and can have no application * * * to a case having a divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible, and when it appears that the injury was caused by one of two causes for one of which defendant is responsible but not for the other, plaintiff

must fail, if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other." (Emphasis added.)

Applying the rule to the facts of this case, it is obvious that the doctrine does not apply. While, as pointed out by plaintiff, the rule of exclusive control "is not limited to the actual physical control but applies to the right of control of the instrumentality which causes the injury" it is not clear to us how this helps plaintiff's case. A hotel does not have exclusive control, either actual or potential, of its furniture. Guests have, at least, partial control. Moreover, it cannot be said that with the hotel using ordinary care "the accident was such that in the ordinary course of events * * * would not have happened." On the contrary, the mishap would quite as likely be due to the fault of a guest or other person as to that of defendants. The most logical inference from the circumstances shown is that the chair was thrown by some such person from a window. It thus appears that this occurrence is not such as ordinarily does not happen without the negligence of the party charged, but, rather, one in which the accident ordinarily might happen despite the fact that the defendants used reasonable care and were totally free from negligence. To keep guests and visitors from throwing furniture out windows would require a guard to be placed in every room in the hotel, and no one would contend that there is any rule of law requiring a hotel to do that.

The cases cited by plaintiff as authority for the application of the doctrine of res ipsa loquitur are easily distinguishable from this case. In Gerhart v. Southern California Gas Co., supra, which involved an explosion from leaking gas, the court found (56 Cal.App.2d 425 at page 427, 132 P.2d 874) that defendant was in the exclusive ownership, control and management of the supply, flow and existence of the gas which exploded. In Helms v. Pacific Gas & Electric Co., 21 Cal.App.2d 711, 70 P.2d 247, a glass portion of an electrolier fell and injured the plaintiff, who was standing on the sidewalk beneath it. The parties stipulated that the electrolier was owned and maintained by the defendant. There, not only was the instrumentality which caused the accident in the *exclusive* control and management of the defendant, but the falling of the glass portion was something that in the ordinary course of events would not occur if the defendant used ordinary care in maintaining it.

In Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480, the length of pipe which fell and caused the injury was "unquestionably under the management of the appellants at the time of the accident." 203 Cal. at page 609, 265 P. at page 240, 59 A.L.R. 480. While the court holds that, 203 Cal. at page 608, 265 P. 239, 59 A.L.R. 480: "The doctrine has also found frequent application in actions for damages for injuries incurred by reason of being struck by falling objects," it is limited to situations in which the thing is shown to be under the exclusive management or control of the defendant or his servants, or in which it must necessarily follow that the injury would not have occurred had the defendant used ordinary care.

In Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370, a paid guest in defendant's hotel was injured while in bed by the falling of a huge piece of plaster from the ceiling. It was held by the court that the ceiling was in the exclusive control of the hotel, and that plaster does not ordinarily fall from properly constructed ceilings.

Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, holds at page 688, 80 P.2d 185, 197, 1016: "The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant. * * * To justify the invocation of the rule res ipsa loquitur the instrumentality which caused the injury must have been under the exclusive management of the defendant" and quotes from Biddlecomb v. Haydon, 4 Cal.App.2d 361, 364, 40 P.2d 873, as follows: "Neither does it apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible." See also Hilson v. Pacific Gas & Electric Co., 131 Cal.App 427, 434, 21 P.2d 662, 665, which held that in a situation as last above quoted, the doctrine "can in no event apply."

[5] Plaintiff quotes 9 Cal.Jur. 548 to the effect "that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made" and contends that the motion for nonsuit in the trial court did not do this. The motion was made on the ground that "there is no evidence from which it might be inferred that the hotel was guilty of any negligence which caused the chair" to hit plaintiff. It further points out that the only evidence attempting to connect the hotel with the accident is the fact that it occurred in the proximity of the hotel, and that such proof is not sufficient to establish liability. The motion was sufficient.

[6] In her complaint plaintiff alleged in paragraph III that the defendant was engaged in the hotel business on all the premises described therein and had the right of control and management thereof. In its answer defendants denied all of the allegations of paragraph III and then stated: "Further answering paragraph III, these defendants admit that they operated the St. Francis Hotel at said time as copartners." Plaintiff contends that in some way this is an admission that defendants had exclusive control and management of the furniture of the hotel so as to warrant the application of the doctrine of res ipsa loquitur. It is obvious that such contention is without merit.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

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83 Cal.App.2d 291

SWALES et al. v. BARR.

Civ. 3809.

District Court of Appeal, Fourth District, California.

Jan. 16, 1948.

1. Appeal and error 🔑996

Where two conflicting reasonable inferences may be drawn from the same evidence, trial judge must decide which inference should be drawn.

2. Appeal and error 🔑996

In action on implied contract to pay commission to yacht broker and his salesman for sale of defendant's yacht, reasonable inference drawn by trial judge in favor of defendant on questions of implied contract and implied promise to pay was conclusive in appellate court, notwithstanding that contrary inference might have been reasonably drawn. Business and Professions Code, § 8900 et seq.

3. Brokers 🔑86(1)

Evidence warranted finding that yacht broker and his salesman abandoned any employment that they may have had for sale of defendant's yacht, precluding recovery of commission for such sale. Business and Professions Code, § 8900 et seq.

Appeal from Superior Court, Orange County; Martin J. Coughlin, Judge.

Action for commission for sale of yacht by L. G. Swales and another against Wilbur H. Barr. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Hampton Hutton, of Los Angeles, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from a judgment for defendant in an action in which plaintiffs sought to recover $1,100 as commission on the sale of a yacht owned by defendant.

L. G. Swales is a duly licensed yacht broker and O. T. Walkey is a duly licensed yacht salesman working under him.

Wilbur H. Barr was the owner of the yacht Branta, which was anchored at its mooring in Newport Harbor about one and one-half miles from the place of business of plaintiffs.

J. W. Reckman operated a boatswain's locker at Newport Harbor. He repaired boats, sold hardware and did an occasional brokerage business. He had done some extensive work for Mr. Barr on the Branta and he knew that Mr. Barr might want to sell it.

On January 3, 1946, Dr. Donald W. Barber contracted Mr. Reckman and asked him if he knew of a boat he could use or buy. Reckman testified: "And I suggested the Branta to him. He was interested, but I was in no position to show it to him, so I referred him to Mr. Walkey, and I called Mr. Barr (over the telephone) and told him, 'I sent a party down to Mr. Walkey and if it was all right for Mr. Walkey to show the boat.'" And that Barr replied "It is all right, go ahead."

Dr. Barber went to see Mr. Walkey, who took him out to see the Branta. The boat was locked and Walkey did not have the keys. He telephoned Mr. Barr, telling him his business and that Mr. Reckman had phoned about the boat. Permission was given to show the boat and Walkey obtained the keys from Mr. Barr's secretary. He did not tell Mr. Barr the name of the prospective purchaser.

After obtaining the keys Walkey took Dr. Barber back to the Branta and they made a thorough inspection of it. Dr. Barber gave Walkey a check for $900 and signed an offer of purchase, reading in part as follows:

> "Newport Beach, California
> Jan. 3, 1946
>
> "Mr. O. T. Walkey
> "Newport Beach, California
>
> "Dear Sir:
>
> "You are hereby instructed to offer the sum of $9,000.00, payable cash, for the vessel known as the 'Branta' now moored in Newport Beach waters.
>
> "This offer is accompanied by a deposit of $900.00 in accordance with the Ship & Yacht Brokers Act [Business and Professions Code, § 8900 et seq.] and which is to be returned to me in the event this offer is not accepted."

Walkey communicated this offer to Mr. Barr, who rejected it saying his price for the Branta was $11,000. Walkey returned the check to Dr. Barber and a few days later, about January 11th, interviewed Mr. Barr and was told by him that he was not quite ready to sell the Branta as he had not owned it six months. So far as the record shows, Walkey did nothing more in connection with the sale of the boat except phoning Dr. Barber that Mr. Barr would not take less than $11,000, and receiving the reply that Dr. Barber would not pay that sum, but would go East and buy a boat. The keys were returned to Mr. Barr and the check to Dr. Barber. That Walkey had no express authority to sell or to negotiate the sale of the Branta is admitted.

Later, Dr. Barber contacted Mr. Barr directly and after three conferences purchased the Branta. He paid Barr $6,500 and transferred a six-meter boat to him. It is admitted that Barr received the value of $11,000 for the Branta. All approaches were made by Dr. Barber and the transaction was completed about January 20, 1946.

The complaint in this action is in two counts. The first alleges that Barr employed plaintiffs to find a purchaser for the Branta and promised to pay the usual commission of ten per cent of the selling price. The second count alleges that Barr is indebted to plaintiffs in the sum of $1,100 for services as broker and salesman in the sale of the Branta, performed at the request of defendant.

The answer denied the foregoing allegations of the complaint and in an amendment to the answer alleged that plaintiffs abandoned any employment they might have had for the selling of the Branta and also abandoned Dr. Barber as a purchaser.

The trial court found that neither of the plaintiffs was employed by defendant to procure a purchaser for the Branta; that defendant did not promise to pay plaintiffs any commission; that plaintiffs did not procure Dr. Barber as a purchaser of the boat at any price acceptable to defendant; that Dr. Barber terminated his negotiations through plaintiffs for the purchase of the Branta and that thereafter plaintiffs did nothing to procure Dr. Barber as a purchaser of the boat.

It is obvious from the facts already outlined that these findings are all well supported unless, as argued by plaintiffs, the law compels the inference to be drawn from them of an implied contract of employment and an implied promise to pay a commission. It is admitted that there was no express contract of employment and no express promise to pay a commission.

It is clear that plaintiffs' right of recovery must depend on an implied contract to be established by inferences to be drawn from the evidence. In discussing the question of implied contracts in Medina v. Van Camp Sea Food Co., 75 Cal.App.2d 551, 171 P.2d 445, 448, it was said:

"It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. Here, reasonable conflicting inferences might have been drawn from the evidence. As the trial judge drew the reasonable inference in favor of plaintiffs, and as the existence of an implied contract was a question of fact for the trial court, its decision on that question is conclusive here. Caminetti v. National Guar [anty] Life Co., 56 Cal.App.2d 92, 132 P.2d 318; Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 P.2d 798.

"Further, on appeal we must draw all reasonable inferences in favor of the judgment. Mah See v. North American Acc [ident] Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. As the trial judge resolved the conflicting inferences in favor of plaintiffs, and as there are reasonable inferences supporting the judgment, we cannot disturb it here."

[1, 2] Further, where two conflicting reasonable inferences may be drawn from the same evidence it is the province of the trial judge to decide which should be drawn and any attempt of the appellate court to draw a contrary inference amounts to an invasion of the powers of the trial court. Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; High v. Pacific Gas & Electric Co., 52 Cal.App.2d 701, 126 P.2d 911, 127 P.2d 588. As the trial judge drew the inference in favor of defendant on the questions of implied contract and implied promise to pay, and as the inference drawn is reasonable, it is conclusive here, assuming without holding that a contrary inference might have been reasonably drawn.

[3] There is another compelling reason why the judgment must be affirmed and that is the finding supporting the defense of abandonment, as the evidence supports that defense.

In Baird v. Madsen, 57 Cal.App.2d 465, 134 P.2d 885, 890, it is said: "The governing rule in such cases is stated in 8 American Jurisprudence, p. 1069, as follows: 'If a broker, after introducing a prospective customer to his employer to no purpose, abandons his employment entirely, or if, after procuring a person who proves to be unwilling to accept the terms of his principal, he merely ceases to make further endeavors to negotiate a deal with that particular individual and all negotiations in that direction are completely broken off and terminated, he will not be entitled to a commission if his employer subsequently renews negotiations with the same person, either directly or through the medium of another agent, and thus effects a sale without further effort on the part of the broker first employed.' "

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

83 Cal.App.2d 221

MacDONALD et al. v. ROSENFELD.

Civ. 13491

District Court of Appeal, First District,
Division 1, California.

Jan. 13, 1948.

Rehearing Denied Feb. 11, 1948.

Hearing Denied March 11, 1948.

1. Appeal and error 🔑1008(1)

In action for accounting by defendant as managing trustee of partnership business, whether parties continued to operate under their original agreement or subsequent communications exchanged by them controlled operation of business and parties' rights after dates thereof were questions to be determined by trial court under evidence.

2. Appeal and error 🔑1008(1)

In partners' action for accounting by managing trustee of partnership business, whether letter to plaintiffs from defendant, who introduced it in evidence to show that his previous letter, modifying parties' original agreement, was not without consideration nor uncertain and indefinite, as plaintiffs argued, was a fraud and written after first submission of case, was fact question for trial court.

3. Appeal and error 🔑843(2)

In action for accounting by managing trustee of partnership business, appellate court cannot determine income tax obligations, including interest and penalties, due from partnership or its members at time of entry of judgment appealed from.

4. Principal and agent 🔑78(6)

In partners' suit for accounting by managing trustee of partnership business, documentary evidence was sufficient to support finding that plaintiffs induced defendant, for good and valuable consideration, to continue to advance money to operate business and that he continued operation thereof until enjoined from exercising any control thereof.

5. Principal and agent 🔑78(1)

One entitled to exclusive management of partnership business, as managing trustee thereof, under contract with partners, was entitled to accounting of all profits agreed to be paid him during period of enforcement of superior court's order temporarily enjoining him from exercising any control of business.

6. Principal and agent 🔑78(8)

In action for accounting by managing trustee of partnership business, no direct finding in judgment for defendant as to definite time limit on defendant's power to manage business was necessary, where no such limit was specified in parties' agreement.

7. Appeal and error 🔑931(1)

Fact findings and judgment thereon should be construed by appellate court in manner tending to uphold fact finder's evident intention.

8. Trusts 🔑179

A trustee is bound to act in highest good faith toward beneficiary and may not obtain any advantage over him by adverse pressure of any kind. Civ.Code, §§ 2228, 2229, 2231, 2234, 2235.

9. Principal and agent 🔑78(6)

In action for accounting by managing trustee of partnership business, evidence showed that defendant was granted a "power coupled with an interest" in that he was given management of business as security for loans made by him to partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Power Coupled With an Interest".

10. Contracts 🔑56

"Consideration" is a promise which is bargained for and culminates in agreement, and reliance must be based on promise.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

11. Contracts 🔑168

A promise to forbear may be implied.

12. Principal and agent 🔑78(6)

Evidence sustained finding that contract between partners and managing trustee of partnership business that he should have complete control of business, with right to sell it at any time at any price he saw fit, and receive 60 per cent of net profits of business until he received specified profit over and above all salary and interest paid himself under parties' previous agreement, was valid and binding on each party and supported by good, valuable and sufficient consideration.

13. Appeal and error 🔑1008(3)

Final construction of contract, in absence of substantial conflict in evidence, may be resolved by reviewing court in accordance with applicable principles of law.

14. Principal and agent 🔑9

Partner's letter, authorizing managing trustee of partnership business to sell entire business at any time, handle stock, if corporation were formed, for best interests of business, and continue to handle business as he had under parties' previous contract, wherein he agreed to pay certain bills and operating expenses of business in consideration of assignment and transfer of partnership property to him as security for payment of loans made to partnership by him, constituted security transaction in form of contract supported by good and sufficient consideration, and was legally binding contract, where parties operated thereunder for at least eight years. Civ. Code, § 1584.

15. Equity 🔑39(1)

The fact that contract, though valid, is not susceptible of specific performance in equity, does not leave parties thereto without remedy or deprive trial court of power to proceed with disposition of their entire controversy.

16. Principal and agent 🔑78(6)

Evidence supported implied finding that managing trustee of partnership business was not estopped from asserting rights under his contract with partners for division of profits on theory that he abandoned such rights particularly by failing to enter credits of agreed percentage of profits to himself and to attribute any net profits of business to himself in his income tax returns.

17. Principal and agent 🔑78(6)

Evidence supported conclusion that partners were estopped from denying right of partnership's managing trustee to share of partnership profits under agreement from which partners continued to receive benefits in form of such trustee's continued financing and management of partnership business as under previous agreement between him and partners.

18. Principal and agent 🔑78(1)

Federal and state income taxes, paid by partners on percentage of partnership profits to which partnership's managing trustee was entitled under agreement with partnership, were deductible from amount due trustee from partners under such agreement.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by W. W. MacDonald and another, copartners, doing business under the name of MacDonald Truck & Manufacturing Company, against Max L. Rosenfeld for an accounting and injunction. From an interlocutory decree and a final judgment for defendant, plaintiffs appeal, and from so much of the judgment as allowed plaintiffs a credit, defendant appeals.

Judgment affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Fabius T. Finch, of San Francisco, for respondent.

WARD, Justice.

There appears in the clerk's record of this action for accounting and an injunction, two notices of appeal filed by plaintiffs W. W. MacDonald and John R. Pomfret: the first from an interlocutory decree, and the second from the whole of the final judgment. There also appears a notice of appeal by defendant Max Rosenfeld setting forth five designated grounds of appeal.

Plaintiffs' opening brief states as grounds of appeal that the whole of the judgment is erroneous and in defendant's brief it is contended that the court "erred in allowing plaintiffs a credit of $30,734.13." The latter statement is condensed but sufficiently definite to guide this court in determining the contention of the respective parties and the merit of each appeal.

The complaint sets forth that plaintiffs are copartners doing business under the name of MacDonald Truck and Manufacturing Co., as sole owners, and that plaintiffs and defendant entered into an agreement in 1934 whereby defendant was to act as managing trustee of the business, advance money thereto, and receive for his services $300 per month. For the purpose of security plaintiffs' assets were assigned to defendant. It then alleges that prior to September 2, 1944, all indebtedness owing to defendant on account of loans and salary were paid, and that plaintiffs gave defendant notice that they were exercising their right to take over the entire management and demanded that he turn over to them all assets and render a statement of all transactions conducted by him as managing trustee. The complaint further alleges that the demands were not complied with and that defendant is conducting the business in a manner that is not conducive to its best interests. The complaint alleges generally acts performed by defendant upholding the previous allegation. Plaintiffs prayed for an order restraining defendant from further participating in the business. A temporary restraining order was issued.

Defendant's answer, filed September 29, 1944, not only referred to the allegations of the plaintiffs' complaint—denying that all indebtedness owing to him had been paid, but set forth the following history of the parties' business relations: "* * * during the year 1932 defendant Rosenfeld loaned to plaintiffs herein small sums of money; that plaintiffs were then operating under the name of MacDonald Motors, Inc., but failed in business and were adjudged bankrupt in the year 1933. Prior to said bankruptcy plaintiffs had borrowed about $2200.00 from the Advance Company and had given * * * a chattel mortgage * * * defendant did buy said mortgage from said Advance Company * * * Thereafter all of the right, title and interest of said MacDonald Motors, Inc., was sold by the Trustee in Bankruptcy thereof and was purchased by one Richard F. Guggenheim * * * said Guggenheim in connection with plaintiffs and Tevis Jacobs, started the business under the name of MacDonald Truck & Manufacturing Co. * * * Plaintiffs and said Guggenheim and Jacobs then stated and represented to defendant Rosenfeld that said Guggenheim and Jacobs could no longer provide any additional money for said business * * * and requested defendant * * * to purchase said machinery and other assets * * * That in this situation of the business, the agreement dated May 29, 1934, * * * was executed and defendant Rosenfeld started the operation of said business as his own and granted to plaintiffs the right to acquire an interest therein as specified in * * * [the 1934 agreement]." The answer further alleged: "The condition of said business continued unprofitable until about January 31, 1936, at which time said business owed to defendant Rosenfeld for money advanced, salary which he had not drawn and interest on advances, the total sum of which was about $18,000.00, at which time the agreement of January 31, 1936, which is attached hereto as 'Exhibit B' was executed * * * That more recently said business has operated at a profit and defendant Rosenfeld has drawn therefrom all salaries due to him up to August 31, 1944, almost all sums advanced by him for the operation of said business and interest thereon, and $15,000.00 profit, but has not received any portion of the 60% of the profit of said business to which he is entitled by the terms of the agreement of January 31, 1936, which is 'Exhibit B' attached hereto." By defendant's amendment and supplement to his answer, he alleged that a partial audit had been made of the business which showed that he had not withdrawn any portion of said $15,000.00.

At the trial the agreement dated May 29, 1934, which was referred to in the pleadings heretofore set forth, was admitted. Certain correspondence between the parties which was produced at the trial will be related herein to show the relationship of the parties.

On December 15, 1935 defendant sent the following communication: "Messrs. Richard F. Guggenheim, W. W. MacDonald & John R. Pomfret, The MacDonald Truck & Mfg. Co., San Francisco, Cal., Gentlemen: This will refer to the agreement under which I have been financing this organization and our various talks and my expressions of dissatisfaction. No need to list them all, such as the Dock Truck orders, patents, the greater indebtedness, the ownership of the Essex car, etc., as both Messrs, Guggenheim and Mr. Tevis Jacobs have acknowledged to me that I have found matters considerably different from what was represented to me to get me in here, and I have given you notice time and again and do hereby that I would like to sell out, and, while I do not wish to be abrupt, I will give you much more than ten days time in which to pay me or consider that the business has fully reverted to me and that I shall sell it. Here's the rub with me,—I find that, through Mr. Richard F. Guggenheim not putting in the time he agreed to here at your office, I have been compelled to spend more time and put in more money than at first anticipated and as Mr. Henry Block wisely puts an old expression I cannot be true to two masters at once; I will have to either give up being with you or give up my work at John Rosenfeld's Sons, which is more secure and takes less of my time than I have given you. Because of Dick's desertion and you other two gentlemen living down the Peninsula, I have put in more hours than expected with you. As stated above, I will not be harsh or abrupt, and am open for a proposition where I will be encouraged to continue the management and financing, something along the following lines, that until I am paid in full, salary and interest, I to draw the greater part of the Net Profits, and if I remain over a period of years after I have been paid off with interest the table will be reversed so that you will get the greater share and I the lesser but that I will always have control until I am ready to sell out. Unless I get a proposition that I consider equable I will sell the business out within the next 30 to 40 days. I cannot afford to continue otherwise. The agreement would have to be signed by all four of you as I understand Mr. Jacobs has some interest in the way of money loaned. Please bear in mind that while I only purchased the complete mortgage from the Advance Company in November, '32 to save you from losing your machinery, I had previous to that time advanced some money in 1932, and put in considerable time and some money before May 1934,—none of which has been as yet made good to me. Meanwhile, I wish you all a Very Merry Xmas and a Happy and Prosperous New Year. Yours very truly, Max L. Rosenfeld."

Subsequently a communication dated January 31, 1936, was directed to defendant and signed by the parties interested in the 1934 agreement. It reads: "Mr. Max L. Rosenfeld * * * Referring to the agreement dated May 29, 1934, signed by Richard F. Guggenheim, W. W. MacDonald, John R. Pomfret and yourself; we fully appreciate and agree that you have done all and more than was expected of you under that agreement. We are appreciative of the fact that you have put in more time and a great deal more money than was anticipated to be necessary, and that but for your help (financial and otherwise) the business * * * would have failed long ago. We have carefully read the financial statement of the business, as of December 31, 1935, which has been prepared by Miss F. M. Buie. It is correct and we approve the same; we also approve of all of your actions in connection with the business, and we agree that you shall continue to handle the business, as you have, under the above mentioned agreement as long as you may see fit. Richard F. Guggenheim and Tevis Jacobs have sold all their interests in said business and all property connected therewith to W. W. MacDonald and have accepted his promissory note for $1,700.00 in full payment therefor. So far as you are concerned, the title to said interest has passed to Mr. MacDonald, whether he pays the note or not. At any time you believe it to be for the best interest of the business, you may incorporate it, and you shall have free reign to handle the stock as you see fit. You are to have complete control of the business, until such time as you sell out. We hereby agree that you have our irrevocable consent to sell the entire business at any time and at any price you see fit. We agree that until you shall have received a profit of $15,000.00 over and above all salary and interest that you may pay yourself, under the present agreement, the net profits of the business shall be divided as follows: sixty (60%) per cent thereof to yourself, your heirs or assigns, and forty (40%) per cent thereof to W. W. MacDonald, he to take care of the other signors hereto as per agreement among ourselves. After you have been paid in full for all money advanced by you, all salary, interest, the $15,000. profit and the 60% net operating profits, then the profits of the business shall be divided in the ratio of thirty (30%) per cent to you or your heirs or assigns and the balance to W. W. MacDonald, to dispose of as we may agree among ourselves * * * Richard F. Guggenheim, W. W. MacDonald, John R. Pomfret, Tevis Jacobs."

The following day defendant sent the following communication: "In accepting to continue here under the agreement of January 31, 1936, signed by all four of you gentlemen who got me into this business and who have urged me to remain, I am doing so only with the following understanding: When I first came, it was understood I was only to put in a few hours per day, and you knew I had other interests and had properties to look out for for my family and also that I was (and still am and have been for a number of years) President of the Cirac Automatic Reverse Control Company, for the manufacture of which I paid MacDonald Motors a goodly sum several years ago, and as I have considerable money invested there, it must be understood that my work for all of the above will not in any way at any future time jeopardize my rights to full participation in the profits of the MacDonald Truck & Mfg. Co., as outlined in the agreement of January 31, 1936 and signed by all four of you gentlemen * * * until I sell out or am paid off in full as per new agreement mentioned at the top of this letter, I am to have full and free use of the office for my own personal use and for Shaflock, and only with this understanding can I afford to continue on here. It will be a convenience all round, as it will save my running back and forth between offices across town * * * Max L. Rosenfeld, Manager, MacDonald Truck & Mfg. Co."

[1, 2] The primary issue involved the ownership and control of the business. The genuineness and due execution of the 1934 agreement was admitted by the pleadings. Whether the parties continued to operate under the 1934 agreement, or whether the conditions and relationship as outlined in the communications exchanged during the latter period of 1935 and the first part of 1936, particularly the letter of January 31, 1936, controlled the operation of the business and the rights of the parties after that date were questions to be determined by the trial court. The evidence is voluminous on these questions. It would serve little if any enlightening purpose to repeat all of the evidence on this appeal. Evidence concerning a meeting of February 27, 1936, of the board of directors of the Cirac Automatic Reverse Control Company was introduced. Three of the directors tesified that in MacDonald's presence, defendant had showed the group the letter of January 31, 1936, as establishing his control of the MacDonald company. MacDonald, however, denied being present at such meeting. This meeting of February 27, 1936, according to evidence introduced by defendant, gave rise to a letter dated March 11, 1936, which was introduced by defendant when his motion to reopen the case was granted. Defendant sought by this letter to answer plaintiffs' argument to the effect that the letter of January 31, 1936, was wholly without consideration, and that it was uncertain and indefinite. The March 11, 1936, letter reads as follows (Bill and Jack refer to MacDonald and Pomfret respectively): "Messrs. W. W. MacDonald & John R. Pomfret, The MacDonald Truck & Mfg. Co., San Francisco, Cal., Dear Bill and Jack: I had Mr. Garrett McEnerny's Office go over the Certified Copy of the minutes of the Special Meeting of the Cirac Automatic Reverse Control Co. of Feb. 27. They have now passed on each of our contracts of this year, yours to me of Jan. 31 and the Cirac A. R. C. Co's as above. In each case they asked as did Major French when we were at his office on Feb. 27th, 'What is the consideration in the contract.' As you know, Bill, I satisfied Major French that the consideration for your giving me the new Agreement dated Jan. 31 last was my promise to finance the Company for at least two years longer, and that I made the same promise to the Directors of the Cirac A. R. C. Co. that in consideration of their giving

the MacDonald Truck & Mfg. Co. the deal as per your letter to them of Dec. 9, '35, as quoted in the Certified Copy of the Meetings' Minutes now signed by Leon French, that I will finance that Company also for two years from date. You'll recall Bill that the Major laughingly said 'Well, our Company gets the worst of it by 27 days' so I said 'To make it all right' I'll agree to finance both Companies for two years from March 31st, that is up to and including March 31, 1938. The Major then said that that would be consideration enough for each contract and we all agreed. You two gentlemen have freely stated your entire satisfaction with both of the above deals, but I feel it proper for your sakes in the event of my passing on that I put in writing here and now my verbal agreements with you as follows: First, that if Shaflock is put over as the result of our proposed trip East, Bill, or at any time within the two years as above, I will waive all interest on your entire indebtedness to me. Second, if the MacDonald Truck & Mfg. Co. is sold out, unless we get $80,000. (or better) I will waive all right to the $15,000 profit as mentioned in the new Agreement. But, if no sale is made of Shaflock or of the MacDonald Truck & Mfg. Co. so that I remain with you as under the new contract beyond five years from the date of my start with you, say to be liberal if I am still in this same capacity and you are still indebted to me for any large amount beyond the year say 1939, I will be entitled to interest as now being charged (7%) seven Percent Per Annum, and also interest on any sums due me for salary to be compounded each year, because, as we have agreed this would be only fair because if you had to borrow from a bank to pay me monthly my salary the interest charges by the Bank would be on each sum borrowed each month. I would also, in such event, be free to take the entire $15,000 profit when the Company has paid me in full principal and interest due but not until the Company has sufficient in its own bank account so that the $15,000 would not force them to borrow again. In other words, I will not pay myself any part of the $15,000 within five years from date, until it can be taken without in any way greatly depleting the Company's Bank Account, and it will be at my discretion as to when I shall take it after it is earned, as I am trying to build up your credit standing, which was Nil until after I came in to finance you. While we have talked this over fully, I feel it proper to place a c. c. of this in my Safe Deposit Box with the Certified Copy of the Cirac Automatic Reverse Control Co's Minutes of Feb. 27th, '36, as signed by Leon French. The key to my box, as you both know, is in the middle drawer of my desk. All of the above for your protection. Yours very truly, Max L. Rosenfeld." Plaintiffs contend that the above quoted letter of March 11, 1936, is a fraud and was written in 1944 after the first submission of the case. This problem was clearly a question of fact which the trial court decided.

Plaintiffs introduced evidence to the effect that defendant did not enforce the terms of the January 31, 1936 letter. They showed that defendant caused no account of plaintiffs' liability to defendant under said terms to be set up on the company's books. Evidence was also introduced relative to defendant's practice of filing fiduciary informative returns allocating 100% of the profits to plaintiffs, with plaintiffs filing returns, respectively, for 50% of the profits each as copartners. On March 2, 1938, defendant wrote the following letter to the bookkeeper: "Happening to pass the Federal Building before 4:00 p. m. I called on Mr. Sutherland and found him a very fine gentleman. His opinion is still the same, but he said there was no objection to my putting it in as MacDonald and Pomfret being partners (with myself as manager & trustee). He said when the accountants come around to check and if they decide the other way the money will be given back to MacDonald and Pomfret and then the only penalty will be interest. I prefer to do it this way because my own statement is already made up and because it is actually, morally, the business of MacDonald and Pomfret, simply hypothecated to me. There was no money paid by me to Messrs. Guggenheim, Pomfret and MacDonald, to justify the word 'sale' in that agreement: No money passed from me to them in payment for the business. The word was used merely to circumvent any creditors of MacDonald and Pomfret stepping in, as I was taking in trust what had been taken over in bankruptcy by Guggenheim and Jacobs. I believe that a lawyer or a court (if it was worthwhile to take it there) would agree with my claim. Messrs. Jacobs, Guggenheim, MacDonald and Pomfret, as well as myself could testify to this. Therefore, we will make our returns as originally intended and you agreed would be the best way for MacDonald and Pomfret as partners, and I will advance them the money, as I have heretofore. I will have to take notes from them with the agreement that in the event the government pays this money back then they will immediately pay me, because I do not want to pay twice. Very sincerely yours, Max L. Rosenfeld."

In an attempt to show that the plaintiffs knew that they were working under the terms embodied in the letter of January 31, 1936, defendant produced the following communications. On July 14, 1938 defendant wrote plaintiffs: "Much as I dislike to be constantly after you, I must again express my dissatisfaction and repeat to you notice that I may wish to sell out the place. Your efforts have been far from satisfactory and the fact that you both lived on the Peninsula * * * has entailed too much work on me * * * I told you when I agreed to continue here under the newer agreement signed in January '36 by all four of you that unless the company was sold for $80,000 or more I would waive any additional payments than salary and interest and the sixty percent of the Net unless I remained over five years after the signing of that agreement, although at that date, Jan. 31, '36 I had already served you full time almost two years but actually had been helping you financially since the summer or early fall of '32. Carrying you has been not only a burden but thus far a great risk. But for me, you would have no lift truck business and but for my financial help this organization as you know would have been sold out long ago * * * if I remain and continue to manage and finance this company, I will expect better teamwork and when there is a profit expect to take my payments as per Agreement dated January 31, 1936, which was signed by you two gentlemen as well as Richard F. Guggenheim and Tevis Jacobs, and because of which I have continued here thus far. Because I will require a witness to your signatures to agreement to cooperate more properly I will make the letter as mild as I feel I can. If you can get the money to pay me out in Cash now, I will be willing to give a liberal discount if paid cash within 30 days. Again I will say I'm sorry to have to write you as above * * *"

Under date of October 28, 1938, plaintiff Pomfret wrote his attorney as follows: "Dear Mr. Skinner: Referring to your letter to Mr. Max L. Rosenfeld, dated October 27, agreement under which we are operating with Mr. Rosenfeld is enclosed herewith. Please return same after perusal with other papers sent you with my letter of October 4th. You doubtless have forgotten that you vised this for us, before we signed it. It was signed by Richard F. Guggenheim, W. W. MacDonald, John R. Pomfret and Tevis Jacobs. [Letter of January 31, 1936] As in a previous letter, I told you we owe Mr. Rosenfeld considerable for personal loans. On all of these notes he agrees to rebate half the interest if we pay him before noon of November 1, 1938. Since reading your letter he had told me that he would step out of the picture entirely and wipe out all of our indebtedness to him for the sum of $62,500 net cash, paid to him on or before November 5 next,—we in turn to agree to assign to him 50 percent of what returns we received from Shaflock, as he has furnished his own cars and done all demonstrating. As you know, Mr. Rosenfeld has been our best friend for a number of years, and during all these hard times Mr. MacDonald and I have drawn our salaries weekly, where Mr. Rosenfeld has taken neither bonus or salary. He will, of course, require that whoever buys him out guarantee him against loss because of the guarantees of accounts which he has personally given. We, for our part, would not want Mr. Rosenfeld to step out of the picture now under any circumstances, unless the party you have in view is amply able to finance us for the future."

Defendant testified that a field sales manager of General Motors was shown the letter of January 31, 1936 and that he "had Mr. MacDonald O. K. that that was the agreement under which we were working." Defendant also testified that on another occasion: "I had Mr. MacDonald and Mr. Allen (another purchaser) and myself together, and I said to Mr. MacDonald, handing to Mr. Allen * * * [the letter of January 31, 1936], 'Is this your signature, and will you tell Mr. Allen this is the agreement under which we are operating?' * * * And he said 'It is.' But for that Mr. Allen would not have considered it."

The parties' understanding of the terms under which they were working is further shown by the following letter dated December 18, 1939: "This will refer to the Exclusive Sales Agreement which we all three signed with Mr. H. O. Harrison, as of December 14, 1939, and most especially to the option to purchase, granted to him therein as per paragraphs starting on page 4 and ending on page 5 of said agreement. I understand of course that as he is your particular friend you will look to him to take care of you two with good pay and an interest, should he avail of this option, and that I will be in no way liable. However I am willing to make conditions as follows: If he should avail of the option and pay me off quickly, I will not keep the entire $15,000 profit, should there be so much. On the other hand, inasmuch as you have not installed six Shaflocks within the time limit set in the agreement as per minutes of the meeting of the Cirac Automatic Reverse Control Co. on February 27, 1936 (at which you were present, Bill) I will expect, if I am paid off, that the Cirac Automatic Reverse Control Co. could, at their option, cancel your free shopright and your Twenty-five percent interest in the net, as it would mean my having to move to another office and that would be an added expense and inconvenience. Furthermore, if Mr. Harrison does not avail of his option before its expiry, and if I am called upon to furnish further sums to carry the company I will expect to get the entire $15,000 (if I am here another year or longer) and of course that the interest will be charged on all unpaid balances at the end of each month and year as at present. I am reminding you of this now, as, if they do not pay us promptly, I may have to carry the company for even much larger sums of money than up to date and, as you know, this has become quite a burden and is much more than was contemplated when you signed the agreement of Jan. 31, 1936."

With the war, the business profited. By August 31, 1944, defendant had received approximately $36,000 as his salary from 1934 to that date. Since that date, however, he received no salary. Prior to that date, plaintiffs' salaries were raised, Pomfret getting $85 a week and MacDonald getting $95.00 a week. According to a statement issued bearing the date August 31, 1944, plaintiffs had paid up all amounts due defendant on the books of the business. This statement supports plaintiffs' allegation that defendant had been repaid. However, this statement did not consider such factors as lack of interest being charged prior to 1940 on defendant's salary, as well as plaintiffs' liability to defendant for part of the profits under the 1936 contract.

A report dated September 30, 1944, showed that $3,319.72 was due defendant from plaintiffs. At about that date defendant deposited $5,000 to the company's account to cover outstanding expenses. Defendant also made advances to plaintiffs for taxes.

In the interlocutory decree the following appears: "The Court finds that, as of August 31, 1944, the profits of said business were $72,255.23, no portion of which have been received by said Rosenfeld.

"The Court further finds that, as of August 31, 1944, (after deducting said sum of $15,000.00, in accordance with said stipulation of said Rosenfeld) plaintiffs were and still are indebted to defendant in the sum of $48,541.04. * * *

"That August 31, 1944, was the last accounting date between plaintiffs and defendant and since that time plaintiffs have been operating said business of MacDonald Truck & Manufacturing Co. by permission of the temporary injunction which was issued herein, and defendant is entitled to an accounting of all profits received on account of said business and not shown upon said August 31, 1944 account, and said defendant is entitled to a judgment herein for a salary at the rate of $300.00 per month from August 31, 1944, until he is reinstated in possession and control of all of the assets and property of said business, which salary shall continue hereafter as long as he shall act as Manager of said business, and he is also entitled to a Judgment herein, against plaintiffs, for his interest in the profits of said business since August 31, 1944, at the rates specified in said agreement of January 31, 1936, and said defendant is entitled to be reinstated as Manager of said business and placed in possession of all the assets and property thereof." The conclusions of law attached to the interlocutory decree recite that "plaintiffs paid Federal and State Income Taxes on all of said profits." The court directed the referee "to report to the Court the amount of profits which have accrued to said business for the years 1944 and 1945 and on which plaintiffs have paid Federal and State income taxes, and to recommend to this Court the proper apportionment of taxes on all of said profits."

The findings upon which the final judgment was based, referring to the 1934 and the 1936 contracts, set forth that "both contracts are valid and binding on both plaintiffs and defendant and are both supported by good, valuable and sufficient consideration." The court also found that defendant was entitled to receive a salary of $300 a month and entitled to reinstatement as manager of the business also; "That defendant is entitled to receive sixty (60%) per cent upon $21018.85 of the net profits of said business for the year 1943 and thereby there shall have accrued total net profits in said business sufficient so that sixty (60%) per cent thereof shall amount to $15,000.00 thereof for defendant; and the Court finds that defendant is entitled to receive 30% upon $40,744.64 of the net profits of said business for 1943 and after December 31, 1943 defendant shall continue to receive 30% of the net profits of said business. * * * Defendant is also entitled to receive from plaintiffs thirty (30%) per cent of the net profits of said business, commencing as of January 1, 1946, in addition to the amounts awarded to defendant by the Judgment herein." The report of the referee was accepted and judgment entered in favor of defendant in the sum of $42,709.57 with legal rate of interest and costs.

[3] It is appropriate that it should be noted that it is not necessary that this court consider the mathematical computations involved in the preceding findings and conclusions and judgment. It was stipulated at the oral argument that, without waiving plaintiffs' contentions as to the interpretation to be placed upon the documents introduced in evidence or the claimed inferences that should be drawn therefrom or from the testimony offered, if the findings of fact and the conclusions of law are otherwise correct, the amount found to be due defendant is correct. In the interlocutory decree a referee was appointed to report the amounts accrued to the business for the years 1944 and 1945 and to recommend a proper apportionment of taxes on all profits for the years 1937 and 1941 to 1945 inclusive. This duty was performed by the referee, and, based thereon, a report made and $30,734.13 deducted from the amount decreed to be due, namely $73,443.70. Defendant argues that the action of the trial court in this respect was unjust to him. There may be considerable apprehension by both sides as to future action by income tax authorities. No control thereof is vested in this court in the present proceedings to determine income tax obligations, including interest and penalties that may be decided to have been due by the company or its members at the time this judgment was entered. Assuming that the trial court was warranted in determining the excessive income taxes paid by plaintiffs, but only upon that assumption, at the oral argument it was stipulated that $30,734.13 was the correct amount. As previously noted the amount of the judgment entered by the court was $42,709.57.

[4, 5] The validity of the 1934 contract is admitted. The documentary evidence introduced, previously referred to, is sufficient to support the finding that during the latter part of 1935 and in 1936 plaintiffs induced defendant Rosenfeld for a good and valuable consideration to continue to make

further and additional advances of money to operate the business, and that he continued to operate such business until he was enjoined by an order of the superior court from exercising any control thereof. Having found that under the contracts the defendant was entitled to the exclusive management of the business, the court also correctly found that defendant was entitled to an accounting of all profits during the period the temporary injunction was enforced.

The court further found, upon evidence from which a reasonable inference could be drawn, that it was true that "prior to September 2, 1944, plaintiffs did suggest to defendant that he do certain things in connection with the management of said business, and which suggestions, after being examined by said Rosenfeld, were disapproved by him, but that all of his acts in so disapproving the suggestions of plaintiffs, were in accordance with his best judgment for the successful operation of said business." There is also evidence "that defendant has not drawn or received the $15,000 profit provided by the agreement of January 31, 1936 * * * On December 20, 1945, in open Court, defendant Rosenfeld voluntarily stipulated that the sum of $15,000.00 should be deducted from the sums due to him by plaintiffs, but reserved the right to said sixty (60%) per cent of the profits of said business until such time as he shall have been paid all sums due to him for money loaned to said business, for salary at $200.00 per month from and including September 1, 1944, and for interest at the rate of six (6%) per cent per annum on both said unpaid loans and salary. After all said sums are paid to said Rosenfeld, he shall be entitled to continue to manage said business and receive said salary of $300.00 per month and shall be entitled to receive thirty (30%) per cent of the profits of said business."

[6] It is contended by plaintiffs that the findings are inadequate to cover all of the issues raised by the pleadings. Attention is called to the fact that the rights of the parties are not specified by the terms of the judgment. The only point worthy of consideration is that the judgment sets no time limit on defendant's power to manage the business. None is specified in the 1936 agreement. In this respect no direct finding as to a definite time limit was necessary. In reference to the ownership of the business, the judgment leaves the legal title in the defendant only as security. Defendant is to be repaid the amount of his loans plus interest and salary.

[7] The findings and the judgment should be construed in a manner that will tend to uphold the evident intention of the fact finder. In this case it must be assumed that the findings were served and that that phase of the proceedings was disposed of in accordance with the provisions of Code of Civil Procedure, sec. 634. On the motion for new trial the court could have changed the findings or modified the judgment and if necessary could have reopened the case to settle a claimed inadequate finding. Code Civ.Proc., sec. 662. This court could have invoked the provisions of sec. 956a of the same code and made an additional finding if that appeared necessary.

When the findings and conclusions of law are read as a whole it must be determined that defendant or his heirs and assigns may retain possession and control the management of the business under the designated salary "so long as he [defendant or his heirs or assigns] shall see fit," meaning until the terms of the contract are fulfilled. It must be admitted that whether the duties of the parties as outlined in the contracts are in truth and in fact performed, may lead to litigation. The trial court fixed the present legal responsibilities of the parties —future disputes based upon factual conditions that may or may not arise are beyond the realm of present determination.

[8, 9] Plaintiffs correctly state the rule that a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage over him by adverse pressure of any kind. Civil Code, secs. 2228, 2229, 2231, 2234, 2235. The evidence supports the view that defendant was granted "a power coupled with an interest" in that he was given the management of the business as security for the loans he had made. See Lane Mortgage Co. v. Crenshaw, 93 Cal.App. 411, 428, 429, 269 P. 672;

Hunt v. Rousmanier, 8 Wheat. 174, 5 L.Ed. 589, Marshall, Ch.J.; 33 Words and Phrases, Perm.Ed., 149–155. Neel v. Barnard, 24 Cal.2d 406, 150 P.2d 177, cited by plaintiffs, turns upon the fact that there was evidence in that case to support the trial court's conclusion that defendant was a trustee rather than a mortgagee in possession. In the present case plaintiffs refer to one letter written by defendant upon which such an inference might be drawn, but when all the correspondence is read the statements in the one letter could reasonably appear to the trial court as insignificant. Under the circumstances this court is unable to declare that the trial court was not correct. Holland-Meisell Co. v. Kelly, 37 Cal.App. 610, 174 P. 698.

[10-12] Plaintiffs argue that the 1936 agreement is wholly without consideration as there is no promise to forbear selling the business; that if it is a valid agreement it rather enlarges defendant's right to foreclose as outlined in the 1934 agreement. Consideration is a promise which is bargained for and culminates in an agreement. (Restatement of the Law, Contracts, sec. 75.) Reliance must be based upon the promise. Bard v. Kent, 19 Cal.2d 449, 122 P.2d 8, 139 A.L.R. 1032. "The cases in this state, as elsewhere (74 A.L.R. 301), hold that the promise to forbear may be implied." Wine Packing Corp. of Cal. v. Voss, 37 Cal.App.2d 528, 538, 100 P.2d 325, 330. As noted before, all of the evidence pertaining to a disputed subject, including documents and testimony, must be weighed and determined. The trial court found that the 1936 contract was a valid and binding obligation on each party and was "supported by good, valuable and sufficient consideration." There is evidence to uphold this finding.

[13, 14] The present rule appears to be that the final construction of a contract, where there is no substantial conflict in the evidence, may be resolved by a reviewing court in accordance with the applicable principles of law. Estate of Platt, 21 Cal. 2d 343, 131 P.2d 825. In this case there is no conflict as to the existence of the letters except the letter of March 11, 1936, which plaintiffs claim is a fraud, but which the trial court determined to be genuine. There is a dispute relative to the inferences that may be drawn from the contents of the letter of January 31, 1936, and from the actions of the parties in the succeeding years. Civil Code, sec. 1584, provides: "Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." Here there is evidence that the parties operated under the agreements for at least eight years. The much discussed communication of January 31, 1936 permits defendant "to sell the entire business at any time." The sentence immediately preceding refers to defendant's right "to handle the stock," if incorporated, "for the best interest of the business." Defendant was to be permitted to "continue to handle the business, as you have, under the above mentioned agreement * * *" The first paragraph of the agreement refers to the previous "agreement dated May 29, 1934." In the 1934 agreement defendant, in consideration of an assignment and transfer of the business property, agreed to pay certain bills and "the operating expenses of said business." This court upon the terms set forth in the communication quoted above determines that the parties entered into a security transaction in the form of a contract with a good and sufficient consideration, and that such contract is a legally binding contract upon the parties thereto.

[15] It has been determined that the letter of January 31, 1936 is a valid contract. Nevertheless plaintiffs contend that it is unjust, inequitable, indefinite, uncertain and cannot be specifically enforced. Plaintiffs attempt to treat defendant merely as a creditor. However, the evidence shows that he was the manager of the business and as such entitled to the benefits that might accrue under the security contracts. Plaintiffs understood the meaning of the word "profits" as exemplified by the use of the word in their tax reports. Prior to the commencement of this action in equity by plaintiffs, defendant was in possession, and the 1936 agreement authorizes him to stay in possession—he has not asked for specific performance, but asks to remain in possession. As to the sufficiency of the contract, the parties have

operated under its provisions for many years and found no difficulty in understanding them. "The fact that the contract, although valid, is not susceptible of being made the subject of a decree of specific performance in equity does not leave the parties without remedy or deprive the trial court of its power to proceed with a disposition of the entire controversy." Lyon v. Goss, 19 Cal.2d 659, 675, 123 P.2d 11, 20.

[16, 17] It is also urged that defendant is estopped from asserting any rights under the 1936 agreement upon the theory that he had abandoned all rights under the terms of the 1936 agreement and in particular that he caused no entries to be made crediting himself with sixty per cent of the profits, and that his tax returns did not attribute any net profits of the business to himself. The evidence is sufficient to support the trial court's implied finding that defendant is not estopped from asserting rights under the agreement. The evidence indicates that plaintiffs were aware of the terms of the 1936 agreement, but, as a matter of protecting their claim, they filed returns on the entire profits. Since plaintiffs continued to receive benefits from the 1936 agreement in the form of defendant's continued financing and management, the evidence supports the conclusion that plaintiffs are estopped from denying defendant's rights under the 1936 agreement—to at least the same extent that the evidence supports the conclusion reached by plaintiffs.

The trial court deducted from the determined amount of plaintiffs' indebtedness to defendant Rosenfeld $30,734.13, representing income taxes paid by plaintiffs in excess of the amount they would have paid if they had acknowledged that defendant had an interest in the business profits. It is plaintiffs' theory that this deduction directed by the court is an attempt to avoid the application of the doctrine of estoppel. The facts indicate that defendant could not consistently assert the terms of the letter of January 31, 1936, and have plaintiffs pay taxes on profits based on their ownership of the entire business. Defendant's acquiescence in this method of payment of taxes may have been based upon a desire to decrease the total tax paid and not as an act on his part of deliberately misleading plaintiffs. The trier of the facts would be justified in concluding that defendant Rosenfeld is not estopped from asserting any rights under the 1936 agreement.

[18] Defendant cross appealed "From that portion of said Judgment which determines and decides that the Income Taxes paid by the plaintiffs to the Federal and State Governments on the percentage of the profits of said MacDonald Trust & Manufacturing Co., to which defendant is entitled, be deducted from the sums due plaintiffs to defendant." Other grounds of appeal are set forth which have not been specifically referred to in defendant's brief on the cross appeal or disposed of on the main appeal by plaintiffs. The idea of charging defendant Rosenfeld with the income taxes which plaintiffs paid on the share of the profits found to be defendant's originated with the trial court. The idea did not meet with the approval of either side, but the trial judge was correct. In the prayer of plaintiffs' complaint is found the following: "That said defendant Max L. Rosenfeld render a full, true and correct itemized account of all of his transactions in the conduct and management of said business while acting as such managing trustee involving the receipt and disbursement by him of the funds of said business." It appeared under the terms of the 1936 agreement, which defendant sought to uphold, that defendant as manager, and plaintiffs as partners, should dispose of the profits in accordance with the terms of the contract. The $30,734.13 represented part of the profits, and therefore, as money paid out by the partners, was deductible from the full amount originally computed as due defendant.

The gist of defendant's cross-appeal is that if $30,734.13 is deducted from the amounts owing him, he will be in effect paying taxes twice for the same years. This conclusion is based upon the fact that as a result of the judgment awarding him a portion of the profits as per the 1936 agreement, he will have to pay additional taxes for past years. On the other hand, plaintiffs not only will in effect be receiving a refund from defendant for the taxes they paid, but will be entitled to a refund from the government. The trial court was not interested in the "form" used by the respective parties in making returns, or in giving "information" to the taxing agencies. It was simply a matter of an allowable deduction. The penalties, if any, that may be involved, or the failure of the respective parties to claim refunds of all or a portion of the taxes, or the filing of false returns, if such occurred, are matters with which this court is not concerned. Such matters may be left to the federal or state taxing agencies to be adjusted and corrected if necessary in a proper tribunal.

The judgment is affirmed in its entirety, each party to bear fifty per cent of the costs of each appeal.

PETERS, P. J., and BRAY, J., concur.

In re BRADY'S ESTATE.

COBBY v. ADAMS et al.*

Civ. 13506.

District Court of Appeal, First District, Division 2, California.
Jan. 19, 1948.

Hearing Granted March 18, 1948.

1. Wills 🔑302(1)

In proceeding on petition for production and probate of alleged will, evidence sustained implied finding that petitioner failed to prove will was executed or in existence at time of death of alleged testator. Probate Code, § 350.

2. Appeal and error 🔑1011(1)

Finding of trier of fact based on conflicting evidence is conclusive.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of Edward R. Brady, deceased, wherein Emma L. Cobby filed a petition against Russell R. Adams and another for production and probate of an alleged will. From an order denying the petition, the petitioner appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Geo. M. Naus, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Petition for production and probate of an alleged will. The court ordered that the petition for production of will be denied and petitioner appeals.

Edward R. Brady died in San Francisco in February, 1933. His wife had predeceased him but he left a son, Edward T. Brady, and a stepson, Russell B. Adams. The latter and one Biggins, a trusted employee of deceased, were appointed administrators on a showing of intestacy. Final distribution and discharge were had in 1934, and the estate was closed in that year. The petition under review was filed twelve years after distribution.

Petitioner, Emma L. Cobby, is a sister of deceased. Her first petition, filed on January 25, 1946, independently under No. 101,995, alleges in part that Russell Adams on or about February 11, 1933, came into possession of the last will and testament of deceased, that petitioner and three others were beneficiaries under that will and that Adams suppressed the will; with prayer that he be required to produce that will, that it be admitted to probate and petitioner be appointed administratrix. Adams demurred. No disposition of this demurrer is on record. Shortly after this on February 13, 1946, petitioner filed a new petition in the old probate proceedings with the same allegations and prayer as the former petition adding that the substance of the will is that it gives to petitioner and the sister Loretta Ellen Brady each $100 per month for life and to the sister Mary L. Hyde $150 per month for life, the residue to the son Edward T. Brady.

The evidence in substance was as follows: A Miss Kerrigan testified that for nineteen and one-half years she had been secretary of the corporation Eureka Boiler

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* Subsequent opinion 196 P.2d 881.

Works, of which concern deceased was superintendent. She went over many wills, maybe eight or ten, with deceased which he had written in pencil, usually on yellow lined note paper. Some of them were dated but they were not signed. They were all in his handwriting. His signature was at the beginning of them, "I, Edward R. Brady." His three sisters were always remembered. When Mr.Brady died all papers and money were turned over to Mr. William Metson, who was attorney for the Eureka Boiler Works and attorney for the estate. The morning of the death three or four, and in the following months at least four more, of these unsigned wills were found and turned over to Mr. Metson. Deceased wrote such wills from 1925 to 1933. Some he tore up. Some of these unsigned wills were in the books of the boiler works in which Mr. Brady figured jobs, in different books he worked on, or "they cropped up at different places." There were twelve on lined yellow tablet sheets. They were not dated. Later Mr. Biggins found a signed will in the upper office and brought it down to witness. That was around July or August, 1933. It was on yellow paper; it was dated with month, day and year. It was dated 1916. *It was one sheet* dated at top and signed at bottom. They showed it to the witness DeRosa. The following morning they turned it over to Mr. Adams. Mr. Adams said he would take it to Mr. Metson. *Mrs. Gertrude Brady* (wife of deceased) was the *heir to that will,* and his three sisters were in the will. She did not copy it but remembers it. Ralph Myers was appointed executor in it. Deceased's wife was to be his sole heir. *He did not mention his son nor Russell Adams in it.* The three sisters were left different monthly amounts, $50 and $75. The witness turned in her resignation to Mr. Adams in 1936 because Biggins who had been with the firm for forty years was made to leave. Mr. Biggins died three years before the trial. When she heard that Loretta Hyde, a niece of petitioner was sick and needed help, she asked, "Why don't they go after Russell Adams and Eddy Brady," and told that deceased left a will. That was in 1937. At that time Mr. Metson gave her various papers regarding the estate, some thirty or thirty-five, which she later gave to petitioner. Among them was one of the unsigned wills that was not dated; it was set up as a trust fund.

Lawrence A. DeRosa, certified accountant who used to audit the books of Eureka Boiler Works, was shown a document on yellow paper by Miss Kerrigan and Mr. Biggins. It was dated May or June, 1916, with a date he does not remember. It had a date at the top and deceased's signature at bottom. It was all written in deceased's handwriting. *He saw two sheets of it,* the first initialed, the second signed; the second was only half full; the top of both sheets were dated. He glanced through it; read about one-fourth. It said *his sisters and his son and stepson* should be his heirs, the estate to be divided as shown below. He does not remember that deceased's wife was mentioned although she died many years later, but there were two or three more involved in it of which *the wife might have been one. He knows that the son and stepson were in.* In 1940 Mr. Metson told him he had never received it from Mr. Adams, nothing but the original papers turned over.

Russell B. Adams, a stepson, testified that shortly after the death of Brady, Mr. Biggins and Miss Kerrigan informed him that they had found a will and handed a paper to him. He told them he would take it to Mr. Metson. It was written in the form of a will in deceased's handwriting on a yellow piece of paper. It had no date according to his recollection. It was written in pencil; it named some sisters and gave them, he thinks, in the same proportion as in certain notes written by deceased. The *son of deceased was principal beneficiary.* Adams himself was given $150 a month. It did not name an executor. He gave it to Mr. Metson one hour after he received it.

Esther H. Orr, secretary of Mr. William Metson at the time of the administration of the Brady estate, had all of the Brady papers except a few that were in the safe. There were numerous unsigned wills on yellow paper. They were handwritten with pencil, unsigned drafts. *None was signed.* She does not remember whether any was dated. Edward T. Brady, son of deceased, was the only heir at law. He never heard of a signed will of deceased.

On April 4, 1946, the trial court made an order in the old estate matter, No. 63,691, ordering that attorneys of both parties should have access to the papers left by Mr. Metson and then under control of Mrs. Jafet Lindberg and P. H. McCarthy, attorney. On July 1, 1946, the attorneys declared that the search had uncovered nothing and submitted the matter. The only disposition is a minute order reading: "Heretofore submitted the court ordered Petn. of Emma L. Cobby for production of will be denied; evidence insufficient as to existence of will. 7/29/46."

[1, 2] The order is in effect that the evidence was insufficient to prove that a will was executed as claimed by appellant and that accordingly the court could not order respondents to produce a will which was never in existence. The evidence amply supports the implied finding. One witness testified that the supposed will was in one sheet; another testified it was in two; one witness testified that the wife was "his sole heir" and that the son and Adams were not mentioned; another witness testified that the son and step-son (Adams) were made the heirs with the sisters of deceased, but did not recall that the wife was mentioned in it. Another witness testified that the document referred to by these witnesses was by him handed to Mr. Metson, that it bore no date, that it made the son the principal heir and gave Adams $150 a month. This witness did not testify that the document was signed by deceased. This evidence is not of the type which would justify a reviewing court in setting aside the finding. The only witnesses who testified that they saw a *signed* will contradicted each other on so many essential points that they appear to have been speaking about two different documents. On such a record the finding of the trier of the facts is conclusive (Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868) and it would serve no purpose to discuss the authorities cited from other jurisdictions.

Appellant attacks the finding, or lack of finding, on the issues of execution and suppression of the alleged will. The order denying the petition recites, "evidence insufficient as to existence of will." Appellant reads "existence of will" as meaning existence at the time of trial and argues that that factor has no bearing on a plea for probate of a "lost" will. The issues are confused. Fairly construed the order of the trial court means that appellant failed to prove that such a will was executed or in existence at the time of death and that accordingly the respondents could not be charged with suppression of a will non-existent. The finding is in effect one that the allegations of the petition reciting execution and suppression of a will were untrue. By the same token if no will had been executed there was no "lost" will subject to probate under section 350 of the Probate Code.

Order affirmed.

GOODELL and DOOLING, JJ., concur.

DRY v. CITY AND COUNTY OF SAN FRANCISCO.*

Civ. 13512.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1948.

Rehearing Granted Feb. 19, 1948.

1. New trial ⇨102(1)

In support of motion for new trial on ground of newly discovered evidence, moving party must show that he made reasonably diligent effort to produce the evidence at trial.

2. New trial ⇨140(3)

A party moving for new trial on ground of newly discovered evidence is not required to have his counsel file an affidavit that he had no knowledge of newly discovered evidence prior to verdict.

3. Appeal and error ⇨981

Ordinarily, conclusion of trial court on motion for new trial based on newly discovered evidence is not disturbed on appeal because trial judge is in better position to determine effect of alleged new evidence than is reviewing court, but trial judge's discretionary determination is not final.

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* Subsequent opinion 189 P.2d 761.

4. Appeal and error 🔑981

Whether party moving for new trial on ground of newly discovered evidence made timely and diligent search for witnesses who might reasonably be expected to be in possession of evidence concerning material facts is a matter which appellate court will consider in determining whether trial court abused its discretion in granting motion for new trial based on newly discovered evidence.

5. Appeal and error 🔑981

A suspicion as to plaintiff's good faith in moving for new trial on ground of newly discovered evidence is not sufficient to warrant reviewing court in deciding as matter of law that trial court abused its discretion in granting a new trial.

6. New trial 🔑163(2)

Order for new trial on plaintiff's motion was implied finding that plaintiff had exercised reasonable diligence in view of all surrounding circumstances, and that new evidence was of sufficient importance to require a resubmission of the issues to another jury.

7. Appeal and error 🔑981

Fact that newly discovered evidence relied on by plaintiff in support of motion for new trial related solely to negligence of defendant and had no pertinency to issue of contributory negligence did not establish that order granting new trial was prejudicially erroneous to defendant, where there was no evidence which would have supported a finding that plaintiff was guilty of contributory negligence upon which verdict for defendant could have been upheld.

8. New trial 🔑104(3)

Order granting plaintiff's motion for new trial on ground of newly discovered evidence, in action for injuries allegedly sustained when thrown from streetcar, was not abuse of discretion, where plaintiff was only witness who testified that he was caused to fall by streetcar giving a "terrific jerk" and affidavits of alleged newly discovered witnesses showed that they would give testimony tending to strengthen plaintiff's version of the accident, and there was no lack of diligence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Raymond H. Dry against City and County of San Francisco to recover for personal injuries allegedly sustained by plaintiff while passenger on municipal streetcar. From order granting plaintiff's motion for new trial after verdict by jury for defendant on ground of newly discovered evidence, the defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and John F. Moran and Geo. E. Baglin, Deputy City Attys., for appellant.

Gladstein, Andersen, Resner & Sawyer and Ewing Sibbett, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal, as appears in the trial court minute record, from an order granting a motion for new trial after verdict by jury, on the ground of newly discovered evidence.

Plaintiff, an employee in the construction department of an electric service company, on May 21, 1945, was proceeding homeward after six o'clock p. m. on a Geary Street municipal car. He testified the car "was crowded but not jammed * * * people [were] standing in the aisles and on the back platform * * *. I stood on the back platform, inside the door, between the controller box and the opening at the back * * * the extreme rear of the car * * *. There seemed to be something out of control of the operator, which caused it to give a terrific jerk at several stops. I believe the first I noticed was at Polk Street. That is, when the electric braker goes out, it stops and starts with a terrific jerk." Near Octavia Street "The car pulled up to the usual stop at the intersection, and I presume there were people getting off, and it started again with a violent jerk, pulled up a few feet and stopped very abruptly, causing all the standing passengers to surge forward and back as the car moved. Then it started again, immediately after that stop, and made another terrific jerk and stopped, and passengers were over-balanced, all surging back again, and knocking me right out of the back door into the street." On cross-examination plaintiff testified: "There is an iron grill that they use when they turn the car around, and which was directly against my back, and that was joined onto it, within a space of a foot or so. I was leaning against that, and another person was leaning against the controller, and several jammed between me and the fare box, toward the center of the car." Plaintiff testified that at the time of the last jerk he was not holding onto anything but that prior thereto he had "held on." The record shows:

"Q. You say that someone bumped against you and threw you out to the right, onto the street? A. That's right.

"Q. This person that bumped against you, did that person fall out in the street, too? A. I don't know. I was knocked unconscious. * * *

"Q. As you were going out of the car—you say you were thrown to the right out of the car—did you see anybody else thrown out of the car? A. No. I was busy grabbing for the center rod and wasn't paying any attention to the rest of the people.

"Q. Well, in any event, as far as you are aware at this particular time, you did not notice anyone but yourself going out to the right, out of that car? A. No.

"Q. You are sure you were riding inside of the car? A. Positive. * * *

"Mr. Moran [for the defendant]: Q. I assume that in your condition, you did not know whether the street car came to a stop after the accident? A. No."

Conflicting inferences might be drawn from the evidence on the following questions: Did plaintiff fall or was he thrown from the car; did the accident occur before the car stopped, or after it had stopped and proceeded onward; and, finally, did the car actually make a stop as it crossed the intersection of Octavia Street.

A conductorette, called as a witness by the defense, testified that she had no recollection of anyone falling or being thrown from the car. Subsequently plaintiff testified that the witness was not the conductorette on the car in question. A police officer, at the time of the accident attached to the Accident Prevention Bureau, reading from his report of the accident, testified: "The victim, who was riding on the platform of the westbound 'B' line, stated that the street car after making a stop at the intersection of Octavia Street, started to move ahead and due to another passenger falling against him, he lost his balance and fell off the street car onto the pavement causing the above injuries." An important issue was whether plaintiff was thrown from the street car as the result of an unusual jerk or lurch.

The jury returned a verdict in favor of defendant on December 4, 1946. A notice of motion for a new trial upon the usual statutory grounds including newly discovered evidence was filed December 11, 1946. Affidavits supporting the motion on the ground of newly discovered evidence were sworn to on December 18, 1946, and filed the following day.

An affidavit sworn to by Audrey R. Buynoch set forth that: "As I was about to cross Octavia Street, all of a sudden I heard a noise like brakes screeching, which caused me to look in the direction of a street car going west, and I saw the street car give a great movement, which I can best call a 'lurch,' and then proceed ahead; and then I saw a body which I later identified as Mr. Dry, lying on the street near the tracks * * * the street car did not stop and render any aid or assistance to Mr. Dry, but continued on out Geary Street * * *." A second affidavit, made by Albert H. Pellandini, the proprietor of a grocery store, set forth: "That I remember an accident occurring about May 1945, and at that time I was standing near the front window of the store, and my attention was attracted to a street car by suddenly hearing the noise and crunch and screech of street car brakes, and then I saw the street car sort of stop and lurch, and during that period I saw the body of a man fall off the rear platform of the car and land in the street by the street car tracks. * * * The street car, after the terrific lurch which

I have mentioned, did not stop, but thereafter continued on and the street car was crowded."

In a counter-affidavit one of the attorneys for defendant, disputing the correctness of the affidavit of Pellandini, states that previous to the trial Pellandini had stated "he did not witness the accident, but saw the injured man lying in the street." It was also averred that subsequent to the action Pellandini informed "affiant that he did not see the plaintiff fall off the street car in question and was not aware that such statement was in the affidavit he signed." The affidavit attacking that of Pellandini merely raises the question of Pellandini's veracity, a matter to be decided by the trial judge. The Buynoch affidavit is not attacked on this ground. The court may have considered one or both of the affidavits.

The first question to consider is whether the plaintiff exercised proper diligence to obtain the designated newly discovered evidence. Plaintiff filed an affidavit in which he averred that immediately after the accident he was rendered unconscious, shortly thereafter becoming semi-conscious; that either while he was lying upon the ground or en route to a hospital in such semi-conscious condition he heard various people talking and that he had a hazy recollection of a name that sounded like "Vinnock"; that after leaving the hospital he made a search for witnesses in the neighborhood of the accident but without success. Plaintiff further averred: "That by virtue of the facts pleaded and set forth herein, plaintiff was unable, with reasonable diligence, to discover and produce said evidence prior to the date of trial; that said evidence is material to the issues herein; and that said testimony, if admitted, would result in a different verdict, upon another trial of said cause."

[1, 2] Plaintiff does not dispute the well-established rule that in support of a motion for new trial on the ground of newly discovered evidence, the moving party must show that he made a reasonably diligent effort to produce the evidence at the trial. A number of citations, including People v. Byrne, 160 Cal. 217, 116 P. 521, are listed by defendant in support of this rule, in all of which the orders appealed from were affirmed. Defendant argues that plaintiff's attorney failed to file an affidavit that prior to the verdict he did not know of the newly discovered evidence. Defendant cites in this connection cases headed by Estate of Cover, 188 Cal. 133, 204 P. 583. In all of these cases the trial court's action in refusing to grant a new trial on the ground of newly discovered evidence was upheld on appeal. None of these cases are authority for a requirement that the party moving for a new trial on the ground of newly discovered evidence should have his counsel file an affidavit that he had no knowledge of the newly discovered evidence prior to the verdict.

It is next urged by defendant that plaintiff's counsel was required to show that in the preparation of the case they made every reasonable search for witnesses who might reasonably be expected to give testimony concerning the facts in issue. Defendant quotes Sofuye v. Pieters–Wheeler Seed Co., 62 Cal.App. 198, 208, 216 P. 990, 995: "An attorney holds himself out as one who will faithfully perform any service within the scope of his profession committed to him by a litigant or a client, and when employed in his professional capacity is always specifically charged with the duty of taking such steps as the case requires shall be taken to protect or conserve the rights of the client." The quoted statement was made by the court in connection with its ruling on the problem of reliance upon the promise of a third party to defend an action as excusable neglect justifying the trial court in setting aside a default judgment. It does not cover the problem at hand. A number of cases are cited seemingly upholding the views of the respective parties. It does not appear necessary to harmonize or reconcile or differentiate the various holdings. The language used in each decision is designed to present the facts of the particular case so that the reviewing court might affirm or reverse the order or judgment in conformity with the conclusion it had reached.

[3, 4] Ordinarily the conclusion of the trial court on a motion for a new trial based on newly discovered evidence is not disturbed on appeal for the simple reason that the trial judge is in a better position, due

to his familiarity with the facts and circumstances, to determine the effect and value of the alleged new evidence, than is a reviewing court. However, the trial judge's discretionary determination is not final. As applied to the present problem, whether a party moving for a new trial made timely and diligent search for witnesses who might reasonably be expected to be in possession of evidence concerning the material facts, is a matter which the appellate court will consider in determining whether the trial court abused its discretion. This does not mean that the reviewing court may substitute its opinion for that of the trial court, but that it will consider and determine whether the discovered evidence is reasonably likely to result in a different verdict, and whether the moving party was timely and diligent in his search for new evidence. Defendant stresses the case of Vertson v. City of Los Angeles, 116 Cal. App. 114, 2 P.2d 411. There the action was for personal injuries consisting of serious burns suffered by plaintiff while working in a storm drain, laying pipe, when defendants' power wires fell and came in contact with him. In support of the motion defendants presented the affidavits of thirteen persons of which only two (116 Cal.App. at pages 118–120, 2 P.2d at pages 412, 413) contained "the statement that the affiant actually saw the boom of the trench machine strike the power wires. * * * This is significant since [defendants'] * * * principal defense [was] that the boom of the drag-line machine operated by the contractors then engaged in constructing the storm drain * * * had come in contact with the power wires, causing them to short circuit and fall. * * * Despite the emphatic avowals of diligent search for witnesses contained in the affidavits of the gentlemen who conducted the investigation * * * the bald facts indicate surprising lack of diligence." Diligence in discovering new evidence in one case may not be the diligence that should be required in another case. Heintz v. Cooper, 104 Cal. 668, 38 P. 511. With these tests in mind the facts and circumstances may be considered.

In the present case the plaintiff was the only witness who testified that the car gave a "terrific jerk," which knocked him "out of the back door into the street." The affidavits are in harmony with this testimony in some respects, and on a second trial, if the witnesses should testify in accord with the affidavits, such testimony would tend to strengthen plaintiff's version of the accident.

[5, 6] There may seem to be some justification for defendant's claim that there was a lack of diligence. The affidavit of plaintiff shows that he did not know but had cause to believe that there were witnesses, unknown to him, who witnessed the accident. Plaintiff's affidavit shows that a search was made by him to discover such witnesses within a reasonable time after his release from the hospital. The fact that the witnesses were not discovered at that time and were located so soon after the verdict may raise a suspicion as to plaintiff's good faith, but a suspicion is not sufficient to warrant this court in deciding as a matter of law that the trial court abused its discretion in granting a new trial. The order for a new trial was an implied finding that plaintiff had exercised reasonable diligence in view of all the surrounding circumstances, and that the new evidence was of sufficient importance to require a resubmission of the issues to another jury.

The answer to the complaint, after denial of defendant's negligence, alleged that plaintiff was negligent and that such negligence proximately contributed to and caused the happening of the accident. The evidence relative to the defense of contributory negligence was meagre. On a new trial contributory negligence under the present pleadings will be an issue. Whether there will be evidence sustaining the special defense is a matter that cannot be determined at this time.

However, on a previous trial the court stated in the instructions to the jury: "I may say in passing that there is no evidence of contributory negligence in this case." So far as the record discloses, defendant did not submit a counter instruction. In the notice to the clerk to prepare the instructions the request is as to all instructions—without specifying instructions offered and refused. As the record now stands, it does not appear that the comment made by the trial court could be classified as error.

[7] Defendant urges: "The claimed newly discovered evidence relates solely to the alleged negligence of defendant, whereas there was sufficient evidence to support the finding of the jury that plaintiff was guilty of negligence proximately causing his injuries, wherefore the trial court committed prejudicial error in granting plaintiff a new trial." Defendant argues that in the instant case the newly discovered evidence bears solely on the defendant's negligence. As to this, defendant contends that there is ample evidence of contributory negligence, and that the jury found against plaintiff because of his own negligence. This contention is without merit in view of the evidence, the comment of the court, and the failure of defendant to present instructions on contributory negligence.

The contention that in the last trial there was evidence to support a finding of the jury that plaintiff was guilty of contributory negligence is not borne out by the record. Hence the claim made on this appeal that the newly discovered evidence relates solely to the negligence of the defendant and therefore the order granting the new trial is prejudicially erroneous is without merit. In Parker v. Southern Pac. Co., 204 Cal. 609, 269 P. 622, it was said that the newly discovered evidence had no pertinency to the issue of contributory negligence, but in that case there was evidence of contributory negligence introduced. Likewise, in Dougherty v. Union Traction Co., 23 Cal.App. 17, 136 P. 722, 724, there was testimony given by plaintiff that she was to blame for the accident. In the present case it appears that plaintiff noticed the "lurch or jerk" of the car approximately four blocks from the scene of the accident. It is not contended that he should have left the car at a "car stop," but that at the time of the accident he should have grabbed or held on to part of the stanchion or the mechanism of the car. Plaintiff testified that he had been holding on but that immediately before the accident he was "jammed" by other passengers and did not hold on as he was thrown from the car. There is no evidence to show that at the precise moment of the accident plaintiff could have held on. Each of the appeals referred to attacking an order granting a motion for a new trial was decided upon the particular and peculiar facts of the case, which are not, nor are those of the other cases cited by defendant, identical with those here considered. They simply and correctly set forth rules for the determination of the particular case then before the court.

[8] The order granting plaintiff's motion for a new trial is affirmed.

PETERS, P. J., and BRAY, J., concur.

83 Cal.App.2d 241

BAKER DIVIDE MINING CO. v. MAXFIELD.

Civ. 7384.

District Court of Appeal, Third District, California.

Jan. 13, 1948.

Rehearing Denied Feb. 9, 1948.
Hearing Denied March 11, 1948.

1. Mines and minerals 🔑106

An option agreement, to which corporation was not a party, under which defendant was to purchase all of corporate stock from stockholders with whom agreement was made constituted no defense to ejectment action by mining corporation to recover possession of its land from defendant.

2. Corporations 🔑116

The shareholders and not the corporation may contract with relation to shares of stock.

3. Corporations 🔑143

A transfer by stockholder of his stock does not transfer any of corporate property or affect any right or obligation of corporation in reference to property.

4. Corporations 🔑182

The whole title to corporate property is in the corporation and shareholders are not in any proper sense owners thereof.

5. Corporations 🔑1

The corporation and shareholders are distinct parties in contracts made by one or the other.

6. Ejectment 🔑81

Defendant in ejectment action after admitting legal title in plaintiffs can prevail only by setting up equitable defense which can be ripened into legal title or will estop plaintiff from prosecution of action.

7. Ejectment 🔑26(2)

In ejectment action by corporation, defendant whose rights were based on an unexercised option agreement with shareholders to purchase corporate stock did not thereby set up any equitable title to the land.

8. Mines and minerals 🔑104

Where defendant failed to exercise option to purchase stock in mining corporation, option agreement not only in no way affected corporation, but defendant could not even maintain action to compel transfer of the stock.

9. Pleading 🔑354(2)

In ejectment action by mining corporation against defendant who had obtained option to purchase corporate stock, cross-complaint seeking to bring in as parties transferees of stock, representatives of estate of a stockholder and the corporation, and to compel transfer of stock to defendant, was properly stricken as not constituting any defense to the ejectment action.

10. Appeal and error 🔑882(6)

In ejectment action, defendant, who had filed a second amended answer relating to his claim under option to purchase corporate stock, could not complain of amended complaint relating to option agreement, where all parties tried case on assumption that the option agreement was in issue.

11. Mines and minerals 🔑104

In ejectment action by mining corporation against defendant claiming under option to purchase corporate stock, introduction in evidence of notice of defendant's default was not error on ground that it was not signed by original optionors, but by transferees of the stock, and that it notified defendant to make payment to transferees, where defendant had consented to transfer of shares to one of transferees, corporation was not a party to option agreement and defendant had taken no steps to cure his default.

12. Mines and minerals 🔑106

In ejectment action by mining corporation against defendant who set up claim based on option to purchase corporate stock, defendant was not entitled to nonsuit because notice given him of his default under option agreement did not conform to agreement, where repeated demands on defendant to make payments had been unavailing.

13. Mines and minerals 🔑106

In ejectment action by mining corporation against defendant who based claim on option to purchase corporate stock, corporation, which was not a party to option agreement, was not bound thereby, and court was not required to make findings on effect of service of notice of defendant's default under option agreement and as to necessity of tendering consideration before a declaration of forfeiture.

14. Mines and minerals 🔑106

In ejectment action by mining corporation defendant's rights, if any, under option agreement to purchase corporate stock, to which corporation was not a party, constituted no defense, and alleged insufficiency of evidence to sustain findings with reference to issues of fact found adversely to defendant and alleged generality of findings became immaterial.

15. Appeal and error 🔑758(3)

An appellate court is not required to search the record for evidence tending to sustain a claim to which its attention has not been specifically invited.

◆

Appeal from Superior Court, Placer County; Dal M. Lemmon, Judge.

Ejectment action by the Baker Divide Mining Company against James Maxfield to recover possession of mining land and for damages for wrongful withholding of possession, wherein the defendant filed a cross-complaint. From a judgment for the plaintiff awarding it possession of property and rental value damages for wrongful withholding, the defendant appeals.

Judgment affirmed.

A. P. G. Steffes and Zeutzius & Steffes, all of Los Angeles, and Thomas F. Sargent, of Auburn, for appellant.

Wm. F. Rose and Carl E. Day, both of San Francisco, and Floyd H. Bowers, of Roseville, for respondent.

ADAMS, Presiding Justice.

Plaintiff, the respondent, brought this action in ejectment against the defendant, appellant, to recover possession of 1929.81 acres, more or less, of mining land in Placer County, and for damages for the alleged wrongful withholding of possession after demand by the corporation. From a judgment for plaintiff awarding it possession of the property and rental value damages for wrongful withholding defendant has appealed.

At all times herein mentioned respondent was and is a California corporation with 21,278 issued and outstanding shares of capital stock. All of the shares were originally owned by two brothers, Beach Carter Soule and H. D. B. Soule, each owning 10,639 shares. Beach Carter Soule died, and W. A. Richardson and Ruth Petit, the latter being decedent's widow who had remarried, were appointed and qualified as executor and executrix of decedent's will. On June 23, 1936, said H. D. B. Soule and said executor and executrix in their representative capacities, entered into an option agreement with appellant in which option the former were designated as "Stockholders," which gave appellant the right and option to purchase said 21,278 shares of stock for $25,000, payable $500 on the execution of the option, the balance to be paid as follows: Seven monthly installments of $100 each, on or before the first day of December, 1936, January, February, March, April, May and June, 1937; monthly installments of $150 each for the second six months of 1937; of $200 each for the first six months of 1938 and $250 each for the second six months; of $300 each for the first six months of 1939 and $350 for each of the second six months; $400 each for the first six months of 1940 and $450 for each of the second six months; and the balance of $11,200 on or before July 1, 1941.

The respondent corporation was not a party to that option agreement. It was stipulated that at all times mentioned the corporation respondent was the legal owner of the property.

The option agreement gave appellant the right to enter into possession of the property of the corporation for the purpose of mining, and the right to the use and occupation of the residence and other buildings on the property and the right to retain possession of the same "only so long as he is not in default in any payments required of him hereunder or in the performance of any of the terms and conditions of this agreement."

It further provided that appellant should pay "to the stockholders to be credited upon the purchase price" of the shares of stock, 10% of the net mint or smelter returns of all gold and other precious metals recovered, and that appellant should pay, and he agreed to pay, "all taxes, assessments, and other State and governmental charges levied or assessed against the Corporation or upon the property of the Corporation and the improvements thereon" and to "keep said buildings on said premises insured in the sum of at least $5,000, loss, if any, payable to the Corporation."

Paragraph 10 of the option agreement then provided: "Time is of the essence of the agreements herein contained and of the payments herein provided to be made and in the event of the default, as hereinafter provided, of the Purchaser to exercise the option hereby granted, the rights of the Purchaser or his assigns herein shall cease and terminate; provided, however, that if Stockholders shall at any time claim that the Purchaser has failed to do or perform anything which, by the terms of this option, he has agreed to do and perform, including the payment of any installments herein provided for, the Purchaser shall have a reasonable opportunity thereafter to perform, and Stockholders shall send to Purchaser, at No. 131 South Third Street, Las Vegas, Nevada, by registered mail, a notice, in writing, specifying the claimed default upon the part of Purchaser, and demanding that such default be cured within a period of thirty (30) days; upon the failure of the Purchaser to perform all the obligations on his part to be performed, which are specified in said notice, the Stockholders shall be entitled to the immediate possession of said property and shall also be entitled to retain all moneys theretofore paid by the Purchaser or his assigns hereunder, as rental for the use and occupation of said property, and upon such default and termination of this option, the Corporation and the Stockholders shall be entitled to the immediate possession of the corporation's properties."

Contemporaneously with the execution of said option agreement, Maxfield executed a lease and option to Neal L. Dow and R. Allen Hall by which he granted to them the exclusive right to enter upon and mine a designated portion of the land so long as appellant was not in default under his option agreement and they complied with the terms of the lease and option given to them. Dow and Hall, in their lease and option, agreed to pay appellant "and/or the Baker Divide Mining Company" a royalty of 10% of all the net mint or smelter returns on the sale of gold or other precious metals mined or produced by them from the property leased to them. Dow and Hall were given an option to purchase the land leased to them for $15,000 cash, which sum or any part thereof, if and when paid, should be paid directly to the corporation and credited on the last payments required to be made by appellant under his option agreement. Upon receiving said $15,000, the corporation was to deed to Dow and Hall the land so leased to them by appellant. The lease and option to Dow and Hall also provided: "The right and possession herein granted to Dow and Hall for the purchase of said mining property shall immediately cease and terminate in the event that Maxfield shall fail to faithfully perform any of the terms of his option and agreement with the stockholders of the Baker Divide Mining Company, and without any notice whatever to Dow and/or Hall, or their assigns, of such failure and default."

Paragraph 13 of the lease and option to Dow and Hall provided: "In the event that Maxfield defaults in his 'Option to Purchase Stock in Baker Divide Mining Company, a corporation' above referred to, Dow and Hall shall have a period of thirty (30) days after notice to them of Maxfield's default, within which to cure the default of Maxfield in each and every respect in which he is in default, and shall, after thus curing such default, be subrogated to all of the rights of Maxfield in and to the said 'Option to Purchase Stock in Baker Divide Mining Company, a corporation' with the same force and effect as if said Option had originally been entered into with Dow and Hall as the Optionees, in the place and stead of Maxfield."

Paragraph 9, which contains the option to Dow and Hall to purchase the land leased to them, for $15,000 and payment thereof direct to the corporation and the conveyance to them by the corporation, paragraph 11, which reserved to Maxfield and the corporation the right to mine areas outside the land leased to Dow and Hall, paragraph 12, which related to use of fuel wood and cutting timber for mining purposes, paragraph 13, which provided that if Maxfield defaulted under his option agreement Dow and Hall should have thirty days after notice to them of Maxfield's default within which to cure the default and after curing Maxfield's default to be subrogated to Maxfield's rights under the latter's option agreement, and paragraph 14, which provided that in the event Dow and Hall should elect to exercise their option to purchase, any royalty payments made by them should be credited on the purchase price of $15,000, were approved in a writing attached to the lease and option to Dow and Hall, and signed Baker Divide Mining Company, by W. A. Richardson, President, and Edgar Zook, Secretary; also by the same stockholders named in the option agreement to appellant.

On February 21, 1938, Hall quitclaimed to Dow all his right, title and interest in and to the lease and option given to him and Dow. However, the option to purchase given to Dow and Hall was never exercised.

In April, 1939, H. D. B. Soule sold his 10,639 shares of stock to P. D. Burtt and P. J. Feykert for $6,000, and, with the written consent of Maxfield, in May, 1939, J. D.

Crummey, a relative of Dow, purchased the 10,639 shares owned by the Estate of Beach Carter Soule, deceased, for the sum of $6,000.

Appellant defaulted under his option agreement. He paid the $500 down and the $100 a month due December 1, 1936, and on the first days of January, February, March, April, May, June, July and August, 1937. He also made a payment of $70 on July, 1, 1938, but he failed to pay the taxes as called for in his option agreement. Therefore, on his option for purchase of the stock for $25,000, he paid only $1,470; and his last payment of only $70 was made July 1, 1938, nearly 7½ years before the beginning of the trial of this action on January 15, 1946.

It is admitted by appellant that on December 18, 1942, the transferees of the stock signed and sent to him, by registered mail, and that he received, a notice of his default under his option agreement, which notice set forth all credits and debits and showed a balance due from appellant as of December 15, 1942, of $27,379.63, and gave him to January 22, 1943, within which to pay same. Appellant did not cure his default. On February 6, 1943, respondent corporation served him with a notice to vacate the property. This action was filed on March 13, 1943.

[1, 3] Appellant, on this appeal, assumes that he had the right to defend against this ejectment suit brought by the respondent corporation, because of his option agreement with the stockholders to purchase their stock, though respondent corporation was not a party to that agreement, nor could it have been, for only the owners of shares of stock, and not the corporation, may contract with relation to the shares. Likewise, as was said in Bank of Visalia v. Smith, 146 Cal. 398, 403, 81 P. 542, 544, approved in Sanchez v. East Contra Costa Irrigation Company, 205 Cal. 515, 518, 271 P. 1060: "The stockholders of a corporation have no estate in the land or other property of the corporation, and a transfer by a stockholder of the stock owned by him does not transfer any of the property of the corporation, or affect any right or obligation of the corporation in reference to the property held by it."

[4, 5] To same effect see 1 Fletcher Cyclopedia Corporations (Perm.Ed.), page 111, sec. 31. The shareholders are not in any proper sense the owners of the corporate property and the whole title is in the corporation. 6A Cal.Jur. p. 749. The corporation and the shareholders are distinct parties in contracts made by one or the other. 6A Cal.Jur. p. 750. Also see Miller v. McColgan, 17 Cal.2d 432, 436, 110 P.2d 419, 134 A.L.R. 1424; Holly Sugar Corporation v. Johnson, 18 Cal.2d 218, 223, 115 P.2d 8.

[6, 7] Aside from the fact that respondent was not bound by the option agreement of its shareholders, appellant failed to allege or prove an equitable title in himself to the land. The rule in such cases is clearly set down in Verbeck v. Clymer, 202 Cal. 447, 561, 261 P. 1017, 1018, as follows: Where the legal title is admitted to be in plaintiffs, defendants can only prevail against them by setting up an equitable defense, 'and the equity presented must be of such a character that it may be ripened by a decree into a legal right to the premises or such as will estop the plaintiff from the prosecution of the action. 9 Cal.Jur., p. 1000. * * * Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default with respect thereto, without excuse he cannot maintain an equitable defense in an action of ejectment by the vendor. Connolly v. Hingley, 82 Cal. 642, 23 P. 273; Howard v. Hewitt, 139 Cal. 614, 73 P. 414. 'A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * *' Rhorer v. Bila, 83 Cal. [51] 54, 23 P. [274], 275; Gates v. McLean, 70 Cal. [42] 49, 11 P. 489; Gervaise v. Brookins, 156 Cal. [103], 106, 103 P. 329. The essence of the rule is that, where the legal title to the property is in the plaintiff and that fact is admitted by the defendants, defendants cannot successfully defend against an action in ejectment unless they make out a complete equitable title in themselves with the right of possession thereunder. Wallace v. Maples, 79 Cal. 433, 21 P. 860; Flint v. Conner, 53 Cal.App. 279, 200 P. 37.

[8] The fact that appellant held only an "option", rather than a contract, affects his standing. He never exercised the option, therefore it never became binding on the optionors, to say nothing of the corporation even if it had been a party to it. In Ware v. Quigley, 176 Cal. 694, 698, 169 P. 377, 378, the court said: "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed."

In Ludy v. Zumwalt, 85 Cal.App. 119, 130, 131, 259 P. 52, 56 (hearing in Supreme Court denied), this court said: "Manifestly, it cannot logically be held that, by virtue of his mere right to purchase the property which is the subject of the option, the optionee acquires any actual interest in the property itself which is the subject thereof, or that he can acquire any such interest until he has seasonably accepted or exercised his option to purchase according to the terms of the agreement. * * * An excellent definition of an option is given in 29 Am. & Eng. Ency. of Law (2d Ed.) p. 606, as follows: 'The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase.'"

Having failed to exercise his option, appellant could not even maintain an action to compel transfer of the corporate stock. Caldwell v. Dalaray Mines, Inc., 68 Cal.App.2d 180, 184, 156 P.2d 52. Not being able to obtain specific performance of the option, it is not a defense in an action in ejectment brought by the owner. Hedden v. Waldeck, 89 Cal.App. 494, 496, 265 P. 344. In Barcroft v. Livacich, 35 Cal.App.2d 710, 96 P.2d 951, in which a hearing in the Supreme Court was denied, it was said at page 718 of 35 Cal.App.2d, at page 956 of 96 P.2d: "Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default in respect thereto without excuse, he cannot maintain an equitable defense to an action in ejectment by the vendor who is the holder of the legal title."

Also, at page 721 of 35 Cal.App.2d, at page 957 of 96 P.2d: "One who appeals to a court of equity to defend him against title to land of which he is in possession must do equity by paying the price which he agreed to pay. The maxim 'he who seeks equity must do equity' applies to him in full force. Appellants, under the circumstances of this case, were not entitled to hold possession and withhold the purchase price."

[9] The first contention stated by appellant in his brief is that the court erred in striking his first amended cross-complaint, the purpose of which was to bring in as parties the transferees of the stock, Burtt, Feykert, Crummey and Dow, the latter alleged to be a partner with Crummey in the purchase (which purchase was consented to in writing by appellant), and to bring in as parties the representatives of the Estate of Beach Carter Soule, deceased, and the corporation itself, and to compel the transfer to appellant of all the shares of the corporation, his theory being that after the execution to appellant of the option agreement, the parties agreed to certain modifications of the price for the shares. The trial court struck the cross-complaint on the grounds that the new parties sought to be brought in were strangers to the issue of right of possession by the corporation of the real property in question. Appellant admits that on March 24, 1945, which was nine days after the filing of the order striking his first amended cross-complaint, he filed an action in the Superior Court of Placer County against the same persons who were named cross-defendants in his first amended cross-complaint that was stricken, that his complaint in the latter action contains substantially the same allegations as were contained in the stricken first amended cross-complaint, and that the latter action is still pending.

Under the rules of law above stated, it would seem that the matter proposed to be set up in the first amended cross-complaint could not constitute a defense against respondent's action in ejectment, and therefore was properly stricken. Furthermore, appellant's second amended answer set up as a separate defense the matter contained in the stricken first amended cross-complaint, and in addition alleged estoppel against respondent, the statute of limitations, waiver of right to possession, and failure of respondent to serve on appellant any notice or compliance with the rules and regulations of the Office of Price Administration relative to the eviction of a tenant from the dwelling house located on the premises. Evidence was admitted in support of the allegations of that second amended answer, which evidence covered the same ground contemplated by his stricken first amended cross-complaint.

The trial court found that the respondent was the owner and entitled to the possession of the premises involved; that on or about March 9, 1943, without right or title, appellant entered into possession of the premises and ousted and ejected respondent therefrom and ever since has withheld and still unlawfully withholds the possession thereof from respondent; that appellant had not made out or proven a complete or any equitable title in himself, or any right to the possession of the property, or any part thereof; that neither respondent nor Burtt, Feykert, Crummey or Dow, or any of them, were guilty of any fraudulent, or collusive, or unconscionable acts or conduct in the premises, and that neither of them at any time disregarded any rights of appellant nor did they agree among themselves, or at all, to deprive appellant of any right or title or interest in and to the property and assets of respondent or the outstanding shares of its capital stock, or any of such shares; that respondent was not estopped, and that its causes of action were not barred by any statute of limitations, and that respondent had not waived any right to the possession of the property; that the premises were not used as a dwelling, that appellant was not a tenant and that the property was not, at the time the action was commenced, located in a defense rental area, wherefore the rules and regulations of the Office of Price Administration were not applicable.

Furthermore, the stricken first amended cross-complaint of appellant did not even attempt to state any cause of action against respondent corporation with relation to the title or right to the possession of the property, but sought to enforce alleged contracts with shareholders with reference to shares of stock, to which contracts respondent was not a party. While it is true that respondent purported to ratify portions of the lease and option from appellant to Dow and Hall which was never consummated, appellant predicated his rights upon the original option agreement between him and the shareholders and not upon the lease and option to Dow and Hall.

[10] The second contention of appellant is that the court erred in permitting respondent to file an amended complaint, which amendment contained a supplemental separate and second cause of action containing language corresponding to that contained in appellant's second amended answer with relation to appellant's claim under his option agreement with the shareholders. Since all parties tried the case on the assumption that the option agreement was in issue, it is not understandable how appellant can now complain of the amendment. Both the amendment to respondent's complaint and the second amended answer of appellant put that option agreement in issue.

[11] The third contention of appellant is that the court erred in overruling his objection to the introduction in evidence of the notice of default which was signed by the transferees of the stock who were not the stockholders who signed the original option agreement. The objection was based upon the claim that the notice was fatally defective because it was not signed by the original optionors, and further because it notified appellant to pay past due payments to the transferees of the stock.

As hereinbefore stated, appellant gave his written consent to the transfer of half the shares to Crummey and thereby, surely at least Crummey was authorized to sign the notice. Furthermore, appellant was not injured but favored by the notice. It gave him more than 30 days to cure his default under his option agreement and he did nothing about it; he took no action nor did he make any offer to any one to perform, despite the fact that he was then woefully in default. Whether signed by the original shareholders or their transferees, the notice conformed to the requirements of the option agreement and appellant should have taken some action within the more than 30 days allowed him. Furthermore, since respondent corporation was not a party to the option agreement, no notice from it was due appellant as a condition precedent to filing the ejectment action.

In connection with that contention, appellant argues that "the most fatal omission in giving the 30 day notice was the failure to tender the stock when the demand was made for the entire balance of the purchase price." Since appellant did nothing after the receipt of the notice, it seems obvious that a tender of the stock would have been useless. There is nothing in paragraph 10 creating a reciprocal obligation; it merely provides that the optionors shall give appellant 30 days to cure "his" default, and there is no provision calling upon optionors to tender the shares of stock as a condition precedent to payment.

In McClintick v. Leonards, 103 Cal.App. 768, 773, 285 P. 351, the court said: "If an offer of performance of an obligation be defective, the offeree must object on that ground or the defect is waived, and he cannot be heard to urge such objection in a subsequent suit. Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1."

Furthermore, respondent, not being a party to the option agreement, owed no duty to make any tender of anything to appellant.

Appellant cites and relies chiefly upon Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126. But that case is easily distinguishable from the instant case. In the Boone case there was a contract for purchase and sale. Boone was in default as to all payments due under the contract. The court found that he was ready, willing and able to perform, offered to perform, and had demanded a deed. To make that case analogous here, appellant would have to show that he was ready, willing and able to perform, and offered to perform. Doubtless when the notice was served on him, had he offered to perform and been ready, willing and able to perform, this action would not have been instituted.

[12] The fourth contention is that the court erred in denying appellant's motion for a nonsuit, because the notice given did not conform to paragraph 10 of the option agreement. Appellant admits in his brief that such argument applies "here as under the preceding point," hence further or repeated discussion of the notice is not necessary. However, it seems that any notice to appellant would have been futile for the reason that long after he defaulted in his payments and long before this action was filed, to wit, on April 2, 1942, appellant wrote a letter, apparently to Richardson, stating in part:

> "Again taxes are about due on the Divide and I am still in an uncertain position financially. * * *
>
> "To cap all my troubles I have been indicted on my 1935 income tax. * * * I am certain I will lick the charge.
>
> "If without injustice to any one under all the circumstances you can see your way clear to have the Divide company advance the April tax installment I will be even more deeply in your debt that I am now. * * *"

The record further shows that repeated demands prior to that date had been made on appellant to make payments due under his option agreement, and that repeatedly he had confessed financial difficulties as an excuse for his failure to make the payments.

[13] The fifth contention is that the court erred in finding and holding that respondent was and is entitled to the possession of the real property in question. It it argued that it was absolutely necessary for the court to determine "what, if any, effect followed the service of the notice of default or the notice of forfeiture," and that it was likewise "necessary to pass upon the question as to the necessity of tendering the consideration before a declaration of forfeiture." The trial court rendered an opinion in which it said: "It is unnecessary in this action to determine what if any effect followed the service of the notice of default or the notice of forfeiture. Neither is it necessary to pass upon the question as to the necessity of tendering the consideration before a declaration of forfeiture. Since plaintiff was not a party to the option agreement, the right of defendant to possession is not measured by the legal effect of that agreement or by the contractual relations of the parties thereto but by the equitable rela-

tions between plaintiff and defendant. Defendant's equitable defense may not prevail unless it squares with the maxims of equity. In determining against this defense this court decides that in this action those relations do not establish a right to possession as against the owner of the property; obviously the rights of others not parties to this action are not involved and so not subject to determination here. All that is decided in this action is that as against the corporation's claim to the right of possession the asserted equitable defense must fall."

Since respondent was not a party to nor bound by the option agreement, it was not necessary to make findings on matters contained in it. The court having found on all material issues, the judgment will not be reversed for failure to find as to immaterial matters. Garvey v. Lashells, 151 Cal. 526, 534, 91 P. 498.

[14, 15] The sixth and final contention is that the evidence is insufficient to sustain the findings with reference to each and every issue of fact which it found adversely to appellant, and that the court erred in making too general findings of fact. Nowhere in appellant's brief is it pointed out in what respect it is deficient to sustain plaintiff's cause of action. An appellate court is not required to search the record for evidence tending to sustain a claim to which its attention has not been specifically invited. Baumann v. Harrison, 46 Cal.App. 2d 73, 82, 115 P.2d 523. However, the matter is unimportant in view of the fact that respondent cannot be held to the option agreement not made by it but by its shareholders. The facts with relation to the option agreement are not disputed and on the face of that instrument it appears that respondent was not a party to it. Therefore, the findings are sufficient under the circumstances. The trial judge properly concluded that this was an action in ejectment by respondent, the legal owner of the premises, against appellant in wrongful possession who did not allege or prove an equitable title against respondent, the only defense open to appellant. His contracts with others were not pertinent to the issue of right to possession of the property as between respondent and appellant. Appellant may have a cause of action against the original stock owners and their transferees, but that is not a defense in this action in ejectment.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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83 Cal.App.2d 272

PEOPLE v. CASSANDRAS.

Cr. 2501.

District Court of Appeal, First District, Division 1, California

Jan. 16, 1948.

1. Rape 🔑35(4)

Rape is proved by evidence bringing case within any of subsections of Penal Code section defining rape, regardless of subsection alleged in information to have been violated. Pen.Code, § 261.

2. Rape 🔑14

To constitute forceful rape, prosecutrix need not resist to utmost, but resistance required depends on circumstances, such as parties' relative strength, uselessness of resistance and degree of force manifested, and need only be such as to make prosecutrix' nonconsent and actual resistance reasonably manifest. Pen.Code, § 261, subd. 3.

3. Rape 🔑11, 14

Defendant's guilt of rape depends on whether evidence reasonably warrants conclusion that prosecutrix resisted and her resistance was overcome by force or that she was prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, and submission induced by fear of such harm is not consent. Pen.Code, § 261, subds. 3, 4.

4. Rape 🔑51(4)

Evidence sustained conviction of rape as showing that prosecutrix' consent to intercourse was induced by threats of great bodily harm. Pen.Code, § 261, subd. 4.

5. Criminal law ⚿369(1)

Generally, defendant can be tried only for offense charged, and evidence of other independent crimes, not directly tending to prove material fact involved in crime charged, is inadmissible.

6. Criminal law ⚿372(1)

Evidence of defendant's commission of other crimes than that charged is admissible to show pattern, scheme, design, project or plan, of which several crimes are part.

7. Criminal law ⚿369(2)

Evidence of defendant's commission of other crimes than that charged must be restricted to other acts having sufficiently high degree of common features with act charged to warrant inference that, if defendant committed such other acts, he probably committed act charged.

8. Criminal law ⚿369(8)

In prosecution for rape, evidence of prior rapes, committed by defendant on others than prosecutrix, is generally inadmissible. Pen.Code, § 261.

9. Criminal law ⚿372(1)

In prosecution for rape, evidence of prior rape or attempted rape by defendant under circumstances remarkably similar to that charged is admissible to show plan or scheme to commit crime in such fashion, though prior rape or attempt was committed on another than prosecutrix. Pen.Code, § 261.

10. Criminal law ⚿372(1)

In prosecution for rape by forcing married woman with children to submit by threats to have her arrested and her children taken from her after luring her to defendant's room by promise to secure lucrative job for her, evidence of prior rape, committed by defendant on another such woman under similar circumstances, was admissible to corroborate prosecutrix' story and show that defendant probably committed crime charged in fashion described by prosecutrix. Pen.Code, § 261, subds. 3, 4.

◆

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

George Cassandras was convicted of rape, and he appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

By an amended information appellant, George Cassandras, was charged with and convicted by a jury of rape with force or violence alleged to have been committed upon the person of Carmen Brown. He appeals from the order denying his motion for a new trial and from the judgment, contending that there is no evidence that he employed force or violence, and that the trial court committed prejudicial error in allowing the prosecution to prove that some time prior to the date of the charged rape appellant had raped another woman under circumstances similar to those testified to by the prosecutrix.

The record is quite short. The prosecution produced but two witnesses and the defense produced no testimony at all, the only witness called by the defense being a hotel clerk who knew nothing about the case or the parties. The appellant did not take the witness stand in his own behalf. The record shows that Carmen Brown is a divorcee and the mother of two small children. She testified that on February 20, 1947, in the late afternoon, she visited the United States Employment office at 13th and Mission Streets, San Francisco, in search of employment; that the appellant accosted her as she was leaving and asked her if she wanted a job; that he told her that he could get her a job as a "soda fountain girl" at $12.00 per day; that there was a gambling place in the rear of the fountain premises, but he assured her that no one engaged in the gambling enterprise would bother her; that there was another girl working at the fountain by the name of Marie who would tell her what to do; that the boss's name was Tony; that she informed appellant that she would consider the job "as long as I won't have nothing to do with men";

that appellant invited her to come over to the hotel to meet "the boss and this girl"; that they then drove in appellant's automobile to 14th and Valencia Streets where appellant parked near a hotel; that they entered the hotel where appellant got a key at the desk and proceeded to the fourth floor; that appellant opened the door to a room; that "I said I didn't want to go in and he pushed me through" the open door; that she then asked appellant why Tony and Marie were not there as he had promised; that appellant denied that he had made any such representation and told her "to sit down and relax"; that he then talked to her about the job and she told him "I didn't want the job, I wanted to go home"; that appellant then said "you should have thought of that before, because you are not going to get out of here until you undress and go to bed"; that she told appellant she had to go home at once because her sister was sick and she had to look after her children; that appellant told her she was not getting out, and that if she tried to get out "I will call the clerk downstairs and the clerk will call the police and pick you up, they are good friends of mine, I will tell them you are a prostitute and they will take your children away"; that "I got scared, I hesitated for a while, and I didn't know what to do"; that appellant then told her she could go if she would pay him $25.00; that she told him that she did not have that much money and he then stated: "Then you'll have to take off your clothes and go to bed"; that she "didn't know what to do. I was scared he would hurt me. I didn't care about being hurt, I wanted to get home with my kids"; that she then removed part of her clothes and he removed the rest; that she got on the bed and "he told me to keep still if I didn't want to get hurt. I stayed still"; that he placed a towel over her eyes and then had an act of intercourse; that when the act was completed they dressed and appellant told her that she could not get out of the hotel unless she was in his company; that she was "scared that he would hurt me"; that appellant told her to call the police if she wanted, but that the police would not believe her but would "take my kids away"; that appellant then asked her how much she wanted and she told him that she did not want his money, that all she wanted was to go home; that she never accepted any money from him; that they left the hotel together; that she told appellant that she did not want to get in the automobile, but he insisted; that appellant told her he wanted her to go to a bar and find Marie and give her a message; that they drove near to a bar and she got out; that she did not go to the bar but boarded a streetcar and went home where she told her sister what had occurred, and her sister called the police.

Josephine Lieb was called as the next witness for the prosecution. She testified, over the strenuous objections of counsel for appellant, that on September 26, 1946, she was accosted by defendant outside the employment office at 13th and Mission; that appellant asked her if she knew where he could find two girls to work in a soda fountain at $8.25 for a five-hour shift; that she told appellant that she was married, had two children to support and had soda fountain experience, and was looking for a job; that appellant told her if she would like this job he would be glad to introduce her to the boss and his wife who were in Daly City; that at Daly City appellant went into an auto court, and, after calling at the office, stated that the boss was not there and drove to another auto court; that here he opened the door and they went in; that when she asked where the people were, appellant assured her that they would soon be there; that then appellant told her that the two auto courts were connected by short wave radio and that if she tried to leave, the proprietors would get in touch with the other auto court and tell them that the witness was a streetwalker and had demanded from appellant more money than he was willing to pay; that he prevented her from leaving the room and ordered her to undress; that appellant threatened that unless she submitted he would have her arrested; that he told her he had had another girl arrested when she refused to submit; that appellant told her that she could not afford to go to the police inasmuch as she had two children to support;

that when she got on the bed he put a towel over her face and had intercourse with her; that she left the auto court with him and he offered her $20.00 which she refused and demanded to get out of the car; that he finally let her go and she took the license number of the car and went immediately to the emergency hospital where she reported the affair.

[1] The first contention of appellant is that this evidence fails to show the force and violence required by § 261 of the Penal Code. There can be no doubt that the information charged a violation of subdivision 3 of § 261 defining rape as an act of intercourse where the resistance of the prosecutrix "is overcome by force or violence." The evidence discloses, however, that the information should have been framed on the theory of a violation of subdivision 4 of § 261. That subdivision defines rape as an act of intercourse where the prosecutrix "is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution." It is this subdivision that is involved in this proceeding. The fact that the information was framed under the wrong subdivision of the section is immaterial. It is well settled that, regardless of the subsection alleged, if the proof brings the case within any of the subsections of § 261, the offense of rape has been successfully proved by the prosecution. People v. Craig, 17 Cal.2d 453, 110 P.2d 403; People v. Mummert, 57 Cal.App.2d 849, 135 P.2d 665.

It is the theory of appellant that the threats to call the police, to charge the prosecutrix with being a prostitute and to have her children taken from her, do not constitute either "force or violence" within subdivision 3, or "threats of great and immediate bodily harm" within the meaning of subdivision 4 of § 261. In this connection he cites People v. Crosby, 17 Cal.App. 518, 120 P. 441; People v. Fleming, 94 Cal. 308, 29 P. 647; People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11, and People v. Cavanaugh, 30 Cal.App. 432, 158 P. 1053. None of these cases is in point. In the Crosby case the conviction of rape was set aside because of misconduct on the part of the district attorney. The court also held that the evidence was sufficient to show lack of consent induced by the administration of narcotics. Purely by way of dicta the court held that evidence that the defendant threatened to "slap" the prosecutrix was not a threat of great bodily harm.

In the Fleming case, supra, the prosecution was for assault with intent to commit rape, which required proof of that specific intent. The conviction was reversed on that ground that, while the evidence showed that the defendant was desirous of having intercourse with the prosecutrix, there was no evidence that he intended to accomplish his ends by forceful means. The court stated, 94 Cal. at page 312, 29 P. at page 648: "It can hardly be said that the defendant used force to any degree, and, from all circumstances of the affair, it would appear that physical force was not an element in his mind in attempting to carry out his intentions. There was no duress upon the part of the prosecutrix, no fear of personal violence, for there were no threats of violence."

The same situation as to the evidence existed in the Mullen case, supra, also a prosecution for an assault with intent to commit rape. The conviction was reversed because, although the evidence showed that defendant was most eagerly bent upon conquest, "at no time did he make any threat of personal violence." 45 Cal.App.2d at page 301, 114 P.2d at page 13.)

In the Cavanaugh case, supra, a conviction for forceful rape was reversed for failure to instruct that if the consent of the prosecutrix had been secured solely because defendant had told the prosecutrix he was a police officer and would have her arrested if she did not consent, and not because of threats to do her great bodily injury, they must acquit. The court said, 30 Cal.App. at page 434, 158 P. at page 1056: "The mere threat to arrest her would not be a threat to use such force and violence as are described in section 261 of the Penal Code." The opinion discloses that the court was most distrustful of the story told by the prosecutrix in that case.

The above four cases, for several reasons, are not persuasive that the evidence in the instant case is insufficient. In the first place, the basic premise of appellant's argument is that the evidence shows that the sole reason why the prosecutrix consented to the act was because of the threats to call the police and charge her as a prostitute and thus have her children taken away. That is by no means a fair appraisal of the evidence. The evidence shows that the prosecutrix was reluctant to enter the room and was "pushed" into it by appellant; that appellant told her she was "not going to get out of here until you undress and go to bed"; that "you are not getting out"; that "he told me to keep still if I didn't want to get hurt"; that the prosecutrix "was scared he would hurt me. I didn't care about being hurt, I wanted to get home with my kids"; that she further testified "I was scared * * * I didn't know what to do." This evidence is reasonably susceptible of the interpretation that threats to do great bodily harm were made, and that the consent of the prosecutrix was secured as a result of such threats.

[2] In the second place, several of the cases cited by the appellant seem to reflect the old rule that in order to constitute a forceful rape the prosecutrix had to make the most vigorous and forceful resistance. That is no longer the law. The more modern view is well expressed in People v. Ford, 81 Cal.App.2d 582, 184 P.2d 524, 525, quoting from other cases, as follows: " 'The courts no longer follow the primitive rule that there must be resistance to the utmost.' People v. McIlvain, 55 Cal.App.2d 322, 329, 130 P.2d 131, 135. 'The resistance required in each case depends upon the circumstances of that case, such as the relative strength of the parties, the uselessness of resistance, the degree of force manifested and other factors. The resistance of the prosecutrix need only be such as to make nonconsent and actual resistance reasonably manifest.' People v. Burnette, 39 Cal.App.2d 215, 224, 102 P.2d 799, 804."

[3] In People v. Lay, 66 Cal.App.2d 889, 893, 153 P.2d 379, 381, the proper rule is stated in the following language:

"The question here is whether the court could reasonably have concluded from the evidence either that the prosecutrix resisted and her resistance was overcome by force or that she was prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution. Penal Code, § 261.

"* * * Submission induced by the fear specified in the Code is not consent. It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist." See, also, People v. Norrington, 55 Cal.App. 103, 202 P. 932; People v. Kinne, 25 Cal.App.2d 112, 76 P.2d 714.

[4] Tested by these standards it is quite clear that the evidence shows consent induced by threats of the type contemplated by the code section. The evidence is ample to sustain the conviction.

[5-7] The second contention of appellant is that it was serious and prejudicial error to have admitted into evidence the testimony of Josephine Lieb as to a prior rape committed upon her by appellant under circumstances substantially similar to the one charged. It is generally stated to be the rule that a defendant can be tried only for the offense charged, and that evidence of other independent crimes that has no direct tendency to prove a material fact involved in the crime charged is inadmissible. See cases collected 8 Cal.Jur. p. 58, § 167. However, to this rule there are several exceptions that are as well settled as the rule itself. In recent years these exceptions have been so extended that the rule appears to have become the exception and the exceptions the rule. See, People v. Peete, 28 Cal.2d 306, 169 P.2d 924, certiorari denied 329 U.S. 790, 67 S.Ct. 356; Id., 329 U.S. 832, 67 S.Ct. 490; note 35 Cal.L.Rev. 131. One exception that is well settled in law is that evidence of other crimes is admissible to show a pattern, scheme, design, project or plan of which the two crimes are a part. See discussion 8 Cal.Jur. p. 69, § 173. In such cases, inasmuch as the defendant has pleaded not guilty and thus put in issue all facts relating to the commission of the offense the evidence of the prior crime of a similar character is of value and admissible in that it tends to show a general plan, scheme or design which is of some direct probative value in proving that the crime of which defendant is charged was in fact committed by him. So

far as this particular exception is concerned the evidence must be restricted to other acts with a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he probably committed the act charged. See, generally, II Wigmore on Evidence, Third Ed., p. 265, § 357; 23 Cal.L.Rev. p. 530; 26 Harv.L.Rev. 656; 46 Harv.L.Rev. 954; 51 Harv.L.Rev. 988.

There are many examples of this exception. The following list of cases, while by no means complete, will serve to illustrate a few situations where this particular exception has been applied. In People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569, defendant was charged with the murder of his wife for her insurance. It was held that evidence tending to show that he had murdered a prior wife for her insurance was admissible to show a plan of murdering wives for their insurance. The same rule was applied in People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. In People v. Peete, 28 Cal.2d 306, 169 P.2d 924, the defendant was charged with the murder of her employer for her property, and under the general scheme or plan exception it was held that evidence was admissible that she had committed a prior murder to acquire the deceased's property and had served eighteen years in jail. In People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806, in a prosecution for the murder of three boys alleged to have been committed to hide the crime of sodomy it was held that evidence of the commission and attempts to commit sodomy on others, and evidence of other murders, was admissible to establish "a well planned scheme of appellant for abducting young boys in order that he might satisfy his abnormal desires, and then later kill them in order to cover up his crime." 209 Cal. at page 653, 289 P. at page 640, 70 A.L.R. 806. See, also, People v. Craig, 111 Cal. 460, 44 P. 186.

The general pattern, scheme and plan exception has frequently been held applicable to show previous burglaries, larcenies or thefts, where the prior offenses were committed under circumstances similar to the one charged (People v. Tibbitts, 35 Cal.App.2d 669, 96 P.2d 812; People v. King, 4 Cal.App.2d 727, 41 P.2d 593; People v. McGill, 82 Cal.App. 98, 255 P. 261; People v. James, 40 Cal.App.2d 740, 105 P.2d 947; People v. Lapierre, 205 Cal. 462, 271 P. 497; People v. King, 122 Cal.App. 50, 10 P.2d 89), or, under the same circumstances, to show prior forgeries (People v. McWilliams, 117 Cal.App. 732, 4 P.2d 601; People v. Cowen, 41 Cal.App.2d 824, 107 P.2d 659), or prior perjuries. (People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611). There are doubtless many other examples of the same rule.

[8, 9] In rape cases the courts have followed the general rule and also have recognized the general plan or design exception. Generally speaking, in such a prosecution, evidence of prior rapes committed on persons other than the prosecutrix is not admissible. See, People v. Whalen, 70 Cal.App.2d 142, 160 P.2d 560; see, also, annotation entitled: "Admissibility, in prosecution for sexual offense, of evidence of other similar offenses," 167 A.L.R. 565. But where the prior rape or attempt is committed under circumstances remarkably similar to the one charged the evidence is admissible to show a plan or scheme to commit the crime in that fashion, even though the prior rape or attempt was committed on a person other than the prosecutrix. In such cases the evidence that defendant committed the prior offense tends to prove that he committed the offense charged. A case quite similar to the instant one is People v. Cosby, 137 Cal.App. 332, 31 P.2d 218. There the defendant was charged with assault with intent to commit rape. The prosecutrix testified that she had placed an advertisement in a newspaper to secure work; that appellant telephoned her and asked her to call; that when she called he invited her to his room so that he could secure her references; that when she entered his room he attempted to rape her. It was held that evidence that on two prior occasions he had lured other women to his apartment under similar circumstances and attempted to ravish them was admissible. The court, after stating the general rule that such evidence is normally not admissible, declared that an exception to that rule was "that where several crimes are committed as part of one scheme or plan, all of the same general character, tending

to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, as tending to show logically that the crime in question was part of such common scheme." 137 Cal.App. at page 335, 131 P. 2d at page 220. The same rule was applied in a rape case in People v. Branch, 77 Cal.App. 384, 246 P. 811.

[10] In the present case the evidence of the prior rape falls within the exception. It is quite obvious that the defendant had formed a plan of approaching necessitous married women with children at this employment agency, and, by the promise to secure then a lucrative job, lured them to his room, where by threats to have them arrested and their children taken from them, and by the use of other threats, forced them to submit to him. The evidence of the prior rape committed under such circumstances corroborated the story of the prosecutrix and was of direct probative value in proving that defendant probably committed the crime charged in the fashion described by the prosecutrix.

The order denying the new trial and the judgment are affirmed.

WARD and BRAY, JJ., concur.

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83 Cal.App.2d 262

HORNEY v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY et al.

Civ. 13610.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1948.

Hearing Denied March 11, 1948.

1. Prohibition 🔑10(2)

Prohibition was the proper remedy to secure dismissal of a will contest on ground that court was without jurisdiction to proceed.

2. Wills 🔑223

Where provisions of Code of Civil Procedure refer to "actions", "proceedings", "judgments" or "decrees" and there is no provision in Probate Code on the subject, such provisions of Code of Civil Procedure in Part II are generally applicable to will contests. Probate Code, § 1233.

3. Wills 🔑307

The provision of Probate Code making applicable to probate proceedings provisions of Part II of Code of Civil Procedure did not render applicable to citation in will contest provision of Code of Civil Procedure requiring dismissal of action unless summons should be served and return made thereon within three years after commencement of action. Code Civ. Proc. § 581a; Probate Code, §§ 370, 380, 381, 1233.

4. Wills 🔑271

Where heir at law who had not been served with citation noticing contest of will filed a petition for partial distribution of estate within one year and three months alleging existence of will contest and seeking relief that could be granted only if will contest were on file, heir at law was not thereafter entitled to dismissal of will contest because of failure to serve citation upon her within three years. Probate Code, §§ 370, 381, 382.

5. Appearance 🔑9(1)
Dismissal and nonsuit 🔑60(2)

A voluntary appearance for any purpose other than to question jurisdiction of the court is general, and a general appearance within three years renders inapplicable codal provision requiring dismissal of action for failure to serve summons within three years. Code Civ.Proc. § 581a.

6. Prohibition 🔑10(2)
Wills 🔑271

Where heir at law upon whom no citation noticing will contest had been served filed petition for partial distribution in the estate alleging that will contest had been filed, trial court had jurisdiction of will contest and heir at law was not entitled to writ of prohibition to restrain further proceedings in the will contest on ground of lack of jurisdiction because of failure to serve the citation within three years. Probate Code, §§ 370, 381, 382.

◆

Prohibition proceeding by Nelty Lefranc Horney against the Superior Court of the State of California, in and for the county of Santa Clara, and others to restrain the Superior Court from proceeding further in a will contest in the estate of Marie Lefranc.

Alternative writ discharged and petition for a peremptory writ denied.

David M. Burnett and John M. Burnett, both of San Jose, for petitioner.

Burchard H. Styles and Elson L. Jones, both of Oakland, and R. G. Lean, of San Jose, for respondent.

PETERS, Presiding Justice.

Petitioner, Nelty Lefranc Horney, seeks by this proceeding in prohibition to restrain the Superior Court of Santa Clara County from further proceeding in a will contest in the estate of Marie Lefranc now pending in that court. It is the theory of petitioner that the trial court is without jurisdiction to proceed in that contest, except to dismiss, for the reason that no service of the citation noticing the contest after probate was made upon her within a period of three years from the filing of the contest. It is her contention that § 581a of the Code of Civil Procedure is applicable to such a proceeding and that under that section it was mandatory upon the trial court to dismiss the contest at least as to her upon her motion made after the three-year period had elapsed. The following time table gives the pertinent dates:

April 22, 1942—the will of Marie Lefranc was admitted to probate. Two executors were appointed, and, pursuant to the terms of a trust set up in the will, the Wells Fargo Bank was appointed trustee of that trust. Adele Masson was named in the will as the life beneficiary of the trust, and petitioner was to receive the corpus upon the death of Adele Masson if petitioner survived Adele and if Adele died childless. Adele is over fifty years of age and unmarried. Adele and petitioner are the next of kin of the deceased, both being nieces. The will named several individuals as the recipients of specific legacies.

October 20, 1942—Adele Masson, within the time permitted by law, filed a contest after probate alleging that Marie Lefranc lacked testamentary capacity. The clerk of the court on the day the contest was filed issued a citation directed to the executors, trustee and beneficiaries under the will, including petitioner.

November 5, 1942—on this date, after the citation had been served on the trustee, executors and one of the legatees, but not on petitioner, the executors and trustee filed their answer in the will contest.

January 6, 1944—petitioner filed a petition for partial distribution in the estate of Marie Lefranc. This petition alleged that Adele Masson had filed a contest of the will of Marie Lefranc; that petitioner was one of the two heirs of law of the deceased; that if the will contest was successful, she, the petitioner, would be entitled to one-half the residue of the estate as one of the two heirs at law; that if the will contest was not successful petitioner would then be entitled to the entire residue pursuant to the provision of the will of Marie Lefranc disinheriting any unsuccessful contestant. The petition prayed for partial distribution of half of the assets of the estate to petitioner.

October 20, 1945—three years from the date of the issuance of the citation expired. Petitioner alleges that the citation was not served on her within three years of its issuance, nor has it ever been returned to the court.

January 14, 1946—petition for partial distribution denied.

February 7, 1946—petitioner filed a notice of intention to move for a new trial in the partial distribution proceedings.

March 28, 1946—petitioner, through her attorneys, stipulated in writing with the attorneys for Adele Masson, the contestant in the will contest, and with the attorneys for the executors of the will, that the motion for a new trial should not be submitted until thirty days after the termination of the will contest.

June 10, 1947—petitioner appeared specially and upon notice moved for a dismissal of the contest on the ground that the citation was not served within the period prescribed by law. The motion was resisted and taken under submission.

June 20, 1947—while the motion to dismiss was under submission the contestant, Adele Masson, served on petitioner a notice of motion that on June 27th she, the contestant, would move the court for an order directing the service of the original citation upon petitioner, or for an order directing the issuance of an alias or supplementary citation on petitioner and another legatee, on the ground that they were proper parties for a complete determination of the controversy. Petitioner thereupon moved to quash the service of this motion upon her upon the ground that the trial court lacked jurisdiction.

June 27, 1947—hearing of motions continued to July 7, 1947.

July 7, 1947—motions heard and taken under submission.

August 11, 1947—the trial court quashed contestant's motion for an order directing the service of the citation on additional parties, but made an order directing the service upon petitioner, and another legatee, of the citation. The citation was thereupon served upon petitioner.

September 8, 1947—the trial court denied petitioner's motion of June 10, 1947, to dismiss the will contest. Petitioner thereupon noticed a motion for September 19, 1947, and served contestant, the trustee and executors, for an order quashing the order of August 11, 1947, directing service of the citation upon petitioner.

September 19, 1947—motion of petitioner denied, and petitioner given five days to appear and plead in the will contest.

September 22, 1947—this petition for a writ of prohibition filed in this court. On the same day this court issued its alternative writ.

[1] There can be no doubt that, if petitioner is entitled to a dismissal, prohibition is the proper remedy to secure such relief. Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357; Gonsalves v. Bank of America, 16 Cal.2d 169. 105 P.2d 118; see cases collected 9 Cal.Jur. p. 533, § 23.

The basic question presented is whether § 581a of the Code of Civil Procedure is applicable to a will contest. That section requires the dismissal of any action "unless summons shall have issued within one year" and "unless the summons shall be served and return thereon made within three years after the commencement of said action." The problem arises because this section appears in Part II of the Code of Civil Procedure, and § 1233 of the Probate Code provides that, as to matters of procedure: "Except as otherwise provided by this code, the provisions of Part II of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code." It is the theory of the petitioner that this section makes § 581a of the Code of Civil Procedure applicable to will contests, and that, under that section, since the citation was not served upon her within the three-year period, the proceeding must be dismissed.

It will be noted that § 581a of the Code of Civil Procedure refers to the issuance, service and return of a "summons." There is no such thing as a "summons" in a will contest. Section 380 of the Probate Code provides that any interested person, with certain exceptions not here involved, may contest the probate of a will any time within six months of its admission to probate. Section 381 of the Probate Code provides that upon filing the petition to contest a "citation must be issued" directed to the executor of the will and to all devisees and legatees mentioned in the will, and to all known heirs, directing them to plead to the contest within thirty days of service of the "citation." Section 382 of the same code provides that the "citation" shall be served and "proceedings had thereunder as in the case of a contest before probate." Section 370 of that code, referring to contests before probate, requires that the service of the "citation * * * shall be made personally or by publication in the manner provided by law for the service of summons in civil actions."

Thus it is quite apparent that, unless a "citation" can be held to be a "summons" within the meaning of § 581a of the Code of Civil Procedure, § 1233 of the Probate

Code does not make § 581a of the Code of Civil Procedure applicable to such contests.

[2] The general provisions of § 1233 of the Probate Code making Part II of the Code of Civil Procedure applicable to will contests as to matters of procedure "except as otherwise provided by this code," and its forerunner, old § 1713 of the Code of Civil Procedure, also so providing, have led to some confusion. It is by no means clear just what sections and provisions of the Code of Civil Procedure are thus made applicable to will contests. Several general observations, however, can be made. Wherever the provisions of the Code of Civil Procedure refer to "actions," "proceedings," "judgments" or "decrees," and there is no provision in the Probate Code on the subject, the courts have generally held that the provisions of the Code of Civil Procedure in Part II of that code, are applicable to will contests. Thus it has been consistently held that § 581 of the Code of Civil Procedure, referring to when "an action" may be dismissed, is applicable to will contests. Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536; In re Estate of Cook, 205 Cal. 581, 271 P. 1083; In re Estate of Knauft, 59 Cal.App. 536, 211 P. 29; In re Estate of Gurnsey, 61 Cal.App. 178, 214 P. 487; In re Estate of Matthiessen, 10 Cal.App.2d 323, 52 P.2d 248; In re Estate of Somers, 82 Cal.App.2d 757, 187 P.2d 433; see, also, O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621. It has also been held that § 583 of the Code of Civil Procedure providing for dismissal of "any action" for want of prosecution within a specified time is applicable to a contest after probate. In re Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102. In re Estate of Baker, 170 Cal. 578, 150 P. 989, § 385 of the Code of Civil Procedure referring to the abatement of an "action or proceeding" was held applicable to will contests. In San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379, at least the judge writing the main opinion held that § 389 of the Code of Civil Procedure providing for the bringing in of new parties where necessary to the decision of the "controversy" pending before the court was applicable to will contests, although this was "doubted" by the two judges signing the concurring opinion. In the Voyce case, supra, the holding of the judge writing the main opinion in the Orphan Asylum case was referred to with approval. There are undoubtedly other cases holding that § 1233 of the Probate Code (or its predecessor § 1713 of the Code of Civil Procedure) makes various procedural sections found in Part II of the Code of Civil Procedure applicable to will contests. But in none of the cases that we have found or to which we have been referred has it been held that the various sections in Part II of the Code of Civil Procedure regulating the issuance, service and return of a summons are applicable to will contests except where specifically made applicable by some provision of the Probate Code. In fact, in every case that we have found on this subject, where the point was directly presented, it has been held that the provisions of § 581a of the Code of Civil Procedure relating to the legal effect of failing to secure the issuance of or to serve a summons are not applicable to will contests. One of the leading cases on this subject is San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379. Here a contest was filed within the time then permitted by law, and a citation issued. The citation was served on all parties except the petitioner, a legatee. More than one year after the will was admitted to probate (one year being the time in which contests after probate could then be instituted and the time within which a summons in a civil action must issue) the petitioner moved to dismiss. The trial court denied the motion and ordered a new citation served on petitioner. This order petitioner sought to have annulled on certiorari, on the ground that the court was without jurisdiction to issue a citation after one year, as it is without jurisdiction in the case of a summons. It was contended that old § 1713 of the Code of Civil Procedure, now § 1233 of the Probate Code, made this result inevitable. All the judges agreed that a dismissal was not called for, and the majority opinion expressly held that the sections applicable to summons were not applicable to a citation. At page 451 of 116 Cal., at page

382 of 48 P., the majority of the court stated:

"But I think the statute shows on its face that no provision in regard to summons applies to citations. Everything in regard to citations is provided for in title 11 [of the Code of Civil Procedure—now the Probate Code]. Section 1707 states what it must contain; 1708 provides for its issuance; 1709, that it shall be served in the same manner as a summons. This would be unnecessary if the provisions as to the summons applied, and on that supposition no operation can be given this section. Unlike a summons, the length of the notice may be prescribed by the court; otherwise, it is five days. Section 1711. As a rule, its functions are very unlike those of a summons. It is simply a notice which may be molded to suit the occasion, and not a process which a party may sue out or not, and which, having sued out, he can serve when he pleases, provided it be done within three years.

"In the Bacigalupo Case [Bacigalupo v. Superior Court, 108 Cal. 92, 40 P. 1055], it is correctly said that the provision in regard to citation cannot be used for delay. Of course not, for it must be issued to notify the party interested of a day of hearing specially appointed by the court. It was therefore unnecessary to say anything about the time within which it can be issued. A summons, however, need not be issued at all unless the plaintiff wishes it, and then at any time within the year, and can be served at any time within three years thereafter. These can hardly be said to be provisions to prevent delay, and, as applied to the probate court, would be ridiculous. A proceeding in that court is expected to move continuously and quickly to an end. If applicable to proceedings in the probate court, their effect would be to authorize delay, not to prevent it.

"* * * The office of the citation, then, was not like that of a summons, to give the court jurisdiction. It was an extra protection provided by the statute, and, if the court still had jurisdiction of the proceeding, its power to issue the citation cannot be doubted."

A case even more directly in point is In re Estate of Simmons, 168 Cal. 390, 143 P. 697, where it was directly held that § 581a of the Code of Civil Procedure was not applicable to will contests. In that case a contest was seasonably instituted, but no citation issued. More than one year later a legatee moved to dismiss, and the contestant moved for relief from default under § 473 of the Code of Civil Procedure. If § 581a was applicable the court had no power to relieve from default. The trial court held that, although there was excusable neglect on the part of contestant, the failure to have the citation issued within a year under § 581a was jurisdictional, and dismissed the contest. This was reversed. It was pointed out that under old § 1328 of the Code of Civil Procedure a citation had to issue within a year of the filing of the petition. Under present law—§§ 370 and 381 of the Probate Code—it issues upon the filing of the petition. But even under old § 1328 the court held, 168 Cal. at page 395, 143 P. at page 699: "While section 1328 requires that the citation shall be issued within the year, there is no provision as there now is in the case of a summons (Code Civ.Proc., § 581a), prohibiting further prosecution of the proceeding, and requiring a dismissal for failure to comply with the requirement."

This very quotation was quoted with approval in Los Angeles First Nat. etc. Bank v. Superior Court, 94 Cal.App. 79, 84, 270 P. 710. In Stiebel v. Roberts, 42 Cal.App.2d 434, 109 P.2d 22, it was held that a citation differs fundamentally from a summons, while in Re Estate of Palm, 68 Cal.App.2d 204, 214, 156 P.2d 62, 67, it was held "that the application of the statutes with relation to summons does not govern the issuance of citations," and that the purposes and functions of the two are quite dissimilar.

There are rather important reasons why the legislature has seen fit not to make applicable to will contests § 581a of the Code of Civil Procedure, and the related sections dealing with the issuance of a summons. A summons in a civil action issues at the whim or caprice of the plaintiff at any time within one year of the filing of the complaint, and need not be served, if issued, for three years from that date. The citation in a will contest issues forthwith upon the filing of the contest. If issued but not served, or, if served, the probate court possesses inherent power to dismiss for failure to prosecute, and this might be done in less than the three-year period prescribed by § 581a. The legislature has unmistakenly indicated its desire that probate matters be heard and determined expeditiously. To hold that § 581a is applicable to such proceedings would be to foster and permit delay rather than to prevent it.

That the legislature never intended that § 1233 of the Probate Code should make § 581a of the Code of Civil Procedure applicable to will contests is clearly indicated by § 370 of the Probate Code. That section provides that the citation in a contest before or after probate shall be served "in the manner provided by law for the service of summons in civil actions." If § 1233 of the Probate Code made all sections of Part II of the Code of Civil Procedure relating to summons applicable to citations, this quoted provision of § 370 of the Probate Code would have been entirely unnecessary. By so providing the legislature clearly indicated that it did not intend the other provisions of Part II of the Code of Civil Procedure relating to summons to be applicable to citations.

[3] Based upon the above authorities and for the above-stated reasons it must be held that § 581a of the Code of Civil Procedure is not applicable to a will contest. It follows that the court was not required to dismiss (although it could have done so) for failure to serve the citation within three years. The trial court had power to relieve the contestant from default and to order that a new citation issue and be served on petitioner.

[4, 5] There is an additional reason why, in this case, the trial court acted well within its powers in refusing to dismiss. As will be seen by the table of dates, supra, the contest here involved was seasonably filed. A citation issued and was served on the executors, trustee and one of the legatees, and they duly answered. A little less than a year and three months after the contest was filed petitioner, who had not been served with the citation, filed a petition for partial distribution in the estate. This petition alleged the existence of the will contest and prayed for relief that could be granted only if the will contest were on file. In other words, this petition not only disclosed knowledge on the part of petitioner that the will contest had been filed, but asked for relief that could only be granted if this particular will contest was pending. Even if § 581a were applicable to this proceeding (which we have held it was not) this might well be held to be such an appearance so as to make inapplicable the three-year provision of that section. It is, of course, the law that even where § 581a is applicable a voluntary appearance for any purpose other than to question the jurisdiction of the court is general, and that a general appearance within the three years renders the section inapplicable. Merely applying for a continuance has been held to be a general appearance for this purpose. Zobel v. Zobel, 151 Cal. 98, 90 P. 191. The administration of an estate is an integrated proceeding. As was said in Re Estate of Dobbins, 36 Cal.App.2d 536, 539, 97 P.2d 1051, 1053: "The administration of an estate is one indivisible judicial proceeding from the order appointing the administrator till his discharge," and in Re Estate of Joseph, 118 Cal. 660, 662, 50 P. 768, 769: "The order admitting the will to probate is not final so long as proceedings may be taken to revoke the probate. In all subsequent stages the contest is but a part of the proceeding to probate the will, and is not a new and distinct proceeding. The subject-matter is the same, and the ultimate issue, to wit, whether the will in question should stand as probated, is the same." If this be so, when a defendant in a will contest appears by asking for a partial distribution that could be granted only because the will contest had been instituted it might well be held that such appearance renders § 581a inapplicable.

[6] It thus appears that whether § 581a is or is not applicable the trial court still had jurisdiction of this proceeding, and for that reason petitioner is not entitled to a writ of prohibition.

The alternative writ is discharged and the petition for a peremptory writ is denied.

WARD and BRAY, JJ., concur.

83 Cal.App.2d 296

MERCHANTS CREDIT ASS'N OF UNITED STATES et al. v. BROWN, Public Administrator, et al.

Civ. 15924.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1948.

Rehearing Denied Feb. 4, 1948.

Hearing Denied March 18, 1948.

1. Trusts 🔑110

Evidence sustained finding that attorney for decedent's estate, in procuring conveyance of realty belonging to decedent from holders of title thereto to attorney's corporate alter ego, acted in bad faith and with intent to defraud decedent's heirs and established that attorney and corporate alter ego were involuntary or constructive trustees and as such barred from any compensation for alleged services and not express trustees for benefit of creditors as they contended. Civ.Code, §§ *2221*, *2275*.

2. Attorney and client 🔑125

Evidence established that realty rightfully belonged to attorney for deceased mortgagee who, holding irrevocable general power of attorney from mortgagee waiving any accounting, instituted trust deed foreclosure actions, had certificates of sale made to mortgagee, and as attorney in fact assigned them to third persons who claimed no interest in the realty.

3. Equity 🔑65(2)

Evidence failed to establish any inequitable conduct of deceased attorney in fact with respect to realty acquired from his principal which, under clean hands doctrine, would preclude administratrix of his estate from obtaining equitable relief with respect to such realty.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Merchants Credit Association of United States, a California corporation, and another, against Ben H. Brown, as Public Administrator of Los Angeles County, etc., and others, for a declaratory judgment determining the rights of the parties with respect to certain realty, wherein Margaret M. Leonard filed a cross-complaint for declaratory relief. From an adverse judgment and an order denying a new trial, plaintiffs appeal.

Judgment affirmed and appeal from order dismissed.

Charles A. Sunderlin, of Los Angeles, for appellants.

Harold W. Kennedy, Co. Counsel, and Ernest Purdum and J. P. Wright, Deputy Co. Counsels, all of Los Angeles, for respondent Ben H. Brown as Public Administrator.

Vernon Bettin and Roscoe R. Hess, both of Los Angeles, for respondents Margaret N. Leonard, etc.

DORAN, Acting Presiding Justice.

The present action for declaratory relief was instituted by the Merchants Credit Association of United States, and Charles A. Sunderlin who is secretary-treasurer of such incorporated collection agency. Mrs. Sunderlin is president of the corporation; Mr. and Mrs. Sunderlin and a married daughter are the directors. As Mr. Sunderlin explained in an opening statement to the trial court: "Merchants Credit Association is simply a corporation to handle such parts of my law business as properly belong to the collection business." The trial court found that this corporation was, indeed, "the alter ego of the plaintiff Charles E. Sunderlin."

The record discloses that one Jack P. Leonard, an attorney at law, died March 23, 1942; that in 1941 Mr. Leonard had instituted three trust deed foreclosure actions for George N. White who died October 16, 1941. Judgments were obtained therein and sales made on August 5, 1941, by the Court Commissioner. On June 10, 1941, Mr. White had executed a general power of attorney to Jack P. Leonard, "for his use and benefit or benefit of said attorney hereby waiving any accounting therefor whatsoever, and irrevocable; by my demise or otherwise." Referring to this power of attorney, Mr. White had, on July 15, 1941, written to Mr. R. E. Allen, Court Commissioner, as follows: "In order to secure costs of sale, together with attorneys fees and other moneys expended in the foreclosure actions * * * you are hereby authorized and instructed to make sales, and give necessary titles, to my attorney Jack P. Leonard; who also holds my general power of attorney; to the mentioned parcels of real estate." The certificates of sale, however, ran to George White. On August 11, 1941, Mr. Leonard, as attorney in fact for George White, assigned the foreclosure certificates of sale of two of the properties to one Don Jose for a purported consideration of $3,000 ($300 and a note for $2,700). The following day the other piece of foreclosed property was assigned to Marie Reighley. These assignments were not delivered to the named assignees, and were not recorded by Mr. Leonard, but were later recorded by Charles A. Sunderlin in September and October, 1942.

George N. White, according to appellants' brief, "died without heirs," and on November 19, 1941, Ben H. Brown, Public Administrator, was appointed to administer the estate. Thereafter the Public Administrator corresponded with Attorney Leonard concerning the foreclosure actions handled by the latter for Mr. White. In a letter of March 12, 1942, Mr. Leonard referred the Public Administrator to the above-mentioned power of attorney executed by White to Leonard, "waiving any accounting therefore whatsoever", and took the position that "the administrator cannot demand anything that the person (White) could not himself demand." Apparently satisfied on this score, on April 20, 1943, the White Estate was closed by the Public Administrator's office as insolvent, and the administrator discharged.

Upon the death of Jack P. Leonard, March 23, 1942, Mrs. Leonard went to the office of Charles A. Sunderlin, attorney at law and appellant herein, and gave such attorney the keys to Mr. Leonard's office. Thereafter Sunderlin, in the words of respondents' brief which is supported by the record, "moved all of the files to his own office (Stat. p. 330, line 11) and had the telephone calls transferred to his office (Stat. p. 294, lines 15-17)." On August 7, 1942, Mr. Sunderlin called upon the Don Jose named as assignee of the foreclosure certificates of sale hereinbefore mentioned, and, according to Mr. Jose's testimony, stated that if the latter "would assign these papers to him (Sunderlin) through his connection with the Merchants Credit Association that he would be able to realize some money and give it over to the Leonards * * * I think the high point was that the taxes were due, and that they were likely to be dispossessed." Mr. Jose further testified, "I told him (Sunderlin) that the certificates of sale were assigned to me which I did for Jack Leonard and that I had no actual interest in them." Grant deeds covering two of the White properties were then executed by Don Jose to Sunderlin's alter ego, the Merchants Credit Association. A similar deed was secured by Attorney Sunderlin from Marie Reighley covering the other White property foreclosed by Jack Leonard.

After obtaining the deeds from Don Jose and Marie Reighley, the Merchants Credit Association placed loans on part of these properties, and according to appellants' brief, "sold the properties conveyed to it by the defendant Don Jose, and holds the legal title to a portion of lot 36 of Grant tract, Harold Way, Los Angeles, which was conveyed to it by the defendant Marie Reighley." Thereafter, in October, 1942, Attorney Sunderlin started probate proceedings for Mrs. Leonard in the estate of Jack Leonard, deceased, not listing these properties, and had the remaining small estate distributed to the widow. Mrs. Leonard testified that Sunderlin did not disclose the above-mentioned deeds nor the sales made of such properties, but that knowledge thereof was acquired by Mrs. Leonard from the tax assessor's office, and in April, 1945, certain disciplinary proceedings before the State Bar arising out of this transaction. There was further testimony by Mrs. Leonard that Sunderlin at first denied having sold these properties, and finally said: "Well, yes, I did, but I didn't get anything out of it."

On September 11, 1945, more than three years after the death of Jack P. Leonard, Charles A. Sunderlin and the Merchants Credit Association filed the present action, denominated a "Complaint for Declaratory Relief." This complaint alleges that the deeds from Don Jose and Marie Reighley were given to the Merchants Credit Association "as assignee for benefit of creditors," for attorney fees due or to become due to Charles A. Sunderlin, fees to the Merchants Credit Association, taxes, interest, etc., and "as assignee for the benefit of Charles A. Sunderlin and any other legal claimants to the proceeds that might be derived from the sale of the said properties." Plaintiffs also aver that from the sale of the properties conveyed by Don Jose the Merchants Credit Association derived the sum of $4,900; that expenditures amounted to $1,999.34, leaving net proceeds of $2,900. In respect to the property deeded by Marie Reighley, it is alleged that the Merchants Credit Association holds title to said real property as assignee to secure payment of various fees alleged to be due such association and Charles A. Sunderlin. The court was asked to define and determine "the rights and interests of the respective parties plaintiffs and defendants."

Margaret N. Leonard filed a cross-complaint for declaratory relief, alleging that Sunderlin had failed to account for certain fees collected from unfinished law business left by Jack P. Leonard; that Sunderlin had induced Don Jose and Marie Reighley to convey the properties and that appellants "at all times intended to appropriate to themselves the said parcels." Answers were filed by the Public Administrator and other defendants; that of Don Jose praying for cancellation of the $2,700 note given to Jack Leonard. Marie Reighley disclaimed any interest in the real property.

The trial court rendered judgment against the appellants Merchants Credit Association and Charles A. Sunderlin, and found that appellants "acted in bad faith in the handling of the three George White parcels and with the intent and purpose of disguising the facts with reference thereto from the heirs of the Leonard estate and with intent to defraud such heirs." The court further found "that due to the method of handling of the property by the plaintiffs, the plaintiffs are not entitled to any compensation * * * whatsoever," and that such handling and plaintiffs conduct "constitute a disservice to the estate of Jack P. Leonard and the heirs thereof, rather than any service thereto." Judgment was rendered in favor of Mrs. Leonard for $3,951.32 with interest, and appellants were ordered to convey the remaining parcel of real property to Margaret N. Leonard as administratrix. The Don Jose note was ordered cancelled.

[1] According to the appellants' brief, one of the important questions involved on this appeal is whether the Merchants Credit Association, "trustee of the express trust, involved in this action (is) entitled to compensation for its services in the management of the trust estate, and remuneration for its legal expenses, and for the legal services rendered for the trust estate, by the plaintiff Charles A. Sunderlin, and for bringing of the declaratory relief action?" Appellants' entire brief is, in effect, based upon the theory of an "express trust." However, as pointed out by respondents, "Plaintiffs are not express trustees but involuntary or constructive trustees and as such are barred by Section 2275 of the Civil Code from receiving compensation for alleged services." Section 2275 provides that "An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article." Aside from appellants' repeated assertions, the record is barren of anything which would indicate the creation of an express trust.

According to Section 2221 of the Civil Code, "a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." In the instant case, however, there is evidence that Attorney Sunderlin, although ostensibly acting as attorney for Mrs. Leonard, went to Don Jose and Marie Reighley and secured ordinary grant deeds of the three White properties to the Merchants Credit Association. These deeds were not in the form of trust indentures but absolute conveyances. Sunderlin then, without communicating the facts to Mrs. Leonard, proceeded to secure loans on these properties, and to dispose of two parcels without securing court approval or sanction of the parties interested. While it is true that much of this evidence is contradicted by Mr. Sunderlin, the record discloses substantial evidence to support the trial court's finding that Sunderlin "acted in bad faith" and "with intent to defraud such heirs." Obviously an express trust does not create itself, nor can a so-called trustee create such a trust for the benefit of such trustee.

[2] The appellant contends that "The estate of Jack P. Leonard, Deceased, has no right, title or interest in the real properties or proceeds of sale." In this connection it is argued that Leonard, "acting in a fiduciary capacity, as attorney and attorney in fact for the late George N. White, could not by undue influence, gift, power-of-attorney, conveyance, subterfuge, circumlocution or otherwise acquire for himself or his family the real properties of his client * * * without an adequate consideration." Appellants' brief then inquires whether it is fraudulent for Sunderlin "to refuse to consummate the fraud of a deceased attorney-in-fact, whose estate he represents, the estate of Jack P. Leonard, deceased, to wrongfully acquire the properties of his principal, the late George N. White, by bogus and fictitious conveyances; and to bring an action in declaratory relief to adjudicate the question of equitable ownership?"

Appellants' attempt to shift the blame to the decedent, Jack P. Leonard, is without support in the record. In the letter of January 21, 1942, written by Leonard to the Public Administrator, occurs the following passage which was omitted in the version contained in appellants' brief: "Prior to my own marriage about fourteen years ago, we chumed together a great deal for some years. He (George White) was un-married and allways told me that he had no living relatives. * * * He also stated at the time and a number of times in the past that he had no one else to remember as he had no relatives, and that upon his passing I was to settle up his business, pay all costs and expenses of the foreclosures together with some other confidential matter, and to retain for myself whatever was remaining." The irrevocable power-of-attorney which White then executed to Leonard, providing that no accounting was to be required of Leonard, appears to have been consistent with the facts as stated in the above letter.

Notwithstanding appellants' insistence that the property belonged to George White, the record indicates no particular desire to restore the property to the George White estate. When the trial judge inquired why, if it belonged to White, the property wasn't "assigned back to George White," Sunderlin's answer was: "Because it is involved in controversy here where assignments were made to Don Jose and Marie Reighley." It was Sunderlin who had caused these assignments to be recorded and who then had secured the grant deeds from the assignees to the Merchants' Credit Association. It has already been noted that the trust theory and the filing of the action for declaratory relief based upon the theory of an assignment for the benefit of creditors did not materialize for three years. To the trial court's inquiry, "Why did you wait three years," Attorney Sunderlin's reply was: "It wasn't my responsibility. It was the responsibility of Ben Brown (Public Administrator) to take care of the County's business, to care of the George White." However, as hereinbefore indicated, the record contains substantial evidence that the property in question was properly an asset of the estate of Jack P. Leonard, deceased, and that George White had so intended.

[3] What has already been said will likewise dispose of appellants' argument that Margaret N. Leonard, as administratrix, "does not come into this equity court with clean hands. Her claims of title and interest are based upon the unfaithful conduct of the late Jack P. Leonard." As respondents' brief points out: "There is no indication in the record that Mr. Jack P. Leonard, if he had lived, would have gone into court with any unclean hands" in respect to the property in question, and none can be imputed to Mrs. Leonard. Indeed, the allegation of unclean hands comes with little grace from the appellants in view of the evidence supporting the trial court's finding that appellants "acted in bad faith * * * with the intent and purpose of disguising the facts * * * and with intent to defraud."

There is likewise no merit in appellants' insistence that irregularities, abuse of discretion, etc., prevented plaintiffs from having a fair trial. The trial court is charged with making "false and fraudulent findings"; respondents' attorneys are accused of having "perverted and obstructed justice"; the Public Administrator was influenced by "legal chicanery." According to appellants' brief, "Justice had forsaken the courtroom long before the day of judgment." Of all this the record presents no evidence. Nor is reversible error made to appear in any of appellants' contentions.

The judgment is affirmed and the attempted appeal from the order denying a motion for a new trial is dismissed.

WHITE, J., concurs.

YORK, P. J., did not participate.

BURTNETT v. KING et al.*

Civ. 13505.

District Court of Appeal, First District,
Division 2, California.
Jan. 20, 1948.

Hearing Granted March 18, 1948.

1. Divorce 🔑203

In action for divorce, where defendant has defaulted, award of alimony or of community property, when facts pleaded are sufficient to support the award, is within court's jurisdiction and therefore not void, even though there is no prayer for such award and decree for that reason is vulnerable to direct attack by appeal or otherwise. Code Civ.Proc. § 580; Civ.Code, § 146, subds. 1, 2.

2. Divorce 🔑203

If complaint contains no allegations concerning community property, attempt to award it in a default divorce proceeding is void, but, where complaint contains appropriate allegations putting in issue the community character of the property, judgment awarding it in a default proceeding is not void, though complaint contains no prayer for such relief. Code Civ.Proc. § 580; Civ.Code, § 146, subds. 1, 2.

3. Divorce 🔑203

Where wife's complaint alleged that home of parties was community property, and prayer of complaint, though it did not ask for an award of community property, did contain a prayer for an order restraining husband from being on or at the home of the parties, and husband defaulted, divorce decree awarding home to the wife was not void, and husband, in action to quiet title to a one-half interest in the realty against purchasers of the home, could not attack divorce decree. Code Civ.Proc. § 580; Civ.Code, § 146, subds. 1, 2.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Edward M. Burtnett against Ellijah B. King and another to quiet title to a one-half interest in realty. From the judgment for defendants, plaintiff appeals.

Judgment affirmed.

Robt. E. Hatch, of San Francisco, for appellant.

Royal E. Handlos, of San Francisco, for respondents.

DOOLING Justice.

In 1944 Marion Burtnett filed a complaint for divorce against her husband Edward M. Burtnett on the ground of his extreme cruelty. The complaint alleged that the home of the parties was community property. The prayer of the complaint did not ask for an award of the community property but it did contain a prayer for an order restraining the defendant "from being upon or at the home of plaintiff and defendant." The husband defaulted and by its interlocutory decree of divorce the court awarded the home property to the wife. The husband did not appeal from or otherwise directly attack this decree by any proceeding in the action for divorce.

Mrs. Burtnett subsequently conveyed the home property to one Lagarmarsino who in turn conveyed it to the respondents. Plaintiff herein, Edward M. Burtnett, thereupon commenced this action against the respondents to quiet title to a one-half interest in the property. The court gave judgment for respondents and plaintiff appeals.

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* Subsequent opinion 196 P.2d 927.

Appellant's position is that the portion of the default divorce decree awarding the community property to Mrs. Burtnett is absolutely void and for that reason subject to collateral attack. He relies on the language of section 580 of the Code of Civil Procedure: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint."

[1] Respondents cite and rely on Parker v. Parker, 203 Cal. 787, 266 P. 283; Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605; and Grant v. Grant, 52 Cal.App.2d 359, 126 P.2d 130, for the proposition that in an action for divorce, as distinguished from other types of action, where defendant has defaulted an award of alimony or of community property when the facts pleaded are sufficient to support the award, is within the jurisdiction of the court and therefore not void, even though there is no prayer for such award and the decree for that reason is vulnerable to direct attack by appeal or otherwise, under Code Civ. Proc. sec. 580.

As to alimony awards this rule is well settled. In addition to the cases above cited see Bowman v. Bowman, 29 Cal.2d 808, 812, 178 P.2d 751; Miller v. Superior Court, 9 Cal.2d 733, 740, 72 P.2d 868; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362. The rule is succinctly stated in Bowman v. Bowman, supra, 29 Cal.2d, at page 812, 178 P.2d at page 754:

"Plaintiff need not rely solely upon the sufficiency of her complaint and prayer, however, since it is established that if the relief in excess of prayer is alimony, the judgment, although erroneous, is not void."

The reason for this rule insofar as an award of alimony is concerned is stated in Parker v. Parker, supra, 203 Cal. at page 793, 266 P. at page 285: "That an award of alimony is so germane to the cause of action for divorce as that, under a prayer for general relief, the court would have jurisdiction to make it even though error might thereby be committed in exercise of such jurisdiction."

The disposition of the community property of the spouses would seem to be equally germane to the cause of action for divorce. Section 146, Civil Code, subdivisions 1 and 2, provides:

"In case of the dissolution of the marriage by decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows:

"One. If the decree be rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

"Two. If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties."

This section is not only mandatory in form but occurs in the same article of the code as do the provisions for alimony and support.

[2] It must be conceded that if the complaint contains no allegations concerning community property the attempt to award it in a default divorce proceeding is absolutely void. Lang v. Lang, 182 Cal. 765, 190 P. 181. But where the complaint contains appropriate allegations putting in issue the community character of the property the court's judgment awarding it in a default proceeding is not void although the complaint contains no prayer for such relief. In Horton v. Horton, supra, 18 Cal.2d 579, 116 P.2d 605 the court expressly so held. In that case the court distinguished Lang v. Lang, supra, and like cases in the following language (18 Cal.2d page 582, 116 P.2d page 607):

"Examination of these cases reveals that they were concerned with awards referable to matters which the respective complaints either failed entirely to mention or included in limited terms narrower in range than the pertinent provisions of the decree."

[3] In the Horton case there was no prayer for an award of the community

property, the only prayer directed to community property being: "For an order restraining dissipation of the assets by the husband." 18 Cal.2d page 583, 116 P.2d page 607. In the case before us, if this is important, there was a similar prayer that the husband be restrained from interfering with the wife's possession and occupancy of the home.

While it was dictum in the particular case the court in Grant v. Grant, supra, 52 Cal.App.2d at page 362, 126 P.2d page 132, correctly summarizes the holding in the Horton case in the following language:

"If a complaint in a divorce action presents by appropriate allegations issues relative to property rights but the prayer seeks no relief relative thereto a decree purporting to dispose of such property rights after defendant's default has been entered is not void and is not subject to collateral attack but is voidable and subject to correction on a motion for a new trial or reversal or modification upon appeal."

The judgment is affirmed.

NOURSE, P. J., and GOODELL, JJ., concur.

CHELINI v. NIERI et al. *

Civ. 13420.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1948.

Hearing Granted March 11, 1948.

1. Appeal and error 🔑1039(13)

A material variance between pleading and proof can be prejudicial where there is surprise and where the adverse party has been misled or handicapped in preparing his case.

2. Appeal and error 🔑1039(13)

In action against undertaker for breach of contract to embalm body of plaintiff's mother, overruling of undertaker's objection to plaintiff's evidence concerning alleged agreement by undertaker to preserve the body for a long period of time and to furnish a hermetically sealed casket, was not prejudicial, although complaint alleged merely breach of contract to embalm the body properly and to furnish a metal casket, where undertaker was not handicapped in his defence.

3. Appeal and error 🔑1026

Before judgment will be reversed because of error, improper ruling, or defect, they must appear to have been prejudicial and to have caused substantial injury, and it must appear that a different result would have been probable if such error, ruling, or defect had not occurred or existed. Code Civ.Proc. §§ 469, 475; Const. art. 6, § 4½.

4. Appeal and error 🔑1050(1)

In action against undertaker to recover damages for a breach of contract to embalm plaintiff's mother, on ground that undertaker promised embalming that would preserve the body for a long period of time and agreed to furnish a hermetically sealed casket, admission of cemetery's rule that bodies will not be allowed to remain in receiving vault unless in a hermetically sealed casket, was not prejudicial error, where undertaker produced an employee of cemetery as a witness who testified that such rule was not in force at time in question.

5. Dead bodies 🔑9

In action against undertaker to recover damages for a breach of contract to embalm plaintiff's mother, evidence of physicians was sufficient to establish that discovery by plaintiff that his mother's body had decomposed, temporarily aggravated plaintiff's preexisting condition of high blood pressure with resulting impairment to the circulatory system.

6. Dead bodies 🔑9

An undertaker who does not use professional skill and care in the embalming of a body, is liable in tort for negligence.

7. Trial 🔑241

Giving of instruction to jury concerning statute respecting measure of damages for breach of an obligation arising under contract is error, unless qualified by statute providing that no person can recover a greater amount in damages for breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases specified in statutes dealing with exemplary damages and penal damages. Civ. Code, §§ 3300, 3358.

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* Subsequent opinion 196 P.2d 915.

8. Appeal and error ⚩1064(2)
Trial ⚩194(11)

In action against undertaker to recover damages for breach of contract to embalm plaintiff's mother, damage instructions which flatly told jury that contract was as contended by plaintiff, and that plaintiff was entitled to recover for physical suffering and illness proximately caused by undertaker's breach of contract, were prejudicially erroneous. Civ. Code, §§ 3300, 3358.

9. Dead bodies ⚩9

Undertaker was not liable for exemplary damages for alleged breach of alleged contract to embalm body so that it would be preserved for a long period of time, and to place it in a hermetically sealed casket. Civ. Code, § 3294.

10. Damages ⚩89(2)

Generally, exemplary damages for breach of contract are not recoverable, even though the breach complained of be wilfull. Civ. Code, § 3294.

◆

Appeal from Superior Court, San Mateo County; Clark Clement, Judge.

Action by August Chelini against Silvio Nieri and John Doe Johnson, to recover general and exemplary damages for breach of contract to embalm the body of plaintiff's mother. From an adverse judgment defendant Silvio Nieri appeals.

Judgment reversed.

J. W. Coleberd, of South San Francisco, and R. A. Rapsey, of San Bruno, for appellant.

Melvin M. Belli, Jonathan H. Rowell and Laurenz Krueger, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment after jury verdict in favor of plaintiff awarding $10,000 general damages and $900 exemplary damages for breach of defendant's contract to embalm the body of plaintiff's mother.

The complaint alleged that defendant Nieri was a licensed funeral director and undertaker in San Mateo County, engaged in practicing his profession in South Francisco; that defendant Johnson was similarly qualified and was an employee of defendant Nieri; that Caroline Chelini, mother of plaintiff, died in San Francisco December 11, 1943; that on or about December 15, 1943, plaintiff made an oral agreement with defendant Nieri whereby defendant agreed to prepare and embalm the remains of Caroline Chelini in a good and workmanlike manner, and to do all things necessary for properly embalming said remains, including the supplying of a metal casket and to perform all services and do everything essential for properly depositing said remains in a crypt in Cypress Lawn Memorial Park; that plaintiff agreed to pay Nieri therefor the sum of $900, which was paid on or about December 15, 1943 as provided; that defendant Nieri without the knowledge or consent of plaintiff engaged defendant Johnson to embalm the remains of Caroline Chelini, and the defendant Johnson did embalm said remains; that defendants performed the services and supplied the materials so negligently, unskillfully and carelessly, and wilfully that the remains of Caroline Chelini developed into a "rotted, decomposed and insect and worm infested mass"; that such acts were in breach and violation of the oral contract; that plaintiff was thereby specially damaged in the sum of $900, the amount paid to defendant Nieri; that plaintiff discovered the condition of the remains of his mother July 13, 1945, and as a direct and proximate result of such discovery, plaintiff became "immediately inflicted with a serious impairment of his heart and circulatory system", which he alleges is incurable and permanent; that immediately upon the discovery of the facts herein alleged and as a proximate result thereof, plaintiff became ill, suffered nervous fatigue, lost weight and became subject to fainting spells; that prior to said discovery plaintiff was a healthy and normal person not subject "to heart afflictions or any of the symptoms or results thereof, or to fainting spells, or and of said other conditions."

At the opening of the trial defendants' motion to have plaintiff elect against which defendant he would proceed was granted and plaintiff elected to proceed against defendant Nieri.

Plaintiff testified that his mother died Saturday December 11, 1943 at his home in San Francisco at the age of 99 years, 7 months. He called defendant Nieri, a South Francisco undertaker and a personal friend of plaintiff, who came to the home accompanied by his embalmer, Mr. Johnson. Plaintiff informed defendant that his mother wished to be buried where no ants or other bugs could get at her. He told Nieri that he had $1,500 of his mother's money which he intended to put into her funeral, that he wanted the best embalming and a hermetically sealed casket, that he intended to place his mother's remains in a sealed lead box which he himself would make after the war, and pending such time her remains were to be placed in a crypt. They talked about the embalming and to plaintiff's inquiry as to how long the body could be preserved, defendant replied "Practically forever. We got a new method of embalming that we will put on her, and it will keep almost forever." Plaintiff asked if that wasn't a long time, to which defendant replied, "They embalmed Caruso, and they embalmed Lincoln that way, * * * and we have a new method of embalming * * * We can do a first class job, and she will keep almost forever." The following day plaintiff and his wife called at the Nieri's undertaking establishment to select a casket. Having agreed with his wife that a certain metal casket was the most attractive, plaintiff asked defendant if it was a hermetically sealed casket. Defendant, he asserted, replied, "Oh, yes, that is the finest thing there is, that is a bronze casket". Defendant told him that the casket with the cost of the entire funeral expenses included would be $875. Plaintiff who was a skilled mechanic, admitted that at the date when he picked out the casket he knew what "hermetically sealed" meant, but maintained that he was so grief stricken that he believed defendant's statement and did not examine the casket's construction.

After his mother was placed in the crypt in Cypress Lawn Memorial Park, plaintiff made numerous visits to the cemetery. Five months after the funeral he noticed ants around the crypt. The cemetery attendants assured him that the insects came from the flowers and had them sprayed, but on later visits he again noticed the ants. He talked to Nieri about it, and he assured him, plaintiff testified, that his mother was in a hermetically sealed casket, that she would last practically forever. Plaintiff finally had the casket opened in the presence of his wife, family doctor, defendant's embalmer Johnson, and a cemetery official. The remains were badly decomposed. That night plaintiff felt ill, got up with a sensation of terrific pressure, lost his balance and fell, cutting his face. The next day he went to his doctor, who found plaintiff's blood pressure to be 230, advised him not to work, and prescribed medicine and diet.

Defendant Nieri testified that nothing was said about placing the body in a temporary resting place and moving it later. The arrangements in the beginning had been for burial in Holy Cross Cemetery, and on Monday the undertaker was informed by plaintiff that he had changed the burial arrangements from Holy Cross to Cypress Lawn Cemetery. The death notices, defendant testified, had already appeared designating Holy Cross Cemetery as the place of burial and scheduling the funeral from Epiphany Catholic Church. Nieri said that plaintiff told him on Monday, December 13, that the church arrangements for the funeral were cancelled, as he had learned that since he was a divorced man he could not be buried in Holy Cross Cemetery with his mother. Defendant testified that plaintiff had not demanded a hermetically sealed casket.

Defendant's embalmer, Johnson, testified in detail as to the procedure followed in embalming the body of plaintiff's mother. The dean of the San Francisco College of Mortuary Science stated that the procedure followed by Johnson was intelligent and skillful. This expert stated that no embalmer could make a prediction as to how long any body would remain in a state of preservation due to the many factors entering into decomposition, and the condition of a body whether a day, a month, or a year after embalming, in no way indicates anything in regard to the propriety of the procedure used, as there are cases where severe decomposition sets in 24 hours after the most thorough type of embalming. Four other embalmers also approved the procedure used by Johnson. O'Neill, the embalmer who testified for plaintiff stated that since he had not seen the body of plaintiff's mother, he could not say whether or not proper procedure was used, nor could he say that any decomposition found in the body of plaintiff's mother after 19 months entombment was due to lack of proper embalming.

Respondent pleaded an oral contract and alleged a breach of this contract in performing the embalming so negligently, carelessly and wilfully that the body deteriorated. None of respondent's witnesses offered any proof that the embalming procedure was not carried out with skill and care. Appellant's expert witnesses testified that the embalmer's procedure conformed to the highest standards as practiced by the profession in the community. As noted above, plaintiff's expert would not venture an opinion whether or not proper procedure was used without having seen the body. Appellant contends, therefore, that respondent has failed to prove the essential allegations of his complaint, in that the evidence will not sustain proof of a breach of contract, no negligence having been shown. However, there is an allegation that the contract was "wilfully" breached. Appellant Nieri testified that he had no intention of attempting to have the body embalmed except in the usual way so that it would be properly preserved during the period required for the funeral, that no special instructions were issued to Johnson advising him that this case was different from any other. He produced experts to prove that it is impossible to guarantee preservation of a body for a long period of time. He denied, of course, that he made a contract to preserve the body for any period longer than that required in the case of an ordinary funeral. But if the jury found the terms of the contract in accordance with plaintiff's evidence, than there was sufficient evidence of breach in Nieri's admissions that he did not intend to embalm this body in a manner different from the usual procedure, and in Johnson's testimony that no special instructions were issued to him in regard to the body.

[1] Appellant complains that although the plaintiff in his amended complaint alleges a breach of contract to properly embalm the body of his mother and to furnish a metal casket, he endeavored in his testimony to make it appear that the contract was to preserve the body for some long period of time and to furnish a hermetically sealed casket. He contends that the ruling of the court was erroneous in admitting evidence to the effect that respondent requested and appellant agreed to furnish a hermetically sealed casket, and although it is not clear from appellant's brief why the ruling is considered prejudicial, we assume that appellant is complaining of a material variance between pleading and proof. It is true such variance can be prejudicial where there is surprise and where the adverse party has been misled or handicapped in preparing his case. As was said in Swanson v. Hempstead, 64 Cal.App.2d 681, at page 683, 149 P.2d 404, at page 405: "Where * * * the judgment rests upon the determination of issues which were neither foreshadowed by the pleadings nor understood by the parties to be in dispute at the trial, and which determination is the result of one party's failure to produce evidence of whose need he has had no warning, we have a case where the departure from the pleadings may not be merely technical, but substantial, resulting in a miscarriage of justice."

[2, 3] In the instant case when appellant's objection to the admission of evidence of a hermetically sealed casket was overruled, he made no further attempt to keep out such testimony. He did not advise the court that he was surprised or prejudiced, that he would be handicapped in his defense, nor did he ask for a continuance in view of this unforeseen development. From his conduct, we can only infer that he was raising a technical objection and was not in fact surprised. The same may

be said in regard to his argument against admission of testimony of an agreement for preservation of the body for a long period of time. Such an embalming contract is certainly highly unusual, and an allegation to the effect that defendant had agreed to embalm the remains in a good and workmanlike manner and do all things necessary for properly depositing said remains in a crypt, ordinarily would not advise a defendant that he was being charged with a failure to embalm a body so as to insure permanent preservation. However, at the trial, appellant did not contend that he was prejudiced by the admission of such testimony. Nowhere in his brief does he argue that he was unprepared for such a development or that the court deprived him of an opportunity to secure the necessary evidence to meet the case presented by respondent. Appellant, having denied the making of a contract for permanent preservation, produced several embalmers as expert witnesses to testify that undertakers did not enter into such contracts, and that it was impossible for an embalmer in good faith to guarantee the preservation of a body for any considerable length of time. Appellant does not contend that he would have prepared his defense differently had the complaint been more specific in describing the type of metal casket and the type of embalming contracted for, or had it been so amplified by amendment. "It must appear from the record that the error, improper ruling, or defect was prejudicial and caused substantial injury before the judgment rendered may be reversed or be held to be affected by it; and it must further appear that a different result would have been probable if such error, ruling, or defect had not occurred or existed. * * *" (Murnane v. Le Mesnager, 207 Cal. 485, 279 P. 800, 804; Meier v. Meier, 71 Cal. App.2d 502, 162 P.2d 950; Code Civ.Proc., secs. 475, 469; Calif.Const. sec. 4½ art. VI.)

[4] Appellant asserts that error was committed in the admission in evidence of plaintiff's exhibit No. 2, an excerpt from the rules and regulations of Cypress Lawn Memorial Park: "9-D. No remains will be allowed to remain in the Receiving Vault unless they are in a hermetically sealed casket." Assuming the admission was error, no prejudice resulted, since appellant produced as a witness an employee of Cypress Lawn who testified that rule 9-D was not in force in December 1943, and that during the war period Cypress Lawn accepted caskets in the receiving vault crypts that were not hermetically sealed.

[5] Respondent alleged in his amended complaint that as the direct and proximate result of the discovery of the condition of his mother's remains, he became immediately afflicted with a serious impairment of his heart and circulatory system, and that such injury is permanent. Appellant states that although respondent testified that he had been a healthy normal person prior to the discovery, and suffered from high blood pressure immediately thereafter, he made no proof of impairment to his heart or circulatory system, nor did he prove that his permanent condition of high blood pressure resulted from his inspection of the remains after their removal from the crypt. It is true that the medical testimony offered by expert witnesses for both appellant and respondent leads to only one conclusion—that the permanent condition of high blood pressure is not known to be caused by sudden shock. Both doctors agreed that respondent was suffering from high blood pressure, and the testimony of respondent's own physician seems to establish that the shock was not the cause of this permanent condition. But granting that the proof fails to establish that respondent's condition of high blood pressure was originally caused by the shock, if there is evidence from which the jury might have found aggravation of a preexisting condition which caused permanent injury, then recovery may be had. Both doctors agreed that shock can cause temporary elevation of the blood pressure. Such temporary elevation would no doubt carry possibility of greater injury to a person with abnormally high blood pressure than to one with normal pressure. Respondent's physician testified that such a shock "would exaggerate his condition considerably", that it "would do him no good" and "would accentuate his trouble". On redirect examination respondent's physician was asked: "The high blood pressure that is incident

to shock, and also what you call cerebral spasm—that does leave definite impairment on the circulatory system?" A. "It leaves some impairment." The medical expert for the defense stated that if respondent were his patient, he would advise him not to work at the present time, and not to have emotional or traumatic shock. There is, therefore, evidence in the record of temporary aggravation of a preexisting condition and evidence from which the jury could have inferred impairment to the circulatory system resulting from such aggravation. The evidence of impairment is, indeed, lacking in detail, and no attempt was made to bring out the extent of the disability attributable to such impairment.

[6] But all these factors are of minor importance in view of the question of the measure of damages which we deem controlling. If respondent had been able to prove the want of professional skill and care in the embalming of the body he would have had an action in tort for negligence. But, as we have said, all the evidence unmistakably proved that the methods used conformed fully with the standards of care in the embalming profession prevalent in the community. Respondent's case is, therefore, not one for negligent misconduct, but one for breach of a special contract to perform a duty outside of and beyond the scope of the prevailing standards of the profession. Thus the instructions complained of relating to the measure of damages go to the very heart of the contest and, since they were prejudicially erroneous they require a reversal of this judgment.

The jury was instructed in the terms of sections 3281, 3282, and 3283 of the Civil Code. Immediately following the reading of these sections, at plaintiff's request an instruction was given as follows:

"You are further instructed that section 3300 of the Civil Code of California provides as follows:

"'Any person injured through the unlawful act or omission of another person is entitled to recover money therefor, which is called damages'."

Of course section 3300 does not contain any of this language. The court was apparently confused with the provisions of section 3281. Section 3300 is the section applicable here and the measure of damages there outlined should have been given to the jury. It reads: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[7] But this section is not complete and it would have been error to have given it without also instructing the jury in the terms of the qualifying section 3358 which reads: "Notwithstanding the provisions of this chapter, *no person can recover* a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages, and [* * * exceptions not pertinent here]." (Emphasis ours.)

Subsequent to the reading of the code sections the court instructed the jury in the following language which appellant attacks as erroneous:

"You are instructed that in an action such as this the law does not require that there be physical contact with the body of a person to constitute a cause of action for personal injury. When a bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty.

"Therefore, the plaintiff's cause of action here, if any, arises from his relationship to the deceased, and from the effect, if any, of the discovered condition of his mother's body upon the plaintiff personally.

"You are instructed, if you find that the defendant Nieri, either on the part of himself or through his employee, Johnson, was guilty of an unlawful or negligent act or omission which proximately caused or contributed to the illness or physical suffering of the plaintiff, Chelini, that such illness or physical suffering amounted and amounts to a personal injury to the plaintiff, even though no physical contact was had between him and the defendant Nieri."

As we have said the evidence does not sustain the commission of an "unlawful" act. Respondent's whole case rests on the charge that appellant failed to carry out an oral contract to perform a duty in an unusual manner and to guarantee the result. Hence the "omission" referred to in the complaint and in section 3281 of the Civil Code is the foundation of the right of recovery. But such "omission" is the failure to perform the special contract according to its terms. Having elected to instruct the jury on sections 3281 et seq. of the Civil Code, the terms of sections 3300 and 3358 should have been added.

Had the court instructed the jury in the terms of these sections then it would have been proper to interpret them by way of further instructions. In the instant case the court correctly stated the special rule applicable to contracts of the type which plaintiff attempted to prove in an instruction quoting from the case of Westervelt v. McCullough, 68 Cal.App. 198, at page 208, 228 P. 734, at page 738, to the effect that where "the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach." We see nothing in this rule which conflicts with the above code sections, for if a contract is directly concerned with matters affecting the health, comfort or peace of mind, it is reasonable that the loss of health or continued comfort should be compensable in damages.

The rule of the Westervelt case (a case in which $500 damages were allowed for injuries to health resulting from failure to perform a contract to provide an elderly woman with a home for the remainder of her life) is an application to this type of case of the well recognized rule of Hadley v. Baxendale, 9 Ex. 341, 26 Eng.L. & Eq. 396 [156 Eng.Reprint, 145], that "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, *which they would reasonably contemplate,* would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated." [Emphasis ours.]

However, the court in the present case did not leave it for the jury to determine the question of fact: was this or was this not a contract in which such circumstances were within the contemplation of the parties? Had the jury believed plaintiff's version of the case, such circumstances were within the contemplation of the parties; had they believed defendant's version, then they were not. They were flatly told that it was such a contract, although there was a direct conflict in evidence on this point and following the statement of the rule of the Westervelt case the court went on to instruct "that if you find that the defendant Nieri here failed to perform *in accordance with the terms of his agreement* with the plaintiff, and if you further find that the plaintiff, August Chelini, suffered illness or physical suffering as a proximate result of this defendant's failure to perform his agreement, you may award damages for the plaintiff's illness or physical suffering or both." [Emphasis ours]. From this instruction the jury would have to conclude that even if they believed defendant's testimony that the contract was only for the ordinary funeral and no special circumstances had been in the contemplation of the parties, still they must award plaintiff damages to his health proximately resulting from the breach.

[8] The instructions discussed above therefore did not fairly instruct the jury on the subject of damages, and we consider them to have been prejudicially erroneous and misleading to the jury. This in all probability led to a verdict which cannot but appear excessive in view of the very unsatisfactory and insubstantial medical testimony in regard to permanent injury.

[9, 10] Appellant justly complains that it was error to refuse his requested instruction to the effect that exemplary damages

could not be awarded in this case. (Mabb v. Stewart, 133 Cal. 556, 65 P. 1085; 8 Cal. Jur. 914, sec. 145.) "In general, exemplary damages for breach of contract are not recoverable, and this has been held to be the rule even though the breach complained of be wilful." (8 Cal.Jur. 871, 872, sec. 113.) A reading of Section 3294, Civil Code, makes it clear that exemplary damages are not allowed in actions for breach of contract. That section provides that "In an action for the breach of an obligation *not arising from contract,* where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Emphasis ours). And section 3357, Civil Code, provides: "The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." Cases cited from other jurisdictions in support of the award of exemplary damages in breach of contract actions are not authoritative in view of our statute. Nor is the argument based on Overstreet v. Merritt, 186 Cal. 494, 200 P. 11, 16, persuasive. Respondent quotes the following statement: "One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract." That case, respondent contends, is comparable to this, and since the tort measure of damages is set forth in the Overstreet case it logically follows that exemplary damages are allowable. Exemplary damages were not involved in the cited case, and although the language quoted by respondent from said case would seem to be a recognition of the tort rule as applicable, the court appears to have applied the well recognized rule of Hadley v. Baxendale, 9 Ex. 341, 26 Eng.L. & Eq. 396, [156 Eng.Reprint 145], which is, incidentally, a contract measure of damages. The recent case of Haigler v. Donnelly, 1941, 18 Cal.2d 674, 117 P.2d 331, very clearly holds that in an action based upon a contractual obligation exemplary damages may not be awarded even though the breach of contract is wilful or malicious. Had the action been based on tort, then of course, such damages might be recovered even though the tort incidentally involved a breach of contract.

It would serve no purpose to discuss the criticisms of other instructions since any error may be avoided on a new trial.

Judgment reversed.

DOOLING and GOODELL, JJ., concur.

In re PHILLIPI'S ESTATE.

TOMALINO v. WILSON.

Civ. 3474.

District Court of Appeal, Fourth District, California.
Jan. 16, 1948.

Hearing Granted March 11, 1948.*

1. Executors and administrators 🔑122(1)

Appointment of one as special administrator with same powers as a general administrator confers upon such special administrator only the powers of a general administrator and he does not as result thereof become a general administrator. Probate Code, §§ 463–465, 510.

2. Executors and administrators 🔑31, 459

Order appointing a general administrator was in effect a revocation of special administrator's authority, and it became duty of special administrator to render an accounting. Probate Code, §§ 463–465, 510.

3. Executors and administrators 🔑461

A special administrator must render an account in like manner as other administrators are required to do in accordance with Probate Code, and in his account he is to be allowed such reasonable expenses as are necessarily incurred in care and management of the estate. Probate Code, § 900.

4. Executors and administrators 🔑109(5)

The right of every executor or administrator furnishing a surety bond to be reimbursed for cost of such bond is statutory. Probate Code, § 541.5.

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*Appeal dismissed March 21, 1949.

5. Executors and administrators ⚷110, 212

Taxes assessed upon undistributed property of deceased persons are charges against the property which should be paid and should be allowed as necessary expenses in care and settlement of the estate, and are obligations due from the estate.

6. Executors and administrators ⚷258

A representative of estate of deceased person has authority and must preserve property of the estate by paying taxes thereon.

7. Executors and administrators ⚷109(1)

Representative of estate of decedent has right to be reimbursed for expenditures made upon the property of the estate reasonably necessary to preserve it.

8. Executors and administrators ⚷109(5), 110, 132

Expenditures made by special administrator for premium on surety bond, county taxes on property in the estate and costs of repairing bakery owned by deceased after order appointing another as administratrix with will annexed had become final were properly allowed, where it appeared that obligations were necessary to protect estate and were duly authorized and contracted for prior to termination of special administrator's powers. Probate Code, §§ 463–465, 510, 541.5, 900.

9. Executors and administrators ⚷495(1)

Statutory commissions for executor or administrator are intended to be full compensation for all ordinary services rendered during entire administration, from beginning down to final settlement and distribution. Probate Code, §§ 900, 902.

10. Executors and administrators ⚷497

"Extraordinary services," for which executor or administrator is entitled to compensation in addition to statutory commissions, are those services beyond or out of common order or rule. Probate Code, §§ 900, 902.

See Words and Phrases, Permanent Edition, for all other definitions of "Extraordinary Services".

11. Executors and administrators ⚷501

Appellate court is reluctant to disturb determination of probate judge with respect to allowance made administrator or allowance made where extraordinary services were found to have been rendered. Probate Code, §§ 900, 902.

12. Executors and administrators ⚷497

Allowance of $100 to special administrator, who was an attorney and did not engage services of another attorney, for extraordinary services in litigations, divorced from legal services performed by him, was not so unreasonable as to amount to an abuse of discretion. Probate Code, §§ 900, 902.

13. Executors and administrators ⚷497

Allowance of $200 to special administrator as extra compensation for extraordinary services in connection with first account and presentation of claims was required to be set aside as abuse of discretion, where it could not be determined from record what specific amount was allowed for extraordinary services not included as part of the "regular services" required of administrator. Probate Code, §§ 900, 902.

14. Executors and administrators ⚷497

Allowance of $100 to special administrator as extra compensation for extraordinary services in selling and obtaining confirmation of sale of truck, belonging to estate was not an allowance of such a disproportionate amount as to constitute an abuse of discretion, although estate netted only $285 on the sale. Probate Code, §§ 900, 902.

15. Executors and administrators ⚷497

In order for administrator to recover for "extraordinary services", such services must pertain to and be a benefit to estate and not to representative as an individual. Probate Code, §§ 900, 902.

16. Executors and administrators ⚷497

Services rendered by special administrator in opposing litigation instituted to have public administrator appointed special administrator did not result in benefit to estate, and did not constitute "extraordinary services" for which special administrator could be allowed extra compensation. Probate Code, §§ 571–573, 900, 902.

17. Executors and administrators ⚿497

Allowance of $100 to special administrator as extra compensation for his extraordinary services on petition for instructions in reference to repair work on bakery building owned by estate and his appearance in court in support of petition, together with a subsequent allowance of $200 for his extraordinary services in obtaining estimates and letting contracts for the work, was not an abuse of discretion. Probate Code, §§ 900, 902.

18. Executors and administrators ⚿497

Allowance of $500 to special administrator as extra compensation for defending claim against estate for services allegedly performed by claimant, as housekeeper, for decedent during his lifetime was improper, where it appeared that special administrator had been attorney for decedent during his lifetime and that his claim for extraordinary services in connection with such litigation had been satisfied by previous claims presented to and paid by estate. Probate Code, §§ 900, 902.

19. Executors and administrators ⚿494

A special administrator, who is an attorney and elects to act as both attorney and special administrator, instead of employing another attorney, cannot recover for legal services performed by him, even though estate may be saved cost of attorney's fees as result thereof. Probate Code, §§ 900, 902.

20. Executors and administrators ⚿497

Allowance of $200 to special administrator, who was an attorney and elected to act as both attorney and special administrator, as extra compensation for extraordinary services in connection with an action in justice's court wherein deceased was a defendant was improper, in absence of showing that sum allowed was for services performed as special administrator, independent of services ordinarily required of attorney in probating an estate or in defending actions against the estate. Probate Code, §§ 900, 902.

◆

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Proceeding in the matter of the estate of Lorenzo Phillipi, sometimes known as Lorenzo Philippi, sometimes known as Phillipi Lorenzo, deceased. A petition was filed by Fred A. Wilson, for allowance of statutory commissions and for extraordinary services performed by him as special administrator with powers of a general administrator, to which objections were filed by Mary Tomalino and two others. From order allowing compensation for extraordinary services and approving account of Fred A. Wilson as special administrator, Mary Tomalino appeals.

Affirmed in part and reversed in part.

Monta W. Shirley and Lane & Casey, all of Los Angeles (Martin C. Casey, of San Bernardino, of counsel), for appellant.

Fred A. Wilson, of San Bernardino, in pro per.

GRIFFIN, Justice.

The surrounding facts pertaining to this estate are related in a previous decision. In re Estate of Philippi, 71 Cal.App.2d 127, 161 P.2d 1006. As therein stated, on September 2, 1943, a will dated April 23, 1943, was filed for probate by Fred A. Wilson, an attorney at law, who had prepared the will. He was named as executor and was the sole devisee of the estate with certain specified instructions as to its disposition. That will expressly revoked all former wills and disinherited two children of the testator. A contest was filed as to the probate of that will, and so far as the record discloses, that contest is still pending. Fred A. Wilson was, on his application, appointed special administrator and continued to act as such. On April 7, 1945, an order was made appointing the public administrator special administrator. On April 16, 1945, the public administrator filed his declination to act. On May 31, 1945, Mr. Wilson again filed a petition for appointment as special administrator. Over objection, he was appointed "with all the powers of a general administrator". A bond of $25,000 was fixed. He was, in said order, directed to defend certain pending litigation against the estate.

On September 11, 1943, Mary Tomalino filed a petition for probate of a will dated

August 5, 1943, and sought her appointment as administratrix with the will annexed. Contests were filed to it. The trial court subsequently admitted that will to probate and appointed Mary Tomalino administratrix with the will annexed. An appeal from that order was taken and was later affirmed. A remittitur from this court was filed in the Superior Court on December 5, 1945.

The questions here presented arise from the order approving the second account and report of the special administrator ("with powers of a general administrator") and his petition for allowance of statutory commissions and for extraordinary services performed. On July 29, 1946, Mary Tomalino, as well as the two children of deceased, filed objections thereto.

Mr. Wilson, as special administrator, acted as his own attorney in all of these proceedings. Appellant Tomalino argues that since the order appointing her administratrix became final on December 5, 1945, the day the remittitur was filed, the powers of the special administrator ceased, and therefore certain challenged outlays made by the special administrator and claimed in his second account should not have been allowed, citing Probate Code sec. 466.

Respondent contends that he was appointed, pursuant to section 465 of the Probate Code, as special administrator with the "same powers, duties and obligations as a general administrator" and that he thereupon became a general administrator within the meaning of Probate Code section 510, and that his "pre-existing grant of letters * * * of administration must be revoked" before his powers as such special administrator become terminated; that since such authority was not revoked before the date of accounting, he was entitled to be reimbursed for such expenditures from the estate up until that time, citing Dodson v. Greuner, 28 Cal.App.2d 418, 82 P.2d 741; and 11 Cal.Jur. p. 776, sec. 461.

[1] Assuming that respondent was appointed special administrator with the same powers as a general administrator, as alleged, the case relied upon clearly holds that such an appointment confers upon such special administrator only the powers of a general administrator, but even so, he does not become a general administrator. His limited powers, duties, rights and liabilities as an ordinary special administrator are merely enlarged. McNeil v. Morgan, 157 Cal. 373, 108 P. 69; Ruiz v. Santa Barbara Gas & Electric Co., 164 Cal. 188, 128 P. 330; Miller v. Superior Court, 186 Cal. 453, 199 P. 805; In re Estate of Davis, 175 Cal. 198, 165 P. 525; In re Estate of Welch, 106 Cal. 427, 39 P. 805; 11b Cal.Jur. p. 878, sec. 1352. Dodson v. Greuner, 28 Cal. App.2d 418, 82 P.2d 741, relied upon by respondent, is authority only for the conclusion that under section 353 of the Code of Civil Procedure the statute of limitations runs against a special administrator on whom general powers are conferred under sections 463–465 of the Probate Code.

[2] In Security-First National Bank of Los Angeles v. Superior Court, 1929, 100 Cal.App. 702, 280 P. 995, a similar contention was made that the appointment of a general administrator had the effect of only suspending the powers of the special administrator; that his letters were not revoked; that his status as special administrator continued until he had completed his accounting and obtained his discharge. In there disposing of the contention the court said at page 704 of 100 Cal.App., at page 995 of 280 P.: "We find ourselves unable to agree with this contention. We think that the appointment and qualification of the general administrator in legal effect is a revocation of the special administrator's authority, and that thereupon he ceases to be special administrator. His duty to render an accounting and to be discharged from further liability is in no respect different from the same duty which would devolve upon him if the court had by direct order revoked his letters of administration."

The case last cited was decided before the enactment of Probate Code section 465, but was based upon former section 1415 of the Code of Civil Procedure (Amended, Stats. 1921, p. 536), which section then contained the same provisions in reference to the powers and duties of a special administrator. The conclusion there reached seems to be controlling in the instant case. Therefore, when the order appointing the general administrator became final, under the provisions of section 465 of the Probate Code, there was, in legal effect, a revocation of the special administrator's authority and it became his duty to render an accounting. In re Estate of Sherman, 5 Cal. 2d 730, 56 P.2d 230.

The expenditures of the special administrator, with general powers, made after December 5, 1945, were for the period beginning December 28, 1945, and ending April 19, 1946. They involved (1) premium on his bond; (2) second one-half of County taxes on property in the estate of deceased; and (3) cost of painting, plastering, and repair of bakery owned by deceased. All items constituted obligations which were incurred prior to December 5, 1945. The latter expenditures were authorized prior to December 5, 1945, and after a petition was filed by the special administrator for instructions relating to the repairs and improvements contemplated, upon due notice, and without objections thereto having been made. An order directing the special administrator to make the necessary expenditures so as to comply with the requirements of the Board of Health was signed and there was no appeal from that order. There was evidence that the exact extent of the work required was unknown and could only be determined as the work progressed. The work commenced on November 22, 1945, and was completed about December 15, 1945.

[3] A special administrator must render an account in like manner as other administrators are required to do and in accordance with the provisions of the Probate Code in relation thereto. French v. Superior Court, 3 Cal.App. 304, 85 P. 133. In his account a special administrator is to be allowed such reasonable expenses as are necessarily incurred in the care and management of the estate. In re Moore's Estate, 88 Cal. 1, 25 P. 915; Sec. 900, Probate Code.

[4] Section 541.5 of the Probate Code provides that every executor or administrator furnishing a surety bond shall be allowed the cost of such bond. The right to be reimbursed for this charge is statutory.

[5-7] Taxes assessed upon the undistributed property of deceased persons are charges against the property which should be paid and will be allowed as necessary expenses in the care and settlement of the estate, and are obligations due from the estate. A representative has authority and it is his duty to preserve the property by paying the taxes. In re Estate of Freud, 131 Cal. 667, 63 P. 1080, 82 Am.St.Rep. 407; Estate of Herteman, 73 Cal. 545, 15 P. 121; In re Estate of O'Connor, 200 Cal. 646, 254 P. 269; 11b Cal.Jur. p. 255, sec. 846. Likewise, reimbursement may be allowed for expenditures upon the property reasonably necessary to preserve it. In re Estate of Freud, supra.

The case of In re Estate of Bell, 145 Cal. 646, 79 P. 358, relied upon by appellant, is factually different. Appellant there was a special administratrix, apparently with limited powers. The court held that she had no authority, derivable from the statutes, to engage in contracts with real estate agents for the payment from funds, in her charge, of commissions on sales made of property belonging to the estate.

In re Estate of Kafitz, 51 Cal.App. 325, 196 P. 790, involved a small amount of personal property turned over to the widow and for which the special administrator failed to account. The court held that the special administrator was not entitled to draw his compensation, as such, until the property was returned to the executors.

In re Blair, 49 App.Div. 417, 63 N.Y.S. 678, arose under a statute of New York which allowed reimbursement to executors for expenses of administration "paid by them". It was there held that since the services of the executors' attorney were not paid for by the executors, it was not allowable in their account. No such statute prevails in this state.

In Re Couts' Estate, 87 Cal. 480, 482, 25 P. 685, 686, it was said: "There is nothing in the statutes which requires payment of claims against the executor for services rendered, or materials furnished, the estate during administration, before they can be allowed in the settlement of his account. * * * Where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered, or materials furnished, in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and, if so, in what amount."

[8] The cases cited by appellant are not contrary to the conclusions here reached. The trial court found that these obligations and expenditures made by the special administrator, totaling $1,676.40, were "just, true and correct", and should be "allowed and approved". The conclusion must be that since such obligations were necessary to protect the estate and were proper and legal charges against it and were duly authorized and contracted for prior to the termination of the powers of the special administrator, the court had authority to allow them. The same question was presented and similarly answered in Re Estate of Pedroli, Deceased, 47 Nev. 313, 221 P. 241, 224 P. 807, 31 A.L.R. 841. See, also, In re Estate of Clark, 33 Cal.App.2d 523, 92 P.2d 505.

The objection in respect to a request for an allowance of fees in the sum of $1,900 for extraordinary services as special administrator requires more consideration. In addition, petitioner asked that he be allowed three-fourths of the regular fees allowable to the administratrix with the will annexed. The trial court ordered that the "division of the regular commissions" and the portion to be allowed the special administrator be deferred until the close of administration of the estate, which action was proper.

Under Schedule C, Item one, the special administrator claimed that since he was an attorney at law, he did not engage the services of an attorney, but that he rendered all the services as administrator without the assistance of an attorney; that as a basis of his extraordinary services as special administrator, on September 14, 1943, he prepared and endeavored to serve upon Mrs. Tomalino a written notice demanded surrender to him of the property of the estate, and that on October 14, 1943, he signed an affidavit and procured a citation directing her to appear in court and show cause why she should not deliver up the property to the administrator; that she appeared in court, with her attorney, in response thereto and delivered it to him. For this service Wilson claimed extra compensation in the sum of $100. Objections to this claim were made for the claimed reason that such claim was for legal services performed; also that Mrs. Tomalino's attorney phoned Wilson and offered to deliver the assets and property of the estate to him but that Wilson insisted that there must be a hearing; that the work performed by Wilson was useless and wasted, of his own design, and in no way benefited the estate. The evidence on this question does support the court's conclusion that the institution of such proceeding was necessary.

Respondent claims that the amount allowed in his account was not for legal services rendered but for extraordinary services performed as special administrator. It is stated in 21 American Jurisprudence, p. 679, sec. 532, that: "In the absence of statute, the general rule is that where a lawyer becomes executor or administrator, his compensation as such is in full for his services, although he exercises his professional skill therein; and even if he performs duties which he might properly have hired an attorney to perform, he is not entitled to attorneys' fees." See, also, Needham v. Needham, 34 Idaho 193, 200 P. 346.

Cases are to be found in some jurisdictions which hold that where it is provided by statute that executors or administrators may be allowed extra compensation for extraordinary services, an executor or administrator who, being an attorney, performed legal services for the estate may be allowed, in addition to the usual commissions attached to his office, a further compensation for his legal services. This later rule is discussed but not followed in Re Estate of Parker, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025, which case is cited in support of the rule first above mentioned, and which rule has been adopted in this state.

See, also, In re Estate of Runyon, 125 Cal. 195, 57 P. 783; In re Estate of Lair, 70 Cal.App.2d 330, 161 P.2d 288.

Section 900 of the Probate Code provides that: "The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided; * * *." Section 902 thereof provides that: "Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns which require the appointment of a tax counsel, tax auditor or other tax expert for the preparation thereof, the adjustment and payment of extensive or complicated estate or inheritance taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform."

The question then presents itself whether or not the services performed by respondent here and for which allowances have been made are, in effect, legal services or were they part of the ordinary duties of the administrator and, if not, may they be classified as extraordinary services performed by the administrator, for the benefit of the estate?

[9, 10] The statutory commissions are intended to be full compensation for all ordinary services rendered during the entire administration, from the beginning down to final settlement and distribution. In re Estate of Phelps, 186 Cal. 292, 199 P. 10. Extraordinary services have been defined as being beyond or out of the common order or rule; not usual; not ordinary; uncommon. In re Estate of Broome, 162 Cal. 258, 122 P. 470; 11 Cal.Jur. p. 1172, sec. 772. Measured by these rules, we will endeavor to classify the character of the services claimed to have been performed by respondent as reflected by the evidence.

[11, 12] Wilson testified that he had been attorney for deceased prior to his death; that he prepared the will for him; that deceased informed him that if anything happened to him he would find his papers in a cement pipe in his basement; that after Phillipi died Wilson went to his home and made inquiry; that he endeavored to find a key to the basement; that he was informed by the occupant that Mrs. Tomalino had taken all of the papers with her to Los Angeles; that he broke the cellar-door lock to make a personal investigation and found the papers gone; that he thought he had made demand on Mrs. Tomalino by letter for their return to him; that no papers were forthcoming so he filed a petition for an order requiring her to surrender them; that he was unsuccessful in securing service of the order upon her; that after a phone call from her representative she agreed to appear in court on a day set and deliver over the papers. Mrs. Tomalino and respondent, as special administrator, appeared in court and the papers were delivered to him under court order, apparently without contest. Under the circumstances related, the proceeding to compel the production of estate property to the lawfully appointed special administrator, may be classified as a proceeding that is "not ordinary" or "not common" to the duties of the administrator. The services performed by the administrator, divorced from the services that may be classed as legal services, may be properly held to be "litigation or special services as may be necessary for the * * * administrator to prosecute, * * *." under section 902 of the Probate Code. The question of the value of such extraordinary services was determined by the trial court to be $100. Where serious question arises, either over the character or value of a service to an estate, the appellate court will be reluctant to disturb the determination of the judge in probate with respect to the allowances made the administrator or an allowance made where extraordinary services are found to have been rendered. In re Estate of Broome, supra. The allowance here made for his services, divorced from the legal services performed, does not appear to be so unrea-

sonable as to amount to an abuse of discretion.

[13] Item two is a claim for $200 for extra compensation. Respondent alleged that on April 7, 1944, he filed his first account, accompanied by a petition for instructions in respect to the payment of four claims, totaling over $12,000, filed against the estate, and also instructions in respect to the sale of a Ford pick-up truck appraised at $340. Objections to the account and to the petition were made by one of the heirs. A hearing was had. The court approved the first account and ordered the special administrator to take no action on the claims and to sell the truck.

Wilson testified that the $200 claim "has to do with the services in connection with the first account and presentation of the claims". In his testimony no claim is made in regard to the petition for instructions in reference to the sale of the truck. The preparation of the data necessary for the filing and presentation of the administrator's account, and the appearance of the administrator in court in support thereof, is required under the law and is a part of the ordinary services expected to be performed by the administrator as a part of his ordinary services and commissions. Respondent apparently recognized this fact in his brief but argued that he was entitled to the full sum anyway because of extraordinary services he performed in "assembling the data" for the petition for instructions, executing the same and attending as a witness to support the petition, because it was due to the opposition of appellant that he was required to do so. The evidence shows that the amount allowed by the court ($200) was for claimed "extraordinary services in connection with the first account and presentation of claim." We are unable to determine from the evidence or record what specific amount was allowed for extraordinary services not included as a part of the "regular service" required of the administrator. This portion of the order therefore must be reversed.

[14] As to item three respondent claims $100 for services in selling and obtaining confirmation of sale of the Ford truck. The evidence shows that the sale was by public auction held by the administrator at the testator's residence. The claim for extraordinary services included assembling the data for and executing the notice of sale, the posting of such notice, the holding of the sale, the assembling of data for the petition for confirmation, and attending court as a witness on confirmation as well as providing data for and executing the certificate of sale and endorsement of the registration certificate for the vehicle. Appellant claimed that such fee is excessive when considered in connection with the $200 fee alleged in item two, since the truck netted only $285 on the sale. Respondent argues that although the charge, viewed in the light of the amount realized, may appear disproportionate, the time involved must be considered; that had the truck had a value of $2,000 or $3,000 the claim of $100 would not be disproportionate, even though the time involved in conducting the sale would have been the same. The question here presented was a matter for the determination of the trial court and although it seems to us that the amount allowed does appear to be disproportionate, we cannot say that the trial court abused its discretion, particularly in view of the fact that appellant does not claim that any part of the $200 fee allowed in item two pertained to the sale of the truck. That portion of the order is affirmed.

Item number four involves a claim for $250 for extraordinary services in connection with the litigation arising out of the proceedings initiated by appellant to have the public administrator appointed in the place and stead of Wilson. On April 7, 1945, after Wilson filed his first account, the public administrator was appointed in his place and stead. On April 16, 1945, the public administrator filed a refusal to act. On September 17, 1945, over objections, Wilson was appointed special administrator, with the powers of a general administrator. Appellant argues that this service is not compensable as extraordinary services; that his services were directed toward "keeping himself in office"; that such services did not benefit the estate but only the personal representative; and that the order allowing such fee should be reversed.

Respondent claims that the services were in connection with litigation instituted by appellant, who was endeavoring to have the public administrator appointed special administrator; that since appellant was not successful and the respondent was restored to that office, he was entitled to reimbursement for "extraordinary services" in preparation for and his presence as a witness at the several hearings; that in addition thereto, the petition for his reappointment contained a prayer for instructions in reference to the defense of two actions pending against the estate; that in the order reappointing him the trial court ordered him to defend said actions; that the time consumed, aside from the legal services performed, was well worth $250.

[15] The fundamental rule is that in order for an administrator to recover for "extraordinary services", such services must pertain to and be a benefit to the estate and not to the representative as an individual. The application for letters is a part of the ordinary probate proceedings and it has been held that such services benefit the personal representative individually and are not compensable as "extraordinary services" against the estate. In re Estate of Byrne, 122 Cal. 260, 54 P. 957, 1015; In re Estate of Barton, 55 Cal. 87. See, also, 21 American Jurisprudence, p. 693, sec. 554, where it is said: "Although there is some authority to the contrary, the majority rule is that no allowance will be made out of the estate for costs and attorneys' fees incurred in procuring letters of administration or in litigating the right to administer on the estate, even though the party asking for such an allowance was successful in obtaining letters of administration." See, also, 90 A.L.R. 104; Wilbur v. Wilbur, 17 Wash. 683, 50 P. 589; Horton v. Horton, 158 Md. 626, 149 A. 552; In re Estate of Murphy, 171 Cal. 697, 154 P. 839.

[16] It was the administrator's duty to defend all suits that may have been brought against the estate. Secs. 571–573, Probate Code; 21 Am.Jur. p. 496, sec. 223. There is no showing here how the estate benefited under the claimed "extraordinary services" performed by the administrator. Under the rule cited, no recovery could be had by the administrator for the claimed "extraordinary services" involving the contests heretofore mentioned. For the reasons expressed this portion of the order should be reversed.

[17] Item five involves an allowance of $100 to respondent for his "extraordinary services" in gathering data, filing a petition for instructions in reference to the repair work on the bakery building owned by the estate, and his appearance in court in support of the petition. There is also a subsequent allowance of $200 for his "extraordinary services" in obtaining estimates and letting contracts for the work, the cost of which totaled $457.53. The evidence discloses, as heretofore partially related, that the Board of Health threatened to condemn the bakery unless certain improvements were made. Respondent related in detail considerable service expended in connection with the obtaining of this order, in securing estimates, in supervising the work, and in auditing and paying the bills in relation to the improvements authorized. The complaint of appellants that the $300 allowance for this service is out of proportion to the total contract price of the work has some merit. However, the trial judge considered the time required in rendering this service and found that this allowance was reasonable. We do not feel disposed to say that he abused his discretion as to these two items.

Item six (a). The trial court allowed respondent $500 "for extra compensation" in reference to the claim of one Amelio Enrico, totaling $5,000. At the time of his death, deceased was a defendant in an action by her for claimed services, as housekeeper, alleged to have been rendered by her for defendant. On February 21, 1944, claimant presented the claim to the administrator who petitioned the court for instructions in respect thereto as above set forth. Thereafter, by direction of the court, the administrator took no action. Claimant filed an amended complaint based upon the claim and the administrator filed an answer to the amended complaint. The case was set down for trial on several occasions but was subsequently dropped from the calendar and is still pending. It is claimed by respondent that he was prepared for trial.

Item six (b). A similar allowance was made in the sum of $250 regarding the claim of Enid Howell for $1,500 for services rendered as housekeeper and monies advanced for deceased. On July 13, 1944, she brought an action thereon against the administrator who filed an answer thereto. The action was set for trial but has not been tried.

Item six (c). Deceased was a defendant in a Justice's Court action brought by one Slattery to recover $871.87 for merchandise alleged to have been sold to deceased prior to his death. A supplemental complaint, based on his claim, was filed and the administrator pleaded thereto by demurrer and answer. The case was set for trial and is still pending. Respondent now claims and was allowed $200 for "extra compensation" for this service. Respondent claims that in connection with these actions he was required to make preparation for the defense of the actions, without assistance; that it involved the examination of records of the courts, interviewing of witnesses, his appearance as a witness at the time the cases were supposed to have been tried, and that in view of the time consumed and responsibility assumed, as special administrator or in connection with the litigation, and in conference with adverse attorneys, the amount allowed was not unreasonable. The respondent, as special administrator, acted as his own attorney in all of these proceedings.

[18] In connection with the Enrico claim (item six (a)) the record shows, without conflict, that respondent Wilson had been attorney for Phillipi during his lifetime; that prior to becoming special administrator he charged Phillipi on June 16, 1943, a retainer fee of $250 in the original action of Enrico v. Phillipi, and a further item of $75, entitled "Enrico controversy". He presented his claim to the court (a judge other than the trial judge here) and it was allowed. A similar claim was presented by an attorney who officed next door to respondent Wilson, seeking remuneration for legal services in April, 1942, reciting "Legal services rendered re Enrico v. Phillipi, retainer, investigation, preparation of answer, consultations, and preparation for trial $150.00; * * * Filing answer $2.00; * * * Court appearance and subsequent consultations $50.00". This claim was approved by Wilson, as special administrator, and by the same judge who approved the Wilson claim. It would appear to us, from the cold record, and considering the fact that the case is still pending, that the "extraordinary services" claimed to have been performed by the special administrator, had been about satisfied by the previous claims presented to and paid by the estate.

[19] Item six (b), the services claimed to have been performed under the Howell claim, as well as the Slattery claim, item six (c), appear to us to be in the nature of legal services and should be performed by an attorney at law. It would appear to us that in the allowance of these items the trial court was endeavoring to compensate the special administrator for the legal services he performed in representing himself as special administrator. Under the cases heretofore cited, and referring particularly to the case of In re Estate of Parker supra, it must be concluded that respondent cannot recover for legal services performed where he, as special administrator, does not employ another attorney but elects to act as both attorney and special administrator, even though the estate may be saved the cost of attorneys' fees by the transaction. In that case it was said (page 135 of 200 Cal., page 909 of 251 P., 49 A.L.R. 1025): "An * * * administrator * * * who is himself an attorney at law may properly employ another attorney to render the necessary legal services for the estate, and he may be entitled to an allowance out of the estate for the value of such legal services. (Citing cases.) But if the * * * administrator * * * being himself a practicing lawyer, elects to act as his own attorney in the performance of the legal services incident to the administration of the estate, the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provisions entitling him thereto. (Citing cases.) * * *.

This rule is supported by the weight of authority * * * and though there is considerable apparent and perhaps real conflict of authority upon the subject * * * we deem it a sound and wholesome doctrine, founded upon reasons of public policy."

In Re Estate of Graham, 187 Cal. 222, 201 P. 456, 457, 18 A.L.R. 631, the court said: "If he [the administrator] did perform such services which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy forbidding him to be his own employer." See, also, Stanes v. Parker, 9 Beav. 385 (50 Eng. Reprint, 392); In re Bank of Niagara, 6 Paige, N.Y., 213, 215; Broughton v. Broughton, 5 De Gex, M. & G. 160 (43 Eng. Reprint, 831).

[20] No doubt respondent has expended much time and energy, as an attorney, in reference to this estate, but, under these rules, an allowance cannot be made to him as special administrator for attorneys' fees in performing legal services. In the absence of any showing that the sums allowed in item six were services performed as special administrator, independent of and divorced from services ordinarily and customarily required of an attorney in probating an estate or in defending actions against the estate, such allowances cannot be approved. This part of the order must be reversed.

The order approving account and allowing extraordinary fees to special administrator, as to items one, three and five, is affirmed, and as to items two, four, six (a), six (b) and six (c) is reversed.

Each party to pay his own costs on appeal.

BARNARD, P. J., and MARKS, J., concur.

31 Cal.2d 368

GLATTS et al. v. HENSON et al.

L. A. 19874.

Supreme Court of California.

Jan. 27, 1948.

1. Easements ⟹32

An easement may be extinguished by user of the servient tenement by its owner in a manner adverse to exercise of easement, for period required to give title to land by adverse possession.

2. Easements ⟹30(1, 2), 32

An easement created by grant as distinguished from one established by user may not be lost by mere nonuser, but nonuser may be considered as a factor in accomplishing extinguishment by adverse possession.

3. Easements ⟹32

The extinguishment of easement by owner of servient tenement by adverse possession need not be of entire easement and may be of only a part embraced in scope of adverse possession.

4. Easements ⟹32

The nonpermissive erection and maintenance by owner of servient tenement for statutory period of permanent structures, such as buildings, which obstruct and prevent use of easement, will extinguish the easement.

5. Easements ⟹32

The extinguishment of an easement by prescription may be compared with the acquisition of an easement by that method, for although a person cannot own an easement in his own property, where he is so using his land that elements of adverse possession prevail as to easement owned by another, he is in a sense acquiring that easement by eliminating that interest of another in his land.

6. Easements ⟹36(1)

Where easement is acquired by prescription, burden of proving that taxes were levied or assessed against easement, as distinguished from payment thereof, if levied, rests upon record owner rather than upon adverse claimant.

7. Easements ⟹36(1)

Where owner of servient tenement asserted that easement was extinguished by adverse possession and there was no proof that taxes were assessed against easement, presumptively no taxes were levied on the easement, and hence owner had no burden of showing payment.

8. Quieting title ⟹43

Under complaint in the conventional quiet title form alleging ownership generally, extinguishment of easement by adverse possession could be established by owner of servient tenement.

9. Easements ⟹32

Where owner of servient tenement constructed buildings and maintained them for over five years upon easement for road purposes, and there was no evidence that taxes were levied on the easement, easement was extinguished by adverse possession.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Bernard R. Glatts and another against Fred C. Henson and others to quiet title. From an adverse judgment, plaintiffs appeal.

Reversed in part and affirmed in part.

Prior opinion 181 P.2d 917.

Roland Maxwell and Paul H. Marston, both of Pasadena, for appellants.

Vernon M. Brydolf, of Pasadena, Alfred S. Chapman, of Los Angeles, and Bissell & Atwill, of Pasadena, for respondents.

CARTER, Justice.

Prior to 1931, the defendants Chapman estate and Alfred Chapman, trustee, were the owners of a tract of land. Thereafter it became involved in the seven transactions hereinafter mentioned. First transaction. In that year the Chapmans conveyed to the City of Pasadena parcel 1 of that tract. They also conveyed to the city a 25 foot easement for road and pipeline purposes over parcels 4 and 5, the center line of which was the boundary line between those parcels. Second transaction. In 1937 the city deeded parcel 1 to defendants, the Hensons, who now own it. Third transaction. In 1937 the Chapmans conveyed parcel 2 to the Hensons and also an easement embracing the same area described in the first transaction. Fourth transaction. In 1938 the Chapmans conveyed to Riek and Knapp parcel 3 and an easement embracing the same area described in the first transaction. In 1941 Riek and Knapp conveyed parcel 3 and the easement to defendants, the Hensons. Fifth transaction. In 1938 the Chapmans conveyed parcel 4 to plaintiffs Glatts "Reserving unto the grantor, its successors or assigns, an easement for road purposes, together with the right to dedicate the same to the public use over the easterly 30 feet of the herein described parcel of land." Inasmuch as 12½ feet of the easement described in the first transaction covers the east 12½ feet of parcel 4, the easement reserved covered the same area to that extent. Sixth transaction. In 1932 the Chapmans conveyed to Braley parcel 5 and an easement covering the same 30 feet mentioned in the fifth transaction. In 1944 Braley conveyed parcel 5 and quitclaimed the 30 foot easement to defendants, the Simpsons. Seventh transaction. In 1945 the city quitclaimed to plaintiffs Glatts any interest it may have in an easement over their property.

Plaintiffs brought this action against the Chapman Estate, the Simpsons and the Hensons to quiet title to the east 30 feet of their property, that is, to have a declaration that none of the above mentioned easements were effective. The trial court declared plaintiffs to be the owner of the land in fee subject however to a 30 foot easement of the Chapmans and Simpsons and a 12½ foot easement of Hensons.

Originally plaintiffs, on this appeal, attacked the whole judgment. They now concede a 12½ foot easement to the Hensons and Simpsons and a 30 foot easement to the Chapmans together with a right in them to dedicate it to the public. The only remaining controversy is, therefore, with reference to the rights of the Simpsons in the westerly 12½ feet of the 30 foot easement. Plaintiffs assert the easement as to that portion, as to the Simpsons, was extinguished by adverse possession thereof by plaintiffs.

The evidence is without dispute that plaintiffs constructed buildings on the 17½ foot strip and have since maintained them for more than five years preceding the commencement of this action. The Simpsons in their answer to plaintiffs' petition for a hearing in this court state: "In this case appellants [plaintiffs] have placed certain buildings on a part of the thirty-foot strip." The evidence is also uncontradicted that plaintiffs have paid the taxes on their parcel 4. No permission to erect and maintain the buildings was obtained from the easement claimants. The 30 foot easement has not been used except for the east 12½ feet thereof. Thus we have a situation where the owner of a servient tenement erects buildings and maintains them for a period of over 5 years upon a part of an easement for road purposes over his property and owned by the dominant tenement. He has paid taxes on his fee simple interest but there is no evidence whether taxes were levied, or if levied, were paid, on the easement by the owner of the servient tenement—adverse claimant here.

[1, 2] It is well settled that an easement, regardless of whether it was created by grant or use, may be extinguished by the owner of the servient tenement upon which the easement is a burden, by adverse possession thereof by the servient tenement owner for the required statutory period. Perhaps more accurately stated an easement may be extinguished by the user of the servient tenement in a manner adverse to the exercise of the easement, for the period required to give title to land by adverse possession. See, Silveira v. Smith, 198 Cal. 510, 246 P. 58; Currier v. Howes, 103 Cal. 431, 437, 37 P. 521; Smith v. Worn, 93 Cal. 206, 212, 28 P. 944; City and County of San Francisco v. Main, 23 Cal.App. 86, 137 P. 281; Fruit Growers' Ditch & Reservoir Co. v. Donald, 96 Colo. 264, 41 P.2d 516, 98 A.L.R. 1291; Les v. Alibozek, 269 Mass. 153, 168 N.E. 919, 66 A.L.R. 1099; New England Box

Co. v. Wood, 81 N.H. 124, 123 A. 826, 33 A.L.R. 807; City of Savannah v. Barnes, 148 Ga. 317, 96 S.E. 625, 9 A.L.R. 423; 1 A.L.R. 884; Rest. Prop., sec. 506; Tiffany Real Property, 3rd Ed., sec. 827. We are speaking of adverse possession by the servient tenement owner, not abandonment by the owner of the easement. It is true that an easement created by grant as distinguished from one established by user may not be lost by mere non user (9 Cal. Jur. 960-962), but non user may be considered as a factor in accomplishing the extinguishment by adverse possession.

[3, 4] The extinguishment by adverse possession need not be of the entire easement. It may be extinguished in part—to the extent that is embraced in the scope of the adverse possession. See, Scampini v. Rizzi, 106 Vt. 281, 172 A. 619; Brooks v. West Boston Gas Co., 260 Mass. 407, 157 N.E. 362; 33 Mich.L.Rev. 1270. The non permissive erection and maintenance for the statutory period of permanent structures, such as buildings, which obstruct and prevent the use of the easement will operate to extinguish the easement. Brooks v. West Boston Gas Co., supra; Goodwin v. Bragaw, 87 Conn. 31, 86 A. 668; New England Home for Deaf Mutes v. Leader F. S. Corporation, 276 Mass. 153, 177 N.E. 97.

[5-7] It is argued, however, that there is no showing that the taxes have been paid on the easement. As we have seen plaintiffs paid taxes on their fee title to the land subject to the easement. The extinguishment of an easement by prescription may be compared with the acquisition of an easement by that method. It is true that a person cannot own an easement in his own property—the interests become merged, but when he is so using his land that the elements of adverse possession prevail as to the easement owned by another, he is in a sense acquiring that easement—having it merge with his fee interest—eliminating that interest of another in his land. Hence the property interest being acquired is an easement. He already owns the fee. It is to the easement we must look, therefore, to determine the question of whether the requirement that taxes be paid has been met. In the case of the acquisition of an easement by prescription the burden of proving that taxes were levied or assessed against the easement (as distinguished from the payment thereof, if levied) rests upon the record owner rather than the adverse claimant. Biggs Ditch Co. v. Jongste, 24 Cal.2d 298, 149 P.2d 1; Spargur v. Heard, 90 Cal. 221, 27 P. 198; Coonradt v. Hill, 79 Cal. 587, 21 P. 1099; Oneto v. Restano, 78 Cal. 374, 20 P. 743; Chapman v. Sky L'Onda, etc., Water Co., 69 Cal.App.2d 667, 159 P.2d 988; McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944; Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739; Los Angeles County v. Pacific Elec. Co., 93 Cal.App. 512, 269 P. 767; Smith v. Smith, 21 Cal.App. 378, 131 P. 890; Koshland v. Cherry, 13 Cal.App. 440, 110 P. 143. It has been held in regard to the acquisition of the fee, as distinguished from an easement, by adverse possession that the burden is on the adverse claimant to show that no taxes were assessed or that if assessed he paid them. City of Burlingame v. Norberg, 210 Cal. 105, 290 P. 587; Allen v. Allen, 159 Cal. 197, 113 P. 160; Baldwin v. Temple, 101 Cal. 396, 35 P. 1008; Reynolds v. Willard, 80 Cal. 605, 22 P. 262; In re Dixon, 120 Cal.App. 635, 8 P.2d 881; Redemeyer v. Cunningham, 61 Cal.App. 423, 215 P. 83. However, the rule as to easements is settled. In the instant case there was a presumption that no taxes were levied upon the easement and hence taxes need not be paid. There was no proof that taxes were assessed.

[8] The Simpsons claim that the issue of adverse possession was not raised. Plaintiffs' complaint is in the usual conventional quiet title form alleging ownership generally. Under such a pleading title by adverse possession may be established, 1 Cal.Jur. 620. No objection was made to the evidence given on the subject. At the trial plaintiffs' counsel stated that reliance was placed upon "the use of the property and the record title."

[9] For the foregoing reasons that portion of the judgment which determines that the defendants Simpsons have an easement in the west 17½ feet of the east

30 feet of plaintiff's parcel 4 is reversed, and the trial court is directed to amend its findings and judgment quieting plaintiffs' title, as against defendants Simpsons, to said portion of said easement. In all other respects the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SPENCE, and SCHAUER, JJ., concur.

31 Cal.2d 350

EDWARDS v. BILLOW.

L. A. 20252.

Supreme Court of California.
Jan. 23, 1948.

1. Brokers 🔑86(3)

In action to recover commission for procuring purchasers of defendant's realty, evidence showed that all parties to transaction intended, when offer to buy was signed by proposed purchasers and defendant, that terms of sale, including payment of commission, should be incorporated in written escrow instructions, and that plaintiff knew of necessity of securing agreement by holders of trust deed on realty to subordinate it to purchasers' trust deed, as required by such instructions, so as to bar recovery, in absence of compliance with such condition.

2. Estoppel 🔑78(3)

A real estate owner, who did not unconditionally accept proposed purchasers or their offer, procured by broker, to buy realty, but expressly conditioned acceptance of offer and liability for commission on obtaining of agreement by holders of trust deed on realty to subordinate it to purchasers' trust deed, as required by escrow instructions contemplated by parties as expression of their final agreement, was not estopped from disputing proposed purchasers' readiness, willingness, and ability to perform according to terms of offer.

3. Brokers 🔑52

Where real estate owner's acceptance of offer, procured by broker, to purchase realty, was specifically conditioned by escrow instructions on securing of agreement by holders of trust deed on property to subordinate it to proposed purchasers' trust deed and devoid of undertaking by owner to secure such agreement, broker could not recover commission, in absence of such agreement, on ground that procurement thereof was obligation of owner rather than broker or proposed purchasers.

4. Brokers 🔑52
Vendor and purchaser 🔑17

Where agreement by holders of trust deed on realty to subordinate it to trust deed agreed to be executed by proposed purchasers of realty was not obtained within time specified in escrow instructions making owner's acceptance of such purchasers' offer to buy contingent on obtaining of such subordination agreement, owner was not obligated to proceed further under offer or to pay broker a commission for securing offer, which owner did not accept.

◆

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge Assigned.

Action by Sam A. Edwards, doing business under the fictitious firm name and style of Mill-Edwards-Mill, against Sue E. Billow to recover a commission for procuring purchasers of defendant's realty. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion 180 P.2d 428.

Maurice Gordon, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff real estate broker appeals from an adverse judgment in his action to recover a commission which he contends that he earned by procuring a purchaser for certain real property owned by defendant. Trial was before the court sitting without a jury. Plaintiff attacks the judgment on the grounds that the evidence is insufficient to support certain essential findings and that the trial court committed prejudicial error in overruling plaintiff's objections to various questions asked by defendant of one of plaintiff's witnesses. We have concluded that evidence properly admitted supports the findings attacked by plaintiff, that no prejudicial error is shown, and that the judgment must be affirmed.

Plaintiff alleges in his complaint that on or about December 24, 1944, defendant by a written instrument, termed by the parties a "listing agreement," "employed, engaged and authorized" plaintiff to procure a purchaser for described real estate owned by defendant, at a price of $105,000, and by the same writing agreed to pay plaintiff for his services "a sum equal to five per cent" of the price of $105,000; that pursuant to such written authority plaintiff, acting as defendant's agent, "procured and induced" Mr. and Mrs. Don MacQuarrie to offer in writing, on or about December 27, 1944, to purchase defendant's property; that the offer, which is set out in full in the complaint,* was "subscribed by Mr. and Mrs. MacQuarrie and [by] defendant."

Plaintiff next alleges "That said offer was accepted by the said defendant Sue E. Billow who endorsed her acceptance of the same in writing upon the paper containing said offer as the same is set forth hereinabove. That said Don MacQuarrie and his wife, Mrs. Don MacQuarrie, have at all times been ready, willing and able to purchase the property upon the terms specified in said offer. That said defendant Sue E. Billow has refused and continues to refuse to consummate the sale of the said property to the MacQuarries."

For a second and further cause of action plaintiff alleges that defendant "became indebted" to him in the sum of $5250 for "services, work and labor * * * done by plaintiff as a real estate broker" for defendant at her "special instance and request."

In her answer to the complaint defendant denies any liability or indebtedness to plaintiff; in this connection she denies all allegations of the paragraph of the complaint wherein plaintiff alleges the execution of the MacQuarrie offer and the acceptance thereof by defendant except that defendant admits "having signed her name on some paper"; she also denies all allegations of the paragraph averring that the purchasers produced by plaintiff "have at all times been ready, willing and able to purchase the property upon the terms specified in said offer."

In further answer to the complaint defendant alleges, among other things, that at the time she signed the written listing agreement dated December 24, 1944, the condition of her eyes was such that she was unable to read and that she so informed plaintiff; that plaintiff thereupon stated to defendant that the listing agreement provided that defendant "would be under no obligation to pay a commission to him unless" defendant's property "was actually conveyed to a purchaser he [plaintiff] might find," and that it was "not necessary" for defendant to read the listing agreement; that solely in reliance upon such statements by plaintiff defendant signed the agreement. Defendant also alleges that "there was no consideration" for the so-called listing agreement.

Prior to trial defendant amended her answer to allege further that during all the transactions between the parties, "there was a confidential relationship existing" between defendant and plaintiff and plaintiff's salesman, A. V. Siders; that although defendant's property at all times concerned was worth $125,000 she was unaware of that fact until it was disclosed when, during the taking of the deposition of A. V. Siders, he testified that it was his personal opinion that the value was $125,000; that neither plaintiff nor Siders had ever theretofore informed defendant either of the fact of the true value of defendant's property or of the opinion of Siders as to its value; that had defendant theretofore known of such fact or of the opinion by Siders "she would have been unwilling" to sell the property for "any sum less than $125,000.00."

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* The offer reads as follows:

"Offer to Buy

"Los Angeles, Calif. 12–27, 1944

"We, offer the sum of ($105000.00), One Hundred Five Thousand Dollars, for that certain, Brentshire Motel, consisting of, Furniture, Furnishings & property, except furniture in living quarters, located at 12226 Wilshire Blvd. Santa Monica, California.

"We agree to the following terms, ($35,000), Thirty Five Thousand Dollars, Cash, the balance, payable, monthly at the rate of ($800.00), or more, Eight Hundred & No/100 dollars, or more, including, interest at the rate of (5%), per annum, $400.00 on First and $400 on 2nd, T.D.

"We are, herewith making a deposit of ($1000.00), One Thousand & no/100 dollars, to substantiate this offer.

"It is fully agreed and understood that Mill-Edwards-Mill will return this deposit, in full, if the above offer is not acceptable to the Seller.

"Subject to Satisfactory Inventory.

"Above includes 5% Commission.

"Sue E. Billow
Don MacQuarrie
"Mrs. Don MacQuarrie".

At the close of the testimony defendant, upon permission of the court, filed a further amendment to her answer in which she alleges that after she signed the MacQuarrie offer to buy, escrow instructions were prepared under the direction of plaintiff's salesman, A. V. Siders, by which it was specifically agreed between the MacQuarries and defendant that consummation of the proposed sale should be contingent upon the obtaining of an agreement from the holders of a second trust deed on the property subordinating their lien to a $44,000 first trust deed which the MacQuarries were to execute in favor of defendant. Defendant further alleges that through no fault of hers the subordination agreement was not obtained, and that therefore the sale could not be consummated and plaintiff is entitled to no commission.

The trial court found that at the request of one of plaintiff's salesmen (A. E. Siders, not A. V. Siders) defendant signed a "listing card" which the salesman had filled out; that at the time of signing the card defendant could not read because of the condition of her eyes and "did not read the matter appearing" on the card; that she relied on the salesman for information concerning its contents. The listing card is set forth in full in the findings. It bears the date of "12/24/44" and in it appear the address of and various items describing defendant's property. The price and terms of sale are also set forth, as follows: "Mortgage: Carry 1st Price: 105000 Cash: 30,000." Then, immediately above defendant's signature, is the following clause: "I, the undersigned, owner of the above described property, * * * in the event it is sold by [plaintiff] * * * for the price and terms given or any other price and terms accepted by me, * * * promise and agree to pay a commission of * * * (5 percent) or to give all over and above net listing price."

The court further found that on or about December 27, 1944, one A. V. Siders, another of plaintiff's salesmen, presented to defendant the offer to buy signed by the MacQuarries, which is set forth in plaintiff's complaint, and requested defendant "to accept same by signing her name thereto"; that defendant was still unable to read and signed the offer without reading it. It is also found that at the time such offer was presented by Siders and signed by defendant "it was the intention on the part of all parties, * * * the MacQuarries and defendant * * * [and] plaintiff and his salesman A. V. Siders * * *, that the terms and conditions of the sale proposed to be made by the defendant * * * to the said MacQuarries, including the payment of a real estate or broker's commission, should be incorporated in a further written agreement in the form of written escrow instructions"; that in fact a bank escrow officer, in accordance with directions from plaintiff's salesman A. V. Siders who gave to such officer "all the terms upon which defendant * * * was willing to sell and the said MacQuarries were willing to purchase" defendant's property, "prepared a formal agreement covering the sale and purchase of said property in the form of escrow instructions and embodied therein all the terms and conditions of said sale * * * and that after the preparation thereof the said MacQuarries and defendant * * * signed and delivered the same."

The above mentioned escrow instructions are made a part of the findings. Such instructions bear the date of December 29, 1944, and state, among other things, that Mr. and Mrs. MacQuarrie, the proposed purchasers, will pay into escrow the sum of $35,267.85, "$10,000.00 of which amount is being deposited at opening of escrow," and will deliver to the escrow agent a trust deed "to secure note for $44,000.00, dated today, Principal and Interest payable in installment of $400.00, or more, on the 15th day of each month, commencing March 15, 1944 [sic], including interest at 5 per cent * * * in favor of Sue E. Billow." The instructions also direct the escrow agent to "use" the money and instruments deposited provided that on February 14, 1945, a title policy to the property had been issued to the MacQuarries. The escrow agent was also instructed to "Prorate interest on second Trust Deed of record, * * * to close of escrow unpaid balance to be $25,732.15." The instructions further provide that " In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest date possible thereafter, unless we or either of us shall have made written demand upon you for the return of the money or instruments deposited by either of us. In which case you are instructed to return all instruments and/or cash to the respective parties hereto and this escrow will without further notice be considered as terminated." Then appear the signatures of Mr. and Mrs. MacQuarrie. Below their signatures and above that of defendant are the following provisions: "All the conditions and demands above are hereby approved * * *. Pay to Mill-Edwards-Mill a licensed real estate broker * * * as a commission the sum of $5,000.00. It is understood and agreed that the above escrow instructions are contingent upon obtaining a Subordination Agreement from Peter Xeniades and Peggy Xeniades [holders of the second trust deed on the property] * * * within 5 days from date hereof. * * * [T]he provisions for extension of time within which escrow may be closed, cancellation of same, return of instruments and/or money applies equally to me." Defendant's signature then appears. The court found that all of the terms of the escrow instructions signed by the buyers were accepted by defendant except that she required that the subordination agreement be secured within 5 days.

It is further found that the salesman, A. V. Siders, "acting * * * on behalf of plaintiff, assumed to obtain" the execution of a subordination agreement by the Xeniades, but that the latter failed to execute it, and therefore, "it was not possible to consummate said sale upon the terms and conditions finally offered by the said MacQuarries"; that "failure to consummate the sale * * * was through no fault on the part of defendant * * * but solely by reason of the fact that the said MacQuarries were not able to comply with the terms and conditions of their offer"; that "plaintiff did not * * * produce a purchaser able, ready and willing to purchase * * * upon the terms * * *offered * * * by her [defendant's] listing contract with plaintiff, or otherwise" and defendant owes plaintiff nothing; that defendant has received no moneys "out of which plaintiff is entitled to have and receive" the claimed commission.

The court also found that in the transaction a confidential relationship existed between defendant and plaintiff and A. V. Siders; that defendant's property "at all the times mentioned in the pleadings" was worth at least $125,000 which fact was known to Siders and plaintiff at all times concerned but was unknown to defendant until after this action was filed; that had defendant known Siders' opinion of the value she would have been unwilling to sell for less than $125,000; that plaintiff and Siders in not informing defendant of the value did not act in good faith toward defendant and are estopped to recover a commission.

As to the defenses of lack of consideration for the listing agreement and that a commission was to be paid only on actual conveyance of defendant's property the court made no findings for the stated reason that defendant "abandoned" such defenses.

Plaintiff contends that his right to a commission accrued immediately upon the signing by defendant of the December 27 written offer of the MacQuarries, and that the evidence is not sufficient to sustain the finding that at the time plaintiff's salesman A. V. Siders secured defendant's signature to such offer, "it was the intention * * * of all parties * * * the MacQuarries and defendant * * * plaintiff and * * *

A. V. Siders * * * that the terms and conditions of the sale * * *, including the payment of a * * * commission, should be incorporated in a further written agreement in the form of escrow instructions."

Defendant testified as follows: She signed the listing card in October, 1944, and at that time stated to A. E. Siders, who on plaintiff's behalf solicited the listing, that she would sell her property, which is referred to as a "motel," only at a price of $105,000, of which the broker would receive $5,000 commission and which would net her $100,000, and that she wished to receive $30,000 or $35,000 in cash and to herself carry a first mortgage of $44,000; and she told A. E. Siders further that the balance of the purchase price over the cash payment was to be paid at the rate of $400 a month for herself on a first mortgage and $400 to the Xeniades on the second trust deed which they held on the property. At the time (on December 27 or 28, 1944) she signed the MacQuarrie offer she repeated to the salesman then present, A. V. Siders, that she wished $30,000 or $35,000 in cash and to receive a first mortgage of $44,000 on the property. She wished to use the cash payment to pay off a first encumbrance held by a bank against the property. Because of trouble with her eyes she was unable to and did not read either the listing card or the MacQuarrie offer but accepted and acted upon what the respective agents told her as to the contents of the documents. She wished to go out of business but was willing to sell only if she "could have the $44,000.00 on interest." The day after she signed the MacQuarrie offer A. V. Siders returned to see her at the motel and stated that the MacQuarries, who were with him, were "ready to go to escrow." Defendant thereupon accompanied them to the bank which handled the escrow. At the bank Siders stated to defendant that he "gave the escrow officer the information to put in the escrow instructions" and stated further that "we would have to get Mr. Xeniades to carry the second mortgage. * * * would have to get a subordination from Mr. Xeniades to carry the second mortgage. * * * that his second trust deed would be subject" to defendant's $44,000 first encumbrance. The same Mr. Siders (A. V.) and defendant then met at the office of an attorney by whom defendant wished to have the subordination agreement prepared and Siders explained to the attorney "about the subordination * * * what he wanted." The following day Siders picked up the subordination agreement from the attorney's office, while defendant was present, and said that he would take it to the Xeniades for execution. Later Siders telephoned defendant that he did not "get" the agreement from the Xeniades and "was going to try to work out something else." Subsequently, on January 5, 1945, Siders submitted to her a new offer in the form of proposed new escrow instructions under which she would have been paid all cash for her interest in the property but she refused to accept the new terms as she wished to sell only if she received the $44,000 first encumbrance. At no time did she state to Siders or others a willingness to accept all cash. Defendant was willing to sell under the terms specified in the instructions signed by her but after learning that they would not be carried out defendant on January 13, 1945, withdrew from the escrow.

The salesman A. V. Siders in answer to the question, "Was there some discussion at the time that document [the MacQuarrie "Offer to Buy"] was signed that it would be necessary to go to escrow and have instructions to cover the details?", stated, "Well, we always give instructions on details of escrow." And to the question, "at that time when you had this [the offer] signed * * * you did not know the exact amount of the second trust deed, did you?" Siders replied, "Not the exact amount to the penny."

It should be noted that the "Offer to Buy" does not state in whose favor the respective trust deeds mentioned therein should run; it does not appear from such offer whether the procurement of a loan entailing the advancement of funds was necessary nor is it declared on the face of such offer whether the obligation to negotiate a loan or loans, if any, was to rest on the buyer or on the seller; it does, however, appear that two encumbrances in favor of some undesignated creditor or creditors were contemplated. In such respects the offer on its face appears to be uncertain and incomplete.

[1] It is apparent that the evidence hereinabove quoted or summarized supports the finding that all parties to the proposed purchase by the MacQuarries of defendant's property, including plaintiff and his agent A. V. Siders, intended at the time the document entitled "Offer to Buy" was signed "that the terms and condition of the sale * * *, including the payment of a * * * commission, should be incorporated in a further written agreement in the form of written escrow instructions" and such evidence also supports the further implied finding that the "Offer to Buy" did not constitute a complete or final contract. Under such circumstances this court will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties. (See In re Estate of Rule (1944), 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Palmtag v. Danielson (1947), 30 Cal.2d 517, 522, 183 P.2d 265.) It is also apparent that plaintiff through his agents, the two Siders, was aware of the existence of the Xeniades' second encumbrance and of the necessity of either securing a subordination agreement from them or of satisfying their lien in order to comply with one of the terms upon which defendant informed plaintiff she would sell and which particular term or condition is set forth in the listing card, in the "Offer to Buy," and in the escrow instructions; i. e., the execution of a valid first encumbrance in defendant's favor by the proposed purchasers.

[2] Plaintiff agrees that he is entitled to recover only, if, pursuant to a written contract so to do, he found a buyer ready, able and willing to buy upon the "stipulated terms." He argues, however, that the MacQuarries were ready, able and willing to buy under the terms of their written offer; that, in any event, defendant accepted such offer and is consequently estopped to dispute the readiness, willingness and ability of the proposed purchasers to perform according to the terms of their offer. In support of his last stated proposition plaintiff relies upon such cases as Sobaje v. Schubert (1918), 37 Cal.App. 709, 713, 714, 174 P. 364; Grove v. Lewis (1932), 125 Cal. App. 357, 359, 360, 13 P.2d 847, and cases there cited. (See also Rucker v. Hubler (1922), 56 Cal.App. 771, 773, 206 P. 472; Caine v. Biscoe (1926), 78 Cal.App. 660, 670, 248 P. 774; Spalding v. Bennett (1928), 93 Cal.App 577, 583, 269 P. 948; Malmstedt v. Stillwell (1930), 110 Cal.App. 393, 398, 294 P. 41, and cases there cited; Deeble v. Stearns (1947), 82 Cal.App.2d 296, 186 P.2d 173.) In Grove v. Lewis (supra) the rule is stated as follows (quoting from Malmstedt v. Stillwell, supra): " 'Where the owner accepts the buyer procured—which the evidence sufficiently shows was true in the present case—he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale'." (Page 359 of 125 Cal.App., page 848 of 13 P.2d.) In each of the other cited cases it likewise is shown that the owner did accept the buyer produced by the broker. Under such circumstances the application of the quoted rule appears to be founded on principles of estoppel. Thus it is pointed ont in Caine v. Briscoe (1926), supra, 78 Cal.App. 660, 670, 248 P. 774, 778, that "There was and is no claim made by defendant [owner] that he was induced to accept the offer of the buyers to purchase the properties by any act of fraud on the part of the plaintiff [broker] or that such acceptance was brought about through a mutual mistake regarding the facts or the terms of the offer. Hence the case, so far as the present point is concerned, falls within the rule stated as follows in 4 Ruling Case Law, page 309: 'Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against the claim except fraud on the part of the broker in inducing the acceptance.' " And in Spalding v. Bennett (1928), supra, 93 Cal.App. 577, 583, 269 P.

948, 951, it is stated that "When the customer procured by the agent is accepted by the owner, and the lease is executed upon terms satisfactory to the owner, he is estopped from denying the ability or willingness of the customer to consummate the contract."

By contrast, in the case now before us it appears that defendant did not unconditionally accept the proposed purchasers or the offer procured by plaintiff, but in the escrow instructions, which as found by the court were contemplated by all parties as the medium for expression of the final and complete agreement, expressly conditioned her acceptance of the offer and her liability to pay a commission to plaintiff, upon the obtaining of the subordination agreement which she testified A. V. Siders had informed her would be needed in order to comply with the terms upon which she had indicated her willingness to sell. And as indicated above, plaintiff was aware at all times of the existence of the Xeniades encumbrance. Thus there is not here present the element of estoppel or unfair conduct by the owner toward the broker which as noted above appears to be the basis of the rule upon which plaintiff relies.

[3] In support of his contention that the MacQuarries actually were ready, willing and able to perform according to the terms of their offer plaintiff argues that it was the obligation of defendant, rather than of plaintiff or the MacQuarries, to secure the subordination agreement, and that, therefore, failure to secure the agreement and to consummate the proposed sale are the faults of defendant. But plaintiff's argument in this regard ignores the fact that defendant's acceptance of the MacQuarries' offer, as expressed in the escrow instructions, was specifically conditioned upon the securing of the subordination agreement and was devoid of an undertaking to secure it herself; consequently plaintiff cannot impose on defendant the responsibility for failure by the Xeniades to execute such subordination agreement.

[4] Plaintiff argues further that "in any event the agreement of respondent [defendant] to accept $800.00 per month *or more* recited in the Offer to Buy gave the buyers the privilege to pay the *entire* purchase price to respondent at one time; that the evidence without dispute showed that such arrangements to pay the whole purchase price were made by the MacQuarries but that it was refused by respondent." As quoted above, the "Offer to Buy" states that the balance of the purchase price over the $35,000 cash payment would be payable monthly at the rate of $800 or more, including interest at the rate of 5% per annum, "$400.00 on First and $400 on 2nd, T. D." The escrow instructions, which, as previously noted, declare the terms finally agreed upon and which under the findings made, necessarily supplement and qualify all previous writings, state that the MacQuarries "will deliver" into escrow a trust deed "to secure note for $44,000.00 * * * payable in installments of $400.00, or more" on the 15th day of each month including interest at 5 per cent in favor of defendant. The evidence indicates that following the refusal of the Xeniades to execute the subordination agreement the MacQuarries made other arrangements to finance the purchase and on January 5, 1945, offered to pay defendant cash in full for her interest in the property. However, as discussed hereinabove, defendant's acceptance of the MacQuarries' offer, was, as shown in the instructions, expressly made contingent upon the obtaining of the subordination agreement from the Xeniades within five days from December 29, 1944. The agreement was not obtained within the specified period; the cash offer of January 5th was a new offer to buy, but was not performance of the contract which had been made; defendant, accordingly, was under no obligation to proceed further under the old contract or to pay a commission for securing the new offer which she did not accept.

In view of the fact that, as shown above, the evidence supports the finding of the trial court that the proposed buyers produced by plaintiff were at no time "ready, able or willing to purchase * * * upon the terms * * * offered" by defendant in the listing contract or otherwise, it becomes unnecessary to consider attacks made by plaintiff upon other portions of the findings and upon the admissibility of certain evidence in support thereof.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

31 Cal.2d 362

GALE et al. v. WITT et al.

L. A. 19780.

Supreme Court of California.

Jan. 27, 1948.

1. Judgment 🔑**435, 443(1)**

The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after expiration of time for appeal or other direct attack only if alleged fraud or mistake is extrinsic rather than intrinsic.

2. Judgment 🔑**443(1)**

The fraud which will justify the setting aside of a final judgment by equity court must be of such character as prevents a trial of the issues presented to court for determination.

3. Judgment 🔑**443(1)**

Fraud which is collateral to and outside of court so that a party because of such fraud or concealment is effectively prevented from presenting his case or all of his defense, is "extrinsic fraud" against which equity will give relief by setting aside the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

4. Judgment 🔑**443(1)**

Some representation or concealment by one party which prevented the other from having his day in court is necessary to constitute "extrinsic fraud" against which equity will grant relief.

5. Judgment 🔑**443(1), 444**

Use of forged documents or perjured testimony constitutes "intrinsic fraud" and cannot be made the basis for an attack upon a judgment by way of relief in equity.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

6. Judgment 🔑**460(4)**
Wills 🔑**282**

Allegation that executor obtained judgments probating will and distributing realty to him thereunder with knowledge, concealed from court, that will was attested after death of testatrix charged only "intrinsic fraud" and did not state a cause of action for equitable relief against such judgments in absence of allegation that heirs did not have required notice or knowledge of all proceedings in administration of estate.

7. Judgment 🔑**443(1)**

A party who had proper notice of action and was not prevented from full participation therein but had an opportunity to present his case and protect himself from any fraud attempted by his adversary cannot attack judgment after expiration of time for appeal or other direct attack, since fraud perpetrated by adversary, under such circumstances, is "intrinsic fraud", even though unsuccessful party did not avail himself of opportunity to appear before the court.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action in equity by Roy A. Gale and another against John H. Witt, individually and as executor of the estate of Ada L. Gale, deceased, to impress a trust upon realty distributed to defendant under decedent's will. From a judgment of dismissal, plaintiffs appeal.

Judgment affirmed.

Prior opinion, 180 P.2d 993.

Ray Miller, of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondents.

EDMONDS, Justice.

Roy A. Gale and his brother, Melvin C. Gale, sued to impress a trust upon certain real property distributed to John H. Witt in accordance with the will of their mother, Ada L. Gale. Upon appeal from the judgment of dismissal, which followed an order sustaining an objection to the introduction of any evidence in support of the allegations of the complaint, the question for decision concerns the sufficiency of the pleaded facts to state a cause of action.

The will of Mrs. Gale bequeathed $250 to her son Roy, devised certain real property to Witt and named him as executor. The residue of the estate was left to her two sons. The will was witnessed by Witt, Joe W. Matherly, the attorney for the testatrix, and E. Marion Geiger, his secretary.

The complaint alleges that for a long time preceding the death of Mrs. Gale she was in ill health. Witt was her advisor, and by exercising undue influence upon her, he and Matherly procured the execution by her of the will which was admitted to probate. Other allegations are that, pursuant to a fraudulent conspiracy, they "alone purported to witness the signature or purported signature" of Mrs. Gale. Each of them, well knowing that she would not declare the instrument to be her last will and testament, procured the signature of E. Marion Geiger as a witness to it, and the latter "did subscribe to said instrument out of the presence of * * * [Mrs. Gale] and after [her] death." Mrs. Gale did not sign the instrument nor declare it to be her will and she did not request E. Marion Geiger to witness it.

The concluding charges of the complaint are that Matherly, in presenting the will for probate and in all of the proceedings had for the purpose of administering upon the estate of Mrs. Gale, perpetrated a fraud upon the court. Neither of the sons was "informed of and did not know or discover any of the aforesaid fraud, or the facts connected therewith, until on or about the 21st day of March, 1945, when they were so informed by the District Attorney of the said county of San Diego; * * * that since [the specified date they] have refrained from bringing this action at the instance of various governmental agencies who were investigating the * * * [activities of Witt and Matherly in connection with the estate] but that immediately upon being appraised of such facts retained counsel to bring appropriate action * * * upon completion of [the] investigation by [the] governmental agencies."

In regard to the administration of the estate, the sons pleaded that their mother's will was admitted to probate on May 12, 1944, and in the following December, the probate court settled the final account of Witt as executor, and distributed to him the real property which is the subject of the litigation. It is also asserted that, at the time of the filing of the complaint, Witt was the record owner of that property.

A demurrer to this complaint was overruled. When the case was called for trial, Witt objected to the introduction of any evidence upon the ground that the complaint does not state a cause of action against him individually or as executor of Mrs. Gale's estate. During argument upon the objection, the appellants' counsel declared that they would offer no evidence upon any allegation of the complaint other than those relating to the execution of the will, as a witness, by E. Marion Geiger, and the ownership by Witt of the property distributed to him. Otherwise stated, the appellants expressly based their claim of extrinsic fraud upon the sole ground of an offer to prove that E. Marion Geiger signed the will after the death of Mrs. Gale and that Witt presented the will to the probate court, obtained the order admitting it to probate and the subsequent decree of distribution, with knowledge of the facts in regard to such execution. In fairness to Witt and Matherly, it should be noted that there was then on file an answer denying all of the allegations of fraud and alleging that Witt, Matherly and E. Marion Geiger each executed Mrs. Gale's will at her request, in her presence and in the presence of each other. The objection was sustained.

The appellants assert that they have alleged sufficient facts to state a cause of action upon the ground of extrinsic fraud. The basis of their position is that, by the will, Witt was named executor and also made a devisee under it; therefore, he was under a duty to disclose the facts in regard to its execution. Because of the representation to the court that E. Marion Geiger witnessed the will in the presence of the testatrix, the argument concludes, the decree of distribution was obtained by extrinsic fraud.

Witt replies that the allegations show, at most, a case of intrinsic fraud, for the time when E. Marion Geiger signed as a witness to Mrs. Gale's will was an issue decided by the court when that instrument was admitted to probate. The fact that Witt was appointed executor of the will and also named as a devisee does not give a cause of action upon the ground of extrinsic fraud in the absence of allegations complying with the requirements of a pleading in such suits generally.

[1-4] "The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic." Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 106; Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439; Neblett v. Pacific Mut. Ins. Co., 22 Cal.2d 393, 139 P.2d 934; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328. The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. Thompson v. Thompson, 38 Cal.App.2d 377, 101 P.2d 160; Godfrey v. Godfrey, 30 Cal.App.2d 370, 86 P.2d 357. Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. Thus where plaintiff had a defense and counterclaim but relied upon the defendant's representations that he would hold the property in trust for her if she did not defend, she was allowed to set the judgment aside because of the collateral and extrinsic fraud. Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A., N.S., 579. A final decree of divorce was vacated upon proof by a wife that her husband secretly obtained it after reconciliation and the resumption of marital relations. McGuinness v. Superior Court, 196 Cal. 222, 228, 237 P. 42, 40 A.L.R. 1110. The fraud of an executor was characterized as extrinsic when it was shown that he wrote a pretermitted heir stating that he would take care of her interests and she need not appear and he thereafter obtained an order adversely affecting her rights. Larrabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265. But in these and other cases such as Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976, and Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256, the rule has been stated as requiring that, to constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court and it has been applied to the acts of executors and trustees who were charged with false representations.

[5] For example, in a suit against a bank which acted as executor it was held that a judgment rendered in a probate proceeding may not be set aside upon the ground of extrinsic fraud in the absence of proof that the executor acted in such manner as "to prevent, foreclose, or hinder" a full and fair hearing upon the issue then before the court for determination. Carr v. Bank of America, 11 Cal.2d 366, 79 P.2d 1096, 1100, 116 A.L.R. 1282. To the same effect is Adams v. Martin, 3 Cal.2d 246, 44 P.2d 572, in which this court reversed a judgment against a guardian rendered upon findings that he had falsely testified in regard to expenditures made by him, stating: "It is uniformly held that perjury is intrinsic, and not extrinsic, fraud, and therefore does not constitute a sufficient basis for equitable relief against a final judgment." Pages 248, 249 of 3 Cal.2d, page 573 of 44 P.2d. In another case, a trustee's false representations and lack of complete revealment to the probate court were placed in the same category the ruling sustaining a demurrer to the complaint was upheld upon the ground that

the acts complained of went to the merits of the cause submitted to judgment and did not constitute extrinsic fraud. McLaughlin v. Security First Nat. Bk., 20 Cal.App.2d 602, 606, 67 P.2d 726. These decisions follow the long established principle that the use of forged documents or perjured testimony constitutes intrinsic fraud and cannot be made the basis for an attack upon the judgment by way of relief in equity. Hammell v. Britton, 19 Cal. 2d 72, 82, 119 P.2d 333; Tracy v. Muir, 151 Cal. 363, 373, 90 P. 832, 121 Am.St.Rep. 117; Pico v. Cohn, 91 Cal. 129, 134, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159; O. A. Graybeal Co. v. Cook, 16 Cal.App.2d 231, 236, 60 P.2d 525; Harvey v. Griffiths, 133 Cal.App. 17, 22, 23 P.2d 532; 3 Freeman on Judgments, 5th Ed., p. 2583, sec. 1241; Restatement of Judgments, sec. 126 [2] [b].

[6, 7] In the present action, there is no allegation that the appellants were not given the required notice of the hearing on the petition of the executor to admit their mother's will to probate, or of the application for settlement of his account and distribution of the estate. Nor do they charge that they did not have knowledge of all of the proceedings in connection with the administration of her estate. "A party who has been given proper notice of an action, * * * and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, 109 Cal.19, 41 P. 814. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; see Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am.St.Rep. 110." Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107; Howard v. Howard, 27 Cal.2d 319, 321, 163 P.2d 439; Hosner v. Skelly, 72 Cal.App.2d 457, 461, 164 P.2d 573.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and SCHAUER, JJ., concur.

83 Cal.App.2d 381

LAVICK v. NITZBERG.

Civ. 13510.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1948.

1. Gaming 🔑**19(1)**

A contract founded upon a gambling consideration is contrary to good morals and is unenforceable. Pen.Code, § 330; Civ. Code, § 1667.

2. Gaming 🔑**6**

Draw poker is a game of chance or, in other words, "gambling".

See Words and Phrases, Permanent Edition, for all other definitions of "Gambling".

3. Gaming 🔑**19(1)**

Where plaintiff, who conducted gambling establishment, knew that checks were given by defendant for purchase of chips to be used by defendant in a game of "low ball" or draw poker then in progress and that one of plaintiff's employees would participate in the game and defendant, who lost all chips, stopped payment of checks, plaintiff could not recover on the checks since checks were founded upon a gambling consideration. Civ.Code, § 1667.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Harold J. Lavick against Irving Nitzberg on four checks. Judgment for defendant, and plaintiff appeals.

Affirmed.

Nathan G. Gray, of Berkeley, for appellant.

Herman W. Mintz and J. A. Gunning, both of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on four checks of $500 each given to plaintiff in payment for chips to be used by defendant in a game of "low ball" or draw poker. Plaintiff was the owner of the premises in which he conducted a gambling establishment. He knew that the checks were given for the purchase of chips, that the chips would be used by the defendant in the game which was then in progress, and that one of his employees would participate in the game. Defendant lost all the chips and thereafter stopped payment on the checks.

The cause was determined on a stipulation of facts, and the trial court made findings as to the truth of the allegations of the complaint and of the affirmative defense. Judgment followed for defendant.

[1] Appellant rests his case on the premise that since "low ball" or draw poker is not a game declared illegal by section 330 of the Penal Code therefore such a game is a "lawful" transaction. The argument overlooks the provisions of section 1667 of the Civil Code which reads: "That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals." Thus that which is contrary "to the policy" of express law, or contrary to good morals is unlawful though not expressly prohibited by statute. It is this section which determines what is an unlawful contract, not section 330 of the Penal Code which determines what types of gaming are punishable as misdemeanors. And it is this section which establishes the law that a contract founded upon a gambling consideration is unenforceable.

[2] Draw poker is assuredly a game of chance or, in other words, gambling. People v. Philbin, 50 Cal.App.2d Supp. 859, 123 P.2d 159; City of Lake Charles v. Marcantel, 125 La. 170, 51 So. 106. In the early case of Bryant v. Mead, 1 Cal. 441, the court held that the keeper of a licensed gaming room could not recover money lost by the defendant in a game of faro. In Carrier v. Brannan, 3 Cal. 328, at page 329, in holding that a plaintiff could not recover money lost in play at a common gambling house, the court said:

"This court decided, in the case of Bryant v. Mead, 1 Cal. 441, that no action would lie at common law to recover debts of this character. This has ever since been regarded as the settled law of the State upon this subject, and we feel no disposition to disturb or question the propriety of that decision. It needs no authority or arguments to satisfy this court that the practice of gaming is vicious and immoral in its nature, and ruinous to the harmony and well-being of society. Neither do we think that gaming debts have been legalized by the operation of the act of the legislature licensing gaminghouses.

"The legislature, finding a thirst for play so universally prevalent throughout the State, and despairing of suppressing it entirely, have attempted to control it within certain bounds, by imposing restrictions and burdens upon persons carrying on this kind of business. The license simply operates as a permission, and removes or does away with the misdemeanor which existed at common law without changing the character of the contract."

[3] The principle upon which the rule of these cases rests is that the consideration for notes given in a gambling game in a gambling house is contra bonos mores and as such "unlawful" under section 1667 of the Civil Code. Union Collection Co. v. Buckman, 150 Cal. 159; 88 P. 708, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804; Rose v. Nelson, 79 Cal.App.2d 751, 180 P.2d 749; 24 Am.Jur. p. 464; 38 C.J.S., Gaming, 326. Directly in point on all features is Drinkall v. Movius State Bank, 11 N.D. 10, 88 N.W. 724, 57 L.R.A. 341, 95 Am.St.Rys. 693. Without laboring the discussion further

it is sufficient to say that the uniform rule of the cases is that promissory notes given in a gaming-house to the keeper of the house for the purpose of enabling the maker to participate in any game of chance with the keeper or his employees are unenforceable under the provisions of section 1667 of the Civil Code.

Since the plaintiff could not recover on the notes under any form of pleading or practice it would serve no purpose to consider his argument that findings of fact should not have been made because the case was heard on a stipulation of facts. Even if that were error the stipulation alone compelled a judgment for the defendant.

Judgment affirmed.

GOODELL and DOOLING, JJ. concur.

83 Cal.App.2d 362

SANDERS et al. v. ALLEN et al.

Civ. 15843.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1948.

Rehearing Denied Feb. 16, 1948.

Hearing Denied March 25, 1948.

1. Appeal and error 🔑854(3)

An order sustaining a demurrer without specifying the particular ground or grounds of demurrer upon which it is based must be upheld on appeal if any one of the grounds of demurrer is good.

2. Landlord and tenant 🔑180(3)

In tenant's action for damages for constructive eviction, allegation that but for conduct of defendants neither plaintiff nor plaintiff's husband would have vacated rented apartment was sufficient as against demurrer as an allegation that alleged acts of landlord and other defendants allegedly acting as landlord's servants were the proximate cause of damages claimed.

3. Landlord and tenant 🔑172(2), 173

Any disturbance of tenant's possession by landlord, or some one acting under his authority, which renders premises unfit for occupancy for purposes for which they were demised or which deprives tenant of beneficial enjoyment of premises, causing tenant to abandon them, amounts to a "constructive eviction" provided tenant abandons premises within a reasonable time.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Eviction".

4. Action 🔑38(4)

In tenant's action against landlord and other defendants who allegedly acted as landlord's servants, allegations of complaint showed that damages were sought for a constructive eviction allegedly resulting from acts of landlord and other defendants and not for any act or series of acts which allegedly brought about eviction and complaint was not demurrable as stating several causes of action without separately stating them.

5. Executors and administrators 🔑49
Husband and wife 🔑207

Where husband and wife as tenants were allegedly constructively evicted before termination of tenancy, wife succeeded to husband's interest in unexpired tenancy upon death of husband and was entitled, not only for herself, but as administratrix of her deceased husband's estate, to recover for the inconvenience, discomfort, humiliation and embarrassment suffered by each of them as a proximate result of the alleged unlawful eviction.

Appeal from Superior Court, Los Angeles County; Alfred E. Paenessa, Judge.

Action by Mary Sanders, individually, and Mary Pratt Sanders, as administratrix of the estate of George L. Sanders, deceased, against George S. Allen and others, for damages arising out of an alleged eviction. From a judgment of dismissal, plaintiff appeals.

Attempted appeal from order sustaining demurrer to complaint dismissed. Judgment of dismissal reversed and cause remanded with directions.

Frank C. Weller and Thomas S. Tobin, both of Los Angeles, for appellants.

Joseph D. Taylor and Paul Taylor, both of Los Angeles, for respondent George S. Allen.

WHITE, Justice.

This is an action by Mary Sanders, individually and as administratrix of the estate of her deceased husband, for damages arising out of an alleged eviction of plaintiff and her husband from an apartment in the City of Los Angeles. The demurrer of defendant George S. Allen to the fifth amended complaint was sustained with leave to amend. Plaintiff declining to amend further, a judgment of dismissal was entered, from which judgment plaintiff appeals.

The first cause of action of the fifth amended complaint is substantially as follows:

That Mr. and Mrs. Sanders occupied an apartment at 1207 Miramar Street, in the City of Los Angeles, on a month-to-month tenancy; the defendant George S. Allen was the owner of the building in which the apartment was situated; that from and after November 2, 1942, defendant Allen, "so plaintiff believes and alleges the fact to be, entered upon a systematized campaign of annoyance, terrorism and vexation designed to interfere with the quiet and peaceable possession and enjoyment of the apartment," which campaign was directed against Mr. and Mrs. Sanders with the "aim and object" to "force plaintiff and her husband" to vacate the premises so that they could be rented to others at a higher rental.

That in pursuance of said campaign, the defendant Allen and his agents, servants and employees, "acting both jointly and severally and pursuant to a conspiracy, scheme and common design, and particularly one of the defendant Allen's employees, John Sinclair not sued herein, and the defendants Kelly Davis, Mildred M. Cowan and Louise Vaughn, committed, or caused to be committed against the plaintiff Mary Sanders and her husband George L. Sanders, now deceased, a series of malicious and mischievous acts designed by said defendants, and each of them to annoy, terrorize and harass the plaintiff and her husband * * * and to compel them to vacate said apartment against their will.

That for the purpose aforesaid and pursuant to said common design, the windows of the apartment were twice smashed, during February, 1945, by a person alleged on information and belief to be defendant John Sinclair, then an employee of defendant Allen, by throwing a dry cell battery through the windows; that a similar incident occurred a few nights later; that thereafter defendant Allen sent his employees to "remove the windows entirely" while a rainstorm threatened. On information and belief it was alleged that it was Allen's intent to remove the windows and keep them out during inclement weather.

That 15 or 16 months prior to filing of the complaint defendant Allen, with the same purpose aforesaid, blocked off a number of windows of the apartment by placing planks against the windows and refused to remove them for 30 days; that in February, 1945, sugar was placed in the automobile of plaintiffs while it was in a garage on the premises.

That as a part of the scheme and plan aforesaid, defendant Allen or his agents frequently annoyed the plaintiffs by repeated rapping at the door of the apartment; that various employees of defendant Allen, particularly defendant Kelly Davis, repeatedly rapped on plaintiffs' door and falsely accused them of creating a disturbance; that the same defendants repeatedly rang plaintiffs' telephone approximately once each hour.

That during April, May, June and part of July, 1945, the defendants, in pursuance of their plan, committed the following acts: In the latter part of April, defendant Sinclair drenched Mr. Sanders with water from a garden hose; the false telephone calls were resumed; that on July 14, on the porch of the apartment house, defendants Kelly Davis, Mildred M. Cowan, Louise Vaughn and others, employees of defendant Allen, then and there managing the apartment house, assaulted, knocked down, kicked and beat plaintiff's husband, George L. Sanders.

As a result of the conduct of defendants and in fear of injury and of their lives, plaintiffs vacated said apartment on July

15, 1945, although their rent was paid to August 10, 1945.

The second cause of action, which was stated to be solely on behalf of Mary Sanders individually, adopted most of the allegations above set forth of the first cause of action, and further alleged that as a result of the "systematized campaign of terrorism described in plaintiff's first cause of action," particularly smashing windows, boarding up the windows, damaging of the automobile, rapping at the door, ringing of the telephone, and repeated assaults on George L. Sanders, deceased, "this plaintiff, individually, was constantly frightened, apprehensive and mentally upset, and lived in constant fear of her life and of injury to her husband * * * that but for the conduct of the defendants herein and for fear of injury to her husband George L. Sanders and herself, this plaintiff would not have vacated said apartment * * * the sole reason for * * * vacating said apartment was the conduct of the defendants * * * as a result of her having been forced out of said Huntley Apartments this plaintiff, in addition to the fear and apprehension suffered by her, suffered extreme humiliation and embarrassment, all to her damage in the sum of $8,000.00." The second cause of action concluded with allegations as to defendant Allen's wealth, and that by reason of malice and oppression evidenced by Allen, plaintiff Mrs. Sanders was entitled to exemplary damages.

Defendant George S. Allen demurred to the fifth amended complaint and to each of the two causes of action thereof upon the grounds, as to the complaint, that there was a defect and misjoinder of parties plaintiff, that several causes of action had been improperly united and not separately stated, that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint was uncertain, in that it could not be determined therefrom whether plaintiff sought damages to person or property, whether it was sought to recover for personal injury to the deceased, George L. Sanders or for injury to property rights of Mary Sanders and the deceased, and whether the damages sought by Mary Sanders for fear, annoyance, humiliation and embarrassment in the second cause of action "are for the same wrongful acts alleged in the first cause of action." Similar objections were made as to each of the two causes of action, and, in addition, 24 assignments of uncertainty were made as to each cause of action.

[1] The order of the trial court was: "Demurrer sustained; plaintiffs are given ten days to amend." Plaintiffs declining to amend, a judgment of dismissal was entered. It is settled that an order sustaining a demurrer without specifying the particular ground or grounds of demurrer upon which it is based must be upheld on appeal if any of the grounds of demurrer are good. Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 462, 165 P.2d 15, 163 A.L.R. 838; Frasch v. London & Lancashire Fire Ins. Co., 213 Cal. 219, 2 P.2d 147; Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550.

In urging that no cause of action is alleged by the complaint, respondent argues that although the pleader intended to bring an action for damages for unlawful eviction, he has succeeded merely in setting forth a series of wrongful acts of Allen and his codefendants, followed by the voluntary act of vacating the apartment on the part of Mr. and Mrs. Sanders, and has not shown that the damages claimed were proximately caused by the acts; that the complaint contains no allegation that the damages proximately resulted from the wrongful acts. Respondent, in other words, contends that the following allegation in the first cause of action is insufficient as an allegation of proximate cause: "That but for the conduct of the defendants herein and for fear of injury to them physically by said defendants, neither the plaintiff Mary Sanders nor her husband George L. Sanders, now deceased, would have vacated said apartment. * * *". This followed an allegation that as a result of an assault and fearing for their lives, Mr. and Mrs. Sanders vacated the apartment "against their will."

[2, 3] The objection to the complaint, in this regard, is not well taken. The cause of action is one for damages for constructive eviction. There is alleged a series of

acts which were designed to and allegedly did operate to deprive the tenants of the beneficial enjoyment of the premises, causing them to abandon them. In 32 American Jurisprudence, at page 231, it is said: "* * * It is now well established that any disturbance of the tenant's possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, provided the tenant abandons the premises within a reasonable time."

[4] Respondent further contends that "because of the lack of any allegation of proximate causal connection between the acts, as an eviction, and the damages, no cause of action for an eviction is stated. If the acts are to be treated as wrongful, individually, and the damages as being the consequences of these acts then * * * there is a statement of several causes of action without separately stating the same."

By paragraph XIV of the first cause of action, it is alleged: "That each and every one of the acts hereinbefore set forth and complained of were done by the defendants herein wilfully, knowingly, maliciously and oppressively, and with the intent and purpose on the part of said defendants to vex, annoy, harass, and terrorize the plaintiff Mary Sanders and her husband George L. Sanders, now deceased, and to compel them, against their will, to move from and vacate their apartment as aforesaid, and by reason thereof they have suffered actual damages in the sum of $3,000.00." The foregoing allegation adequately shows, when taken together with the other allegations of the first cause of action hereinbefore summarized, that damages are sought for an eviction, and not for any act or series of acts which brought about the eviction. In other words, damages are sought for loss of the premises resulting from a breach of duty on the part of the defendants by a series of acts done with the intent to deprive the tenants of the quiet enjoyment of the premises. A single trespass or assault, it is true, would warrant an action for damages, but might not necessarily support a claimed constructive eviction; while a series of acts such as is set forth here, can well be said to have constituted a substantial interference with the use and enjoyment of the premises. See Cline v. Altose, 158 Wash. 119, 290 P. 809, 70 A.L.R. 1471.

What has heretofore been said applies equally to the second cause of action, on behalf of Mary Sanders individually. It also answers the contention that several causes of action have not been separately stated.

Contrary to respondent's contention, that no cause of action for a constructive eviction is stated, it must be held that sufficient facts are pleaded which, if true, constituted a serious interference with the use and occupation of property, and therefore amounted to an eviction.

[5] The action is not one that abated with the death of Mr. Sanders. Upon his death the widow succeeded to his interest in the unexpired tenancy, and was, therefore, entitled, not only for herself, but as administratrix of her deceased husband's estate, to recover for the inconvenience, discomfort, humiliation and embarrassment suffered by each of them as a proximate result of the alleged unlawful eviction.

From what we have heretofore said, it follows that respondent's contention that the fifth amended complaint is uncertain, in that it cannot be ascertained therefrom whether they are required to answer a cause of action for trespass, assault and battery, nuisance, or unlawful eviction, must fail.

The attempted appeal from the order sustaining the demurrer of George S. Allen to the fifth amended complaint is dismissed. The judgment appealed from is reversed and the cause remanded with directions to the court below to overrule the demurrer of defendant George S. Allen to the fifth amended complaint and to allow him a reasonable time within which to file an answer thereto if he be so advised.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

83 Cal.App.2d 356

GUTKNECHT v. PAUL.

Civ. 13437.

District Court of Appeal, First District,
Division 2, California.
Jan. 26, 1948.

1. Contracts ⚿329

Where defendant, when he sold veterinary and pet hospital business to plaintiff's predecessor, covenanted not to engage in similar business within an area of five miles, which covenant, although defendant believed it to be personal, ran to the heirs and assigns of plaintiff's predecessor, and plaintiff, after his purchase of business, made no objection to defendant's proposed construction of a pet hospital within restricted distance either at license hearing or on any of the occasions on which he visited construction site, action on the covenant commenced after defendant had expended $7,500 was barred by "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

2. Appeal and error ⚿1010(1)
Equity ⚿67

Laches is a question of fact on the evidence and must be determined by a consideration of all the circumstances of each particular case, which determination is to be made primarily by trial court, and appellate court will not interfere with trial court's discretion unless manifest injustice has been done or unless trial court's conclusion is not supported by the evidence.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Albert J. Gutknecht against Emmet W. Paul to enforce a covenant by the defendant not to engage in veterinary and pet hospital business within five miles of the site of business which defendant had sold to plaintiff's predecessor. Judgment for defendant, and plaintiff appeals.

Affirmed.

Raymond J. O'Connor and Regis J. Swetman, both of San Francisco, for appellant.

Bullock, Wagstaffe & Daba, of Redwood City, for respondent.

DOOLING, Justice.

[1] Plaintiff and defendant are both veterinarians. In 1935 defendant sold a veterinary business and pet hospital theretofore conducted by him to one Dr. Haidy. He covenanted not to engage in a similar business within "an area of five miles" from the location sold and this contract ran to the purchaser's heirs and assigns. Plaintiff later purchased the business from Haidy. Defendant applied to the city council of Redwood City for a use permit for a dog and cat hospital and a hearing was set for June 17, 1946 thereon. Plaintiff learned of this application, was present at the hearing, greeted defendant but made no objection to his construction of the proposed hospital. Thereafter plaintiff visited the premises where defendant was constructing his hospital on several occasions but made no objection. On July 19, 1946, after defendant had expended $7,500 on the project, he was served with summons and complaint in this action. Defendant testified that he acted in the belief that his covenant not to re-engage in business was a personal one with his vendee.

The trial court found the action barred by plaintiff's laches and gave judgment for defendant. We cannot interfere with the trial court's discretion in making this finding.

[2] "Laches is a question of fact, on the evidence, and must be determined by a consideration of all the circumstances of each particular case. (Citation.) It is a question to be determined primarily and very largely by the trial court, and an appellate court will not interfere with its discretion in this respect unless manifest injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence." Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767, 770.

Here plaintiff stood by without protest while defendant believing (although mistakenly) that his covenant did not run to plaintiff expended $7,500 in good faith. The case falls within the rule announced in Vesper v. Forest Lawn Cemetery Ass'n, 20 Cal.App.2d 157, 165, 67 P.2d 368. Since the finding on laches fully supports the judgment errors alleged in connection with other issues need no discussion.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

83 Cal.App.2d 303

LEONI v. DELANY.

Civ. 13154.

District Court of Appeal, First District, Division 2, California.

Jan. 20, 1948.

Rehearing Denied Feb. 16, 1948.

See 189 P.2d 517.

1. Witnesses 🔑133

Claimant was incompetent under statute to testify in support of her claim against decedent's estate based on alleged oral agreement with decedent. Code Civ.Proc. § 1880.

2. Work and labor 🔑1

One who receives a benefit at the expense or detriment of another should compensate the latter to the extent of a reasonable value of the benefit received.

3. Frauds, statute of 🔑138(4)
Limitation of actions 🔑28(1), 50(2)

When continuous personal services are performed under express agreement for compensation on termination thereof, which agreement is unenforceable because not in writing, the reasonable value of the services may be recovered, and the statute of limitations does not commence to run until termination of the services, which is usually on the promisor's death. Civ. Code, § 1624; Code Civ.Proc. § 1973.

4. Frauds, statute of 🔑138(1)

Where a contract is merely unenforceable because within purview of the statute of frauds, action generally will lie on a common count.

5. Action 🔑48(3)

Where a person seeks to recover for services rendered, and there is a fair and reasonable doubt as to whether he is entitled to recover on an express or implied contract, he is entitled to plead a claim on each and to recover according to the proof.

6. Action 🔑45(1)

Different causes of action may be stated to meet such phases of the evidence as may be fairly and reasonably anticipated.

7. Executors and administrators 🔑222(1)

The primary function of a creditor's claim against an estate is to appraise the executor or administrator of the nature of the obligation.

8. Work and labor 🔑2

In an action for services rendered, the basis and vital elements of the cause of action are the services performed and the amount due for the services.

9. Pleading 🔑381(2)
Trial 🔑139(4)

Where the circumstances are such as to indicate a fair and reasonable doubt whether action should be on an express contract for services rendered or on quantum meruit, and plaintiff separately pleads both an express agreement to compensate and a common count, plaintiff is entitled to introduce evidence on both causes of action, and the decision as to which of them is sustained is a matter for the jury.

10. Appeal and error 🔑1027

Where two or more counts are pleaded, and one count is not affected by error, and a verdict with respect to it is supported by substantial evidence, commission of errors in connection with another count or insufficiency of evidence to sustain a verdict as to other count is immaterial.

11. Appeal and error 🔑1027

Where plaintiff, in action on a creditor's claim against estate for services rendered deceased, sought recovery on theory of express contract in first count and in second count sought recovery on a common count for reasonable value of services rendered, judgment for plaintiff was required to stand if there was substantial evidence to support the second count.

12. Work and labor ⚷4(2)

Where rendition of services is established, the law implies a promise to pay for the services.

13. Executors and administrators ⚷221(5)

Evidence sustained verdict against decedent's estate on common count for reasonable value of services rendered by claimant in sheltering, nursing, and caring for decedent during latter years of his life.

GOODELL, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Genevieve B. Leoni against Elmer P. Delany, as administrator of the estate of Baltaser Corral, deceased, to recover on a creditor's claim against the estate. Judgment for the plaintiff, and defendant appeals.

Judgment affirmed.

Prior opinion 179 P.2d 820.

Frank C. Sandorff-Pedersen and William A. Sullivan, both of San Francisco, for appellant.

Phillip Barnett and Robert L. Dreyfus, both of San Francisco, for respondent.

JONES, Justice pro tem.

This is an action to recover upon a creditor's claim against the estate of Baltasar Corral. The argument of the appellant upon the rehearing is addressed to the point that the claim is not sufficient to support the complaint and particularly the second cause of action thereof. In this respect it is urged that a contract unenforceable because it is not in writing is presented and that on this account the claim can not be made the basis of a cause of action in any form. The claim is for personal services rendered to the decedent during his lifetime, and which are alleged to be of the reasonable value of $5,000.

The plaintiff filed suit on April 20, 1944, seeking to recover in two counts. In the first count recovery is sought upon the theory of an express contract, and the second is upon a common count to recover the reasonable value of services rendered. The case was tried before a jury which found for the plaintiff in the sum of $4,000, and from the judgment entered on the verdict the defendant has appealed.

The claim recites: "That on or about the 3d day of December, 1940, claimant and decedent, in his lifetime, entered into an oral agreement that, in consideration of the promise of claimant to marry said decedent at a future date when legally entitled to do so, and in consideration of services rendered, and to be rendered by said claimant, said decedent promised and agreed that, instead of paying claimant in cash for said services current wages, he would leave to claimant all of his property as compensation for the performance of said services, and that he would make claimant the beneficiary of a life insurance policy on his life, in the principal sum of $5,000.00, designating said claimant as beneficiary; that said promises were reiterated and restated by said decedent many times thereafter and that in consideration of said promises, said claimant accepted said offer of marriage aforesaid and agreed to perform certain services on behalf of said decedent, consisting of housekeeping, nursing care and attention, and that said claimant entered upon the performance of said services on or about December 3, 1940, pursuant to said agreement, and performed the same continuously up to the time of the death of said decedent, which occurred about October 13, 1943, and that said services so performed are of the reasonable value of $5,000.00."

[1] The plaintiff was barred by section 1880 of the Code of Civil Procedure from being a witness in support of her own claim, but it appears from the testimony of others called as witnesses that she had a home in San Francisco where she lived with her two grown sons. The decedent had a room in the house next to that of her son. He ate his meals at the family table and generally made use of the home. The plaintiff did all of his washing, ironing and mending. The decedent was a seaman by occupation and during the time covered by the claim he sustained a severe injury to his back. On account of this

injury he could not work for a considerable period of time. At the time of his injury he was without funds. The plaintiff, however, gave him shelter, bought clothes for him and advanced money for his personal needs. She also nursed him while he was ill and generally cared for him until he was well enough to go to work.

In addition to his point that the complaint does not state a cause of action in either the first or second counts, the appellant urges that the evidence is not sufficient to sustain the verdict, and that the trial court erred in giving and refusing to give certain instructions.

In regard to the sufficiency of the complaint, it is argued that the first count alleges a contract which the law requires to be in writing, and, since it is not, it is unenforceable; that the second count is based upon the same state of facts, and the same claim, and therefore must fall with the first count.

[2-4] In support of his position the appellant has cited Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65, and Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248. These cases hold that it is proper to sustain a general demurrer to a common count separately pleaded in a complaint where the recovery sought on such count is obviously based on the same set of facts specifically pleaded in another count but which other count fails to state a cause of action. In this respect there is a distinction between a count which fails to state facts sufficient to establish the existence of a contract and one which pleads a contract which is unenforceable because it is not in writing. It is the unenforceability of an otherwise valid contract which gives rise to the right of relief through the medium of a common count. The law contemplates that when one receives a benefit at the expense or detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received. As is said in Winder v. Winder, 18 Cal.2d 123, 127, 114 P.2d 347, 350, 144 A.L.R. 935: "It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing (§ 1624, Civ.Code; § 1973, Code Civ.Proc.), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Morrison v. Land, 169 Cal. 580, 147 P. 259; In re Estate of Rohrer, 160 Cal. 574, 117 P. 672, Ann.Cas. 1913A, 479; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Burr v. Floyd, 137 Cal.App. 692, 696, 31 P.2d 402; Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563; Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 188 P. 1034." To the same effect is Reeves v. Vallow, 16 Cal.2d 95, 104 P.2d 1017. In the cases of Hays v. Temple and Rose v. Ames, supra, relied upon by the appellant, the common counts were based upon the same facts relied on by the plaintiffs to make out a contract. In each case it was held that the count relied upon to establish the contract was fatally defective in that it failed to state sufficient facts to show a contractual relation, and that the common count based upon the same facts must also fall. That is not the question involved here. Where a contract is merely unenforceable because within the purview of the statute of frauds, an action generally will lie upon a common count.

[5, 6] It is also a well established principle of law that where a person seeks to recover for services rendered and there is a fair and reasonable doubt as to whether he is entitled to recover upon an express or implied contract, he is entitled to plead a claim upon each and to recover according to the proof. This right to state different causes of action to meet such phases of the evidence as may be fairly and reasonably anticipated is recognized in Wilson v. Smith, 61 Cal. 209, where the plaintiff was in doubt as to whether he was entitled to recover upon a common count for the reasonable value of services rendered or whether his rights were fixed by an express contract. He pleaded two causes of action, one upon an express con-

tract and the other upon a common count. The court permitted the case to go to the jury upon both counts, and a judgment for the plaintiff was affirmed on appeal. In Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709, 711, it is said: "But when for any reason the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety." See Wilkerson v. Seib, 20 Cal.2d 556, 563, 127 P.2d 904; Goldwater v. Oltman, 210 Cal. 408, 423, 292 P. 624, 71 A.L.R. 871; Cowan v. Abbott, 92 Cal. 100, 28 P. 213; Weintraub v. Soronow, 115 Cal.App. 145, 1 P.2d 28; Van Lue v. Wahrlich-Cornett Co., 12 Cal.App. 749, 108 P. 717.

In Ruble v. Richardson, 188 Cal. 150, 204 P. 572, 574, the plaintiff brought an action for the breach of an alleged contract of a decedent to make provision for plaintiff in her will for personal services rendered. The claim of the plaintiff was rejected by the executor and she sued in two counts. The first count was for a recovery upon an alleged breach of the contract, and the second upon a quantum meruit. When the case came on for trial, quoting from the opinion, "Plaintiff thereupon offered to prove by competent testimony other than her own, under the second cause of action, the fact of the rendition of the services to the deceased and their reasonable value. Defendant objected upon the ground that the second count of the amended complaint did not state facts sufficient to constitute a cause of action. The objection was sustained, and the trial court refused to permit plaintiff to make any proof under the quantum meruit." In commenting upon this ruling the court there said: "We think the trial court was in error in holding that the second count of the complaint did not state a cause of action. Morrison v. Land, supra, 169 Cal. [580,] 584, 147 P. 259; Zellner v. Wassman, [184 Cal. 80,] 193 P. 84; Grant v. Grant, 63 Conn. 530, 29 A. 15, 38 Am.St.Rep. 379, 384; In re Estate of Kessler, 87 Wis. 660, 59 N.W. 129, 41 Am.St.Rep. 74, 79. As to the contention that the claim did not apprise the executor of the nature of the services rendered, there should be considerable liberality in construing the pleadings when the foundation thereof is a claim against an estate. The facts stated therein should not be too strictly construed, for such a claim need not be drawn with the precision which would render a complaint good against a special demurrer, and its sufficiency is not to be tested by the rules of pleading. Doolittle v. McConnell, 178 Cal. 697, 705, 174 P. 305; Pollitz v. Wickersham, 150 Cal. 238, 250, 88 P. 911."

[7, 8] The primary function of a creditor's claim is to apprise the executor or administrator of the nature of the obligation, and as is said in 11a Cal.Juris. 868, sec. 616, "In an action to recover for services rendered, the basis and vital elements of the cause of action are the services performed and the amount due for the services; hence whether the claim is based upon an express contract for an agreed price or on a quantum meruit is not material." If the circumstances of the case are such as to indicate a fair and reasonable doubt as to the form of action to be followed, a plaintiff may separately plead both an express agreement to compensate and a common count and recover for his services according to the proof.

[9, 10] Where two causes of action are so pleaded the plaintiff is entitled to introduce evidence upon both causes of action and the decision as to which of them is sustained is a matter for the jury. Tanforan v. Tanforan, supra. If one count is not affected by error and there is substantial evidence to support a verdict with respect to it, it is immaterial that there may have been errors committed in connection with another count or that there is not sufficient evidence to sustain a verdict as to such other count. Shields v. Oxnard Harbor Dist., 46 Cal.App.2d 477, 491, 116 P.2d 121; King v. Schumacher, 32 Cal.App.2d 172, 179, 89 P.2d 466; Mitchell v. Towne, 31 Cal.App.2d 259, 87 P.2d 908; Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 356, 69 P.2d 483. One count sustained by sufficient evidence and free from error

is all that is required to support a verdict. The specifications of error which the appellant has made with reference to giving and the refusal to give certain instructions, all pertain to the first cause of action and and are immaterial to the second count.

[11-13] If there is substantial evidence to support the second count the judgment must stand. McCray v. Reese, 209 Cal. 453, 288 P. 72; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134. In this regard, all that is needed is to establish the rendition of the services and their reasonable value. In Zellner v. Wassman, 184 Cal. 80, 193 P. 84, it was held that the plaintiff was entitled to the reasonable value of his services upon the theory that when a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the party receiving the benefit to pay the reasonable value of whatever has been received under the contract. When the rendition of the services is established, the law implies a promise to pay for the same. The evidence produced by the plaintiff here contains no suggestion of improbability, and if it were opposed, which it is not, it is such probative force that it would create a substantial conflict. It appears ample to support the second count. Noland v. Noland, 44 Cal.App.2d 780, 113 P.2d 11.

The judgment appealed from is affirmed.

NOURSE, P.J., concurs.

GOODELL, Justice (dissenting).

I dissent:

The court instructed the jury as follows: "You are instructed that a contract, whether written or oral, is an agreement between two or more parties, competent to contract, upon a lawful subject matter with a legal consideration and a mutuality of agreement and obligation. *Such a contract is the one alleged to have been made in this case, and it should be enforced if its terms are established to your satisfaction by the evidence and under the instructions of the court."* (Emphasis added).

The language just emphasized told the jury that the contract sued on had "a lawful subject matter with a legal consideration" and that, if proved, it should be enforced. The contract pleaded was not only unenforceable because not in writing but was one wherein plaintiff promised to marry decedent "at a future date when legally entitled to do so". Indeed that promise was alleged to be part of the consideration for decedent's promises. At the time when these promises were exchanged the plaintiff was a married woman. She did not commence divorce proceedings against her husband until after decedent's death.

In Smith v. McPherson, 176 Cal. 144, 146, 167 P. 875, L.R.A. 1918B, 66, a breach of promise case, the court said: "Appellant contends that, as the original promise of marriage was given by defendant at the time defendant was a married man, and must necessarily rest for its fulfillment upon the basic consideration of securing a divorce, the plaintiff's whole case must fall to the ground. It is unquestionably true that a promise given under such circumstances is against the manifest policy of the law, and therefore wholly void. Noice v. Brown, 39 N.J.L. 133, 23 Am. Rep. 213; Paddock v. Robinson, 63 Ill. 99, 14 Am.Rep. 112. Nor will this court in the slightest modify so salutary a principle." For reasons which appear in the opinion, the language just quoted was not necessary to the decision; the judgment, in plaintiff's favor, was affirmed on other grounds. Although it was but a dictum, there can be no doubt that it is an accurate statement of the law. In Hilbert v. Kundicoff, 204 Cal. 485, 486, 268 P. 905, the court reaffirmed the rule and cited Smith v. McPherson approvingly. An annotation at 130 A.L.R. 1011 indicates that it is the prevailing rule and cites numerous cases, including Smith v. McPherson. The annotator says "* * * the fact that such an agreement encourages divorce is obvious."

Such being the settled law on the subject, it was prejudicial error to instruct the jury that such a contract, based in part on the promise of a married woman to marry "at a future date when legally entitled to do so," was based on a legal consideration.

It should be observed, further, that the contract pleaded in the first count was likewise carried into the second, for the second count by reference pleaded the filing of the creditor's claim, which claim set forth the plaintiff's promise to marry decedent "at a future date when legally entitled to do so".

For these reasons I am constrained to dissent.

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83 Cal.App.2d 330

CONNORS et ux. v. JEROME et al.

Civ. 13402.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1948.

Hearing Denied March 18, 1948.

1. Taxation 🔑785

The quoted phrase in statute providing that tax deed conveys title to purchaser "free of all encumbrances of any kind existing before the sale" included state's lien for delinquent franchise taxes incurred by former owner, notwithstanding provision in statute excepting lien for taxes of taxing agency not consenting to tax sale, in view of other statutes defining state as taxing agency and prohibiting sale of tax deeded property without consent of state comptroller. St.1933, p. 703, § 29; Revenue and Taxation Code, §§ 3694, 3712.

See Words and Phrases, Permanent Edition, for all other definitions of "Free of Encumbrances Existing Before Sale".

2. Taxation 🔑727

The law in existence at time of tax sale from state is the law which determines legal effect of sale.

3. Taxation 🔑785

The provision in Bank and Corporation Franchise Tax Act that tax lien is not removed until tax and penalty are paid or property sold for payment thereof did not preserve delinquent franchise tax lien which state lost under statute providing that deed to tax purchaser conveys title free of all encumbrances existing before sale, where such provision in the Act was modified before deed to purchaser by adding the language "or until the lien is released or otherwise extinguished." St.1933, p. 703, § 29; Gen.Laws, Act 8488, § 29; Revenue and Taxation Code, § 3712.

4. Taxation 🔑785

The purpose of statute providing that tax deed conveys title to purchaser free of all encumbrances of any kind existing before sale is to encourage sale of tax deeded property by showing purchasers that their title acquired from state will not be subject to other tax liens. Revenue and Taxation Code, § 3712.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action to quiet title by Frank Connors and Leatrice Connors, his wife, against J. J. Jerome and others, and the State of California. From a judgment for the plaintiffs, the State of California appeals.

Affirmed.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for appellant.

Eugene K. Sturgis, of Oakland, for respondents.

DOOLING, Justice.

The plaintiffs and respondents purchased a parcel of tax-deeded property from the State of California on November 27, 1941. They thereafter brought this action to quiet their title to the property. The State of California asserted a lien in the sum of $107.99 against the property for delinquent franchise taxes incurred by the Seske Investment Co. in 1932 and 1933, at which time that corporation owned the property in question. Judgment went for plaintiffs and the State of California appeals.

The appellant asserts its lien under section 29 of the Bank and Corporation Franchise Tax Act (Stats. 1929, p. 31 as amended by Stats. 1933, p. 703): "Every tax herein provided for has the effect of a judgment against the taxpayer, and every lien has the effect of an execution duly levied against all property of the delinquent, and the judgment is not satisfied nor the lien removed until the tax and the penalty are paid, or the property sold for the payment thereof. * * *"

Respondents on the other hand rely on section 3712 of the Revenue and Taxation Code as it read at the time the property was deeded to them by the State (Stats. 1941, p. 2464):

"The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale, except:

"(a) Any lien for installments of assessments, which installments will become due after the time of the sale;

"(b) The lien for taxes or assessments or other rights of any taxing agency which does not consent to the sale under this chapter;

"(c) Liens for special assessments levied upon the property conveyed which were, at the time of the sale under this chapter, not included in the amount necessary to redeem the property from the sale to the State, and, where a taxing agency which collects its own taxes has consented to the sale under this chapter, not included in the amount required to redeem from sale to such taxing agency;

"(d) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record."

[1, 2] In connection with subdivision (b) of section 3712 above quoted we notice 1. that the State of California is a "taxing agency", by definition of the Revenue and Taxation Code, section 121 (Stats. 1941, p. 409) and 2. that no tax-deeded property may be sold by the State without the consent of the State Controller under section 3694 (Stats.1939, p. 1922). Hence the lien for franchise taxes does not fall under the exception contained in subdivision (b), nor does it fall under any of the other exceptions found in section 3712. It would seem therefore logically to be included in the sweeping phrase "free of all encumbrances of any kind existing before the sale", in view of the fact that it is settled that the law in existence at the time of the sale from the State is the law which determines the legal effect of the sale. Monheit v. Cigna, 28 Cal.2d 19, 26, 168 P.2d 965, 167 A.L.R. 995.

The appellant argues, however, that to give the deed from the State this effect is to nullify the provision of section 29 of the Bank and Corporation Franchise Tax Act above quoted that "the judgment is not satisfied nor the lien removed until the tax and the penalty are paid, or the property sold for the payment thereof." However before the date of the deed from the State to respondents the quoted language had been modified by the addition of the following qualifying language: "or until the lien is released or otherwise extinguished." (Stats.1937, p. 2344, Gen.Laws, Act 8488.)

The Supreme Court said in Monheit v. Cigna, supra, 28 Cal.2d at page 26, 168 P.2d at page 969, 167 A.L.R. 995: "We know of no reason why the state may not declare a deed from it, with reference to its effect upon conflicting tax liens, to be different from that under the law as declared by it when it received the deed."

[3] The same principle seems applicable to the effect of franchise tax liens under sec. 29, Bank and Corporation Franchise Tax Act. Since the addition of the words "or until the lien is * * * otherwise extinguished" in section 29 no statutory inconsistency is found in the construction which section 3712 naturally bears, that the deed from the State operates to extinguish the pre-existing franchise tax lien.

[4] This construction is in harmony with the purpose of the section, to facilitate and encourage the sale of tax deeded property by assuring the purchasers that their title acquired from the State will not be subject to other tax liens. South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, 490, 42 P.2d 64; Smith v. Addiego, 54 Cal. App.2d 230, 235, 129 P.2d 953, et seq.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

In re CRISLER'S ESTATE.

Civ. 7422.

District Court of Appeal, Third District, California.

Jan. 29, 1948.

Rehearing Denied Feb. 28, 1948.

Hearing Denied March 25, 1948.

1. Executors and administrators ⚷29(2)

The probate court's findings on questions of testatrix' residence at time of her death and such court's jurisdiction of proceedings for letters testamentary on her estate are conclusive, except on appeal, and cannot be collaterally attacked. Probate Code, § 302.

2. Executors and administrators ⚷29(2)

The "fraud," referred to in statute declaring superior court's final order granting letters testamentary conclusive determination of court's jurisdiction, in absence of fraud in procurement thereof, is extrinsic, and mere conflict between what is shown by petition for letters and order admitting will to probate and what is charged in petition to dismiss proceedings for letters or stated in accompanying affidavits is not showing of extrinsic fraud. Probate Code, § 302.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

3. Executors and administrators ⚷29(2)

An executor's representations to probate court that testatrix was resident of state when she died, even if perjured or incorrect, did not constitute "extrinsic fraud" authorizing collateral attack on court's order granting letters testamentary. Probate Code, § 302.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

4. Executors and administrators ⚷29(2)

"Extrinsic fraud," for which probate court's order granting letters testamentary may be collaterally attacked, is fraud preventing contestant from presenting his case to court and does not apply to matter actually presented and considered. Probate Code, § 302.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceedings by Rollin P. Rodolph for letters testamentary on the estate of Vera L. Crisler, deceased. From an order denying a petition by Lena King Nelson to dismiss the proceedings, petitioner appeals.

Affirmed.

Edward E. Craig, of Berkeley, for appellant.

E. G. Funke and Rowland & Craven, all of Sacramento, for respondent.

PEEK, Justice.

This is an appeal from an order denying the petition of Lena K. Nelson to dismiss the proceedings in the above-named estate on the sole ground of lack of jurisdiction of the probate court for the alleged reason that at the time of her death the decedent was not a resident of the State of California but resided at Klamath Falls, Oregon. By the terms of her will and the codicils thereto respondent Rodolph was named as executor and trustee; however if at such time decedent was a resident of Klamath Falls, Oregon, then one Dola N. Clemens of that city was named to act in such capacity.

The verified petition of respondent for letters testamentary which was filed in Sacramento County on December 7, 1945, recites that decedent died on November 20, 1945, at Klamath Falls, Oregon, at which time she was a resident of Sacramento County and left property therein, and that by the terms of her will and codicils thereto he was named as executor thereof. The names, ages, relationships and residences of the heirs of decedent so far as known to petitioner were set forth as were the names, ages and residences of all legatees and devisees who were named in said will and codicils thereto.

The order admitting the will to probate recites that after "due proof being made that notice has been regularly given according to law of the time and place of hearing said petition, and no person appearing to contest the said petition, the court proceeds to hear the testimony and thereupon finds the facts alleged in the said petition to be true, that the above-named deceased died on November 20, 1945, and at the time of her death was a resident of Sacramento County, State of California." No appeal was taken from this order. On February 18, 1947, more than one year after the issuance of letters as above stated, appellant, who is named in said will as a beneficiary of the trust estate created therein, filed her petition to dismiss the proceedings. Neither proof, offer of proof nor contention was, or has been made that appellant failed to receive actual notice of the filing of the petition for letters or that she had no opportunity to attend or was prevented from attending the hearing or contest the same.

The only basis for the petition to dismiss is that when decedent died she was a resident of the State of Oregon, and as stated in appellant's brief, therefore "there was fraud when Rollin P. Rodolph, the Executor, represented to the Court that the deceased died a resident of Sacramento County California." In support of her motion appellant filed affidavits of various persons wherein the affiants stated that decedent was a resident of Oregon.

Appellant's one and one-quarter page argument as set forth in her opening brief (no reply brief having been filed) contains no citation of authority whatever and consists merely of the quotation of Section 302 of the Probate Code, a statement that the executor's representation that decedent was a resident of California was not true, that the only reason for raising any question here is that the will directs the appointment of another if the decedent was a resident of Oregon when she died, and lastly, a reiteration that Rodolph perpetrated a fraud on the court. Stated otherwise, appellant's position simply amounts to a contention that as Rodolph represented to the court that decedent was a resident of California and as appellant asserts that decedent was a resident of Oregon, therefore Rodolph was guilty of fraud and the probate should be revoked.

Obviously, the value, if any, of such a brief is indeed insignificant. Nevertheless we hesitate to designate the appeal as sham and frivolous as respondent contends, for what may appear to one person to be within that category may appear to be a valid legal question to another. However, in light of the showing made by appellant, it cannot be denied that if the appeal is meritorious it is but one degree removed from that which is not.

Section 302 of the Probate Code reads as follows: "In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked." See Estate of Robinson, 19 Cal.2d 534, 121 P.2d 734; Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36.

[1] In conformity with the code section above quoted, the courts of this state have held that the finding of the probate court on the question of residence and jurisdiction is conclusive, except on appeal, and cannot be collaterally attacked. Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of Robinson, 19 Cal.2d 534, 121 P.2d 734; Holabird v. Superior Court, 101 Cal. App. 49, 281 P. 108.

[2] It is also settled that the fraud referred to in Probate Code Section 302 is extrinsic. Estate of Robinson, supra. A mere conflict between what is shown by the petition for letters and the order admitting the will, and what is charged by appellant in her petition or stated in the affidavits accompanying the same, quite obviously is not such a showing of extrinsic fraud.

[3, 4] Finally it may be stated that even though it could be said that Rodolph's testimony was perjured or that he misinformed the court, such acts or statements do not constitute extrinsic fraud but are intrinsic. Extrinsic fraud has been defined as that which has prevented a contestant from presenting his case to the court and does not apply to matter actually presented and considered. Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976; O. A. Graybeal Co. v. Cook, 16 Cal.App.2d 231, 60 P.2d 525; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Estate of Robinson, supra. It must be admitted that the facts and circumstances of the present case do not come within such definition.

The order appealed from is affirmed.

THOMPSON, J., concurs.

83 Cal.App.2d 424

SKAGGS v. HORRALL et al.

Civ. 16311.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1948.

1. **Municipal corporations** ⚷185(12)

In absence of showing of oppression, fraud or bad faith on part of chief of police of city, his denial of suspended police officer's request for a rehearing was limited only by terms of city charter providing that if good cause appears the chief of police must, without unnecessary delay, cause a board of rights to be constituted to pass on suspension.

2. **Municipal corporations** ⚷185(12)

Fact that police officer, who was suspended after conviction of bribery, was subsequently found not guilty after reversal of conviction, was not "good cause" which would require chief of police to grant police officer a rehearing under provision of city charter providing that if good cause appears, chief of police must reconvene board of rights for a rehearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

◆

Original mandamus proceeding by Heber A. Skaggs, petitioner, against C. B. Horrall, Chief of Police of the City of Los Angeles, and others, respondents, to compel respondents to restore petitioner to his position as a member of the police department of the City of Los Angeles, and to pay him all salaries accruing from date of his suspension.

Judgment for respondents.

Morris Lavine, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and George W. Adams, Deputy City Atty., all of Los Angeles, for respondents.

PER CURIAM.

Subdivision 16 of section 202, article XIX, of the Charter of the City of Los Angeles provides that when a request "to be reheard" has been filed by a police officer who has been removed from the police department after hearing before a board of rights, "The Chief of Police must consider and decide upon such request * * *," and that "If good reason or cause appears therefor, the Chief of Police must, without unnecessary delay, cause a Board of Rights to be constituted * * * for the purpose of hearing and deciding upon the matter."

Petitioner was dismissed following a hearing before the board of rights after his conviction in the superior court of the crime of bribery. Subsequently the conviction was reversed. Following a retrial petitioner was found not guilty.

[1, 2] We are satisfied that in the absence of a showing of oppression, fraud or bad faith on the part of the Chief of Police, his determination as to whether or not a discharged police officer's request "to be reheard" shall be granted is limited only by the terms of the charter. There is no such showing here.

The fact that petitioner was subsequently acquitted of the criminal charge is not binding on the Chief of Police with regard to his determination as to whether "good cause" exists for reconvening a board of rights.

As was said in Kavanaugh v. Paull, 51 R.I. 41, 177 A. 352, 355, "The superior court in trying a man on a charge of violation of the criminal law and the town council of Bristol in deciding whether the same man is qualified to be the chief of police of the town are separate and independent tribunals moving in distinct spheres and are governed by different considerations and very different rules as to the necessary degree of proof required for a finding by the one tribunal of guilty or not guilty and a finding by the other tribunal of unfitness or fitness. The purpose of the former proceeding is the punishment of crime and of the latter the maintenance of the morale and efficiency of the police force and its good repute in the community. Therefore the fact that a jury has acquitted a man of a criminal charge does not prevent the council from finding such misconduct on his part as in its judgment disqualifies him for the office which he holds, even though the same conduct by him is involved in both cases."

See also Ludolph v. Board of Police Commissioners, 30 Cal.App.2d 211, 217, 218, 86 P.2d 118.

Although the Chief of Police was advised of petitioner's acquittal, such fact was not binding upon him in determining whether "good cause" existed for ordering a rehearing. Cope v. Steckel, 3 Cal.App.2d 492, 494, 39 P.2d 482, 40 P.2d 901.

The foregoing conclusion at which we have arrived renders it unnecessary to pass upon respondents' claim that petitioner's request for reinstatement is barred by his failure to file a demand therefor pursuant to section 112½ of the Los Angeles City charter.

The petition for rehearing is denied.

YORK, P. J., did not participate in the hearing or rehearing of the petition.

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83 Cal.App.2d 427

CALLISCH v. FARNHAM.

Civ. 7400.

District Court of Appeal, Third District, California.

Jan. 29, 1948.

1. Vendor and purchaser ⚷57

Under option agreement requiring part payment of purchase price of realty upon "exercise" of option and requiring optionor to hold realty for optionee for specified period and granting optionor 90 days after "election to exercise" option in which to perfect title, payment of part of purchase price within time optionor was required to hold realty was necessary to prevent termination of option as against contention that a letter written to optionor within specified time constituted optionee's "election" and that not until optionor conveyed to optionee a sufficient deed, did optionee have to "exercise" the option and pay part of purchase price.

See Words and Phrases, Permanent Edition, for all other definitions of "Election" and "Exercise".

2. Contracts ⚷22(1)

The acts which constitute an acceptance of an offer tendered in an option agreement are determined by the terms of the agreement itself, and where acceptance or "election" or the "exercise" of the option is by the terms of the agreement to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance.

3. Specific performance ⚷119

The optionee under contract for sale of real property has burden to show strict compliance with terms of option agreement, including payment or tender of the amount specified on purchase price within time stated by option to be entitled to specific performance.

4. Vendor and purchaser ⚷6

One may contract to sell property which he does not own.

5. Vendor and purchaser ⚷57

Delivery of deed to optionee under contract for sale of realty was not a condition concurrent with optionee's acceptance of the offer and formation of sales contract where optionor was given a 90 day period after exercise of option in which to perfect title so that inability of optionor to give a deed free of any cloud upon title on date optionee was required to exercise option did not relieve optionee of obligation to tender part of purchase money in order to exercise option to purchase.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by George E. Callisch against C. V. Farnham for declaratory relief and to quiet title to realty wherein defendant cross-complained for specific performance of an alleged contract of sale. From a judgment quieting title in plaintiff, defendant appeals.

Judgment affirmed.

Floyd Merrill, of Yreka, for appellant.

Roy A. Weaver, of Dunsmuir, for respondent.

PEEK, Justice.

The present controversy arises out of a written option agreement for the sale of certain real property by plaintiff to defendant. The pertinent portions of the agreement provides as follows:

"Witnesseth: That for and in consideration of the sum of Two Hundred Fifty Dollars ($250.00) to him in hand paid, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to hold until the 18th day of January, A.D. 1946 (time being of the essence of this option) subject exclusively to the order of the party of the second part the following described real property to-wit:

(Describing it)

"Or to transfer and convey said property to the party of the second part by grant deed free from all encumbrances not hereinafter set forth at any time within the above prescribed time to the said party of the second part at and for the price of Nineteen Thousand Five Hundred Dollars ($19,500.00) lawful money of the United States, payable on the following terms:

"a. Six Thousand Dollars ($6,000.00) upon the *exercise* of this option by the party of the second part.

* * * * *

"If the party of the second part of this option shall duly *elect to exercise* this option, then, and in that event, the amount paid as consideration for this option shall be credited upon the said purchase price; but if the party of the second part of this option shall fail duly to *exercise* this option within the time prescribed therefor, then, and in that event, the amount paid as consideration for this option shall be retained by the said party of the first part in full satisfaction for the aforesaid time.

"The party of the first part shall have ninety (90) days after the *election to exercise* this option by the party of the second part within which to perfect title." [Italics ours.]

On January 16, 1946, plaintiff received a letter from defendant, optionee, dated January 14, 1946, which reads in part as follows: "The purpose of this letter is to give you formal notice that I intend and I have elected to go through with and complete our pending deal on the Camp Lowe property. * * * I shall expect you to let me know when you have your title to both the real and personal property perfected, so that I may have the title examined before the completion of the deal."

In response to this letter plaintiff wrote to defendant on January 17, 1946:

"In reply to your letter of January 14th, this is to advise you that I will live up to my obligations under the option and that it will be necessary for you to do likewise.

"This letter is written to forestall any possible impression of waiver of any of my rights by reason of anything contained in your letter of January, 14th."

The defendant, however, made no tender of the above-mentioned sum of $6,000 on or prior to January 18, 1946. Plaintiff thereafter instituted an action for declaratory relief and to quiet title to the property in question. The defendant answered and by way of cross-complaint sought specific performance of the alleged contract of sale.

The trial court found in favor of plaintiff and cross-defendant—that the option terminated by reason of the failure of the defendant and cross-complainant to pay the $6,000 to plaintiff on or before January 18, 1946, and entered judgment quieting title in the plaintiff. From this judgment the defendant has appealed.

The primary issue on this appeal is whether or not the defendant's act of writing and mailing the above letter to the plaintiff was a sufficient acceptance of the offer according to the terms of the option contract so as to create an executory contract for the sale of the property.

Appellant in his argument attempts to distinguish the terms "election to exercise" and "exercise" as used in said contract. It is defendant's contention that his letter dated January 14th to plaintiff was his "election to exercise" his right under the agreement; and having so informed plaintiff that he had elected to exercise the right given him under the agreement to buy the property, it then became incumbent upon plaintiff to clear the title thereto during the ninety day period therein agreed upon to enable plaintiff to transfer the same to defendant by a good and sufficient deed free and clear of any cloud upon the title, and that not until such time did it become necessary for defendant to "exercise" the option by paying the $6,000 to plaintiff and accepting the deed.

[1] However, from our examination of the contract it does not appear that the use of the terms "exercise" and "election to exercise" can be distinguished. Rather it would appear that such terms are used interchangeably therein and with the same intent and meaning. Particularly does this conclusion appear to be correct by reason of the fact that in the paragraph previously quoted these two terms are used with reference to the same act.

[2] The act or acts which constitute an acceptance of an offer tendered in an option agreement are determined by the terms of the contract itself, and where, as here, the acceptance or the "election" or the "exercise" of the option is by the terms of the contract to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance. Flickinger v. Heck, 187 Cal. 111, 113, 114, 200 P. 1045.

[3] If, as contended by appellant, he could "elect to exercise" the option on or before January 18th by merely giving notice of his so doing, but need not "exercise" the option until some future indefinite time, then the clause by which plaintiff agreed to "hold until the 18th day of January, A.D. * * * subject exclusively to the order of" the appellant, becomes meaningless, since by merely giving notice of his "election" to exercise the option, or his intention to accept as that phrase is interpreted by him, the appellant might extend the obligation of the plaintiff to hold the property beyond January 18th, at which later time appellant might "exercise" the option. On the other hand, if it were intended, and we conclude it was, that the option would have to ripen into a binding contract of sale and purchase prior to the expiration of the period ending January 18th, then, obviously the appellant would have to "exercise" his right within that time. And, concurrent with that exercise is the obligation to pay the sum of $6,000. In Bourdieu v. Baker, 6 Cal.App.2d 150, 44 P.2d 587, under facts and circumstances not wholly unlike those presented herein, it was held that the burden was upon the optionee to show strict compliance with the terms of the option agreement—including payment or tender of the amount specified within the time stated. It necessarily follows from the rule as stated that the letter of January 14th wherein appellant merely informed plaintiff he had "elected to go through with and complete" their deal, without the tender of the $6,000, did not constitute strict compliance with and therefore was not due exercise of the option by appellant.

The second contention of appellant is that since plaintiff was unable to give a deed to the property free and clear of any cloud upon the title on January 18th defendant was not obligated to tender the $6,000 in order to exercise his option to purchase.

In amplification of such contention defendant argues that the payment of the $6,000 and the execution of the note and trust deed by him were conditions concurrent with the delivery of the deed by plaintiff and therefore it was not necessary for him to make the actual tender of the $6,000 on January 18th, at which time plaintiff was unable to give a clear title.

[4, 5] It is well settled that one may contract to sell property which he does not own (Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338, 132 Am.St. Rep. 72; Brimmer v. Salisbury, 167 Cal. 522, 140 P. 30), and while at the time of execution of the option contract or the contract of sale he may be unable to furnish a good title, such infirmity does not necessarily mean that when the time for performance has arrived he still would not be able to furnish a good title, nor excuse the optionee from the performance of acts or payment necessary in order to exercise his right of purchase under the option. Seeburg v. El Royale Corp., 54 Cal.App.2d 1, 128 P.2d 362. The ninety day period

given to the plaintiff in which to perfect his title indicates that delivery of the deed was not a condition concurrent with the defendant's acceptance of the offer and the formation of the sale contract. The trial court correctly concluded that the option terminated on January 18, 1946.

The judgment is affirmed.

THOMPSON, J., concurs.

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83 Cal.App.2d 368

FIRST TRUST & SAVINGS BANK OF PASADENA v. COSTA et al.

Civ. 15977.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1948.

Rehearing Denied Feb. 17, 1948.

Hearing Denied March 25, 1948.

1. Appeal and error 🔑842(8)

Where there was no substantial conflict in evidence which was directed toward establishing whether or not person was in employ of trustor at the date of trustor's death so as to entitle such person to property under trust instrument, conclusion of trial court that person was not in employ was based upon construction of terms of written instrument, and hence there was no issue of fact, so that appellate court would make final determination in accordance with principles of law applicable to uncontroverted facts.

2. Trusts 🔑112

In construing trust instrument, guiding principle is what was intention of trustor as expressed in trust instrument.

3. Master and servant 🔑1

Unless one performing services for another is an independent contractor, he is a "servant" or "employee".

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Servant".

4. Wills 🔑503

Where there is a temporary suspension from particular work in which employee has been engaged, he is nevertheless within the "employment" of person or company for whom he works during such temporary suspension, for purpose of receiving a devise, reception of which is dependent upon whether he is in employ of testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

5. Trusts 🔑124

Evidence that chauffeur, after obtaining war work, continued to perform services for husband and wife, that chauffeur was always available during hours he was not engaged in war work, and that chauffeur was permitted to occupy a house under same terms and reduced rental that had applied to his tenancy prior to his war work, established that chauffeur was in "employ" of wife within wife's trust instrument providing that chauffeur should be given a parcel of realty if he was in employ of trustor at date of her death.

See Words and Phrases, Permanent Edition, for all other definitions of "Employ".

DORAN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the First Trust & Savings Bank of Pasadena against Frank B. Costa and Pasadena Historical Society for a declaratory judgment as to whether first-named defendant or last-named defendant was entitled to conveyance of realty held by plaintiff as trustee under a trust indenture executed by Elma B. Stuart. From a judgment determining that last-named defendant was entitled to the property, first-named defendant appeals.

Reversed and remanded with directions.

J. E. Simpson and Harry A. Wishard, both of Los Angeles, for appellant.

Newell, Brown, Hamill & Hunt and Harry M. Hunt, all of Pasadena, for respondent Pasadena Historical Society.

WHITE, Justice.

This is an appeal from a judgment entered in a declaratory relief action brought by the respondent First Trust and Savings Bank of Pasadena, as trustee, to secure an adjudication as to whether the appellant, Frank B. Costa, or the respondent Pasadena Historical Society was entitled to conveyance of certain real property held by it as trustee under a trust indenture executed by Elma B. Stuart. From a judgment determining that the respondent Pasadena Historical Society was entitled to the property, appellant Costa has appealed.

In 1937 the property of Mrs. Stuart was conveyed in trust and later the trust indenture was modified to provide for the disposition of the property occupied by Costa as follows:

"Upon the death of the Trustor, in the event Frank B. Costa is in the employ of the Trustor at the date of her death, the Trustee shall transfer and convey to him the real property known as 120 North Delacy Street, Pasadena, California, being Item No. 43 in Schedule 'A' attached to said trust indenture, together with the improvements thereon, being the first brick house in Pasadena built in 1879 by Trustor's father, Benjamin F. Ball. In the event that the said Frank B. Costa is not in the employ of the Trustor at the date of her death, the Trustee shall transfer and convey said real property, together with the improvements thereon to the Pasadena Historical Society, with the request that it be used jointly with the Pasadena Pioneer Society."

Both appellant and respondent concede that the question presented on this appeal is whether appellant Costa was in the employ of Elma B. Stuart, trustor, at the date of her death within the meaning of the trust agreement executed by her.

It is conceded by all parties that defendant Costa was employed by the Stuarts as family chauffeur from November, 1929, to October 31, 1942; that he was considered in the employ of Mrs. Stuart even though his dealings were largely with Mr. Stuart, who handled his wife's business affairs. In 1931 the Stuarts requested that Costa move into the property here involved. Although the property had previously rented for $50 per month, defendant Costa has paid but $25 per month down to the present time.

The relations between the Stuarts and defendant Costa at all times down to and including the date of the death of Mrs. Stuart were very friendly and cordial. They had no disputes or disagreements of any kind. At the trial Mr. Stuart, a witness for plaintiff bank, testified that the relations between himself, Mrs. Stuart and defendant Costa were "friendly and cordial. He was a good driver and attentive to her" and "was a faithful and loyal employee."

In the summer of 1942 defendant Costa, who was a veteran of World War I, aged 53 years, expressed to Mr. Stuart his desire about going into war work. To this Mr. Stuart said, "Yes, that would be all right." In October of 1942 defendant Costa again discussed this matter with Mr. Stuart, stating that he thought that Mrs. Brace, who was Mrs. Stuart's companion, could take his place as chauffeur, in view of the fact that the Stuarts were not doing much driving; that he, Costa, felt that Mrs. Brace could take his place while he went into a defense plant; that he would try to get work on the "graveyard shift" so that he would be available during the daytime for service to the Stuarts. Mr. Stuart agreed to this plan and gave defendant Costa the day off to secure employment in war work. Costa went to the Lockheed plant, applied for a position, was accepted, and advised Mr. Stuart of that fact, the latter of whom said, "It was all right, that they could get along with Mrs. Brace." Defendant Costa taught Mrs. Brace how to operate the car. Mr. Stuart corroborated defendant Costa's testimony in this regard, stating that when the latter mentioned his desire to aid in war work it was "quite agreeable to me." When defendant Costa asked Mr. Stuart about going back to work for the Stuarts, he was told that Mrs. Stuart was critically ill; that her husband did not know what their circumstances would be when the war was over, but that if his wife wanted defendant Costa he would be glad to have him back again.

It was undisputed that after Costa went to work for Lockheed, the Stuarts requested, and he did perform for them, any and all services requested, including the following: When the Stuarts were evicted from the Vista del Arroyo Hotel in the spring of 1943, he helped to pack and move their personal belongings to their new location, and thereafter performed the same services in moving to other locations. He drove for the Stuarts on Mrs. Brace's day off and for a full week while she was on vacation in 1943. He drove for them on other occasions. He hoed weeds for them for several days. On the very day of Mrs. Stuart's death, Costa was actually driving her husband in picking up and delivering Christmas packages to friends of the Stuarts.

It is also uncontradicted that no full-time chauffeur was employed to replace defendant Costa, but Mrs. Brace and Miss Morrison, a niece of Mrs. Stuart, did such driving as could be done under gasoline rationing. There is evidence that on different occasions when defendant Costa was driving the Stuarts, Mr. Stuart said that he was glad that Costa was driving for him and that "it was like old times. I am glad to have you drive." On another occasion, when he was driving both Mr. and Mrs. Stuart, the former said: "It seems like old times. I will be glad when this mess is over, so that you can be back with us."

Respondent takes no issue with the foregoing statement of the evidence, other than to assert that defendant Costa was not performing services for Mrs. Stuart, the trustor, on December 22, 1945, the date of her death; that Mr. Stuart testified his wife was in a coma on that day and did not know anything about Costa driving Mr. Stuart.

[1] From the foregoing it is evident that there was no substantial conflict in the evidence, all of which was directed toward establishing whether or not appellant was in the employ of the trustor, Elma B. Stuart, at the date of her death. The trial court held that he was not. Since the evidence was without conflict, it follows that the conclusion arrived at by the trial court was based upon the construction of the terms of the written instrument. In the instant case there was no issue of fact, and it therefore becomes our duty to make the final determination in accordance with principles of law applicable to the uncontroverted facts. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

The evidence was undisputed that after appellant went to work for Lockheed Aircraft Corporation in 1942, the Stuarts requested him to, and he did, perform for them any and all services requested during the period that he was so employed on the "graveyard shift" by the Lockheed Aircraft Corporation. He was always available during the hours he was not actually working for the aforesaid corporation; and that he did during those hours perform services for the Stuarts, is evidenced by testimony hereinbefore narrated. It is also conceded and noteworthy that during the interim when appellant was working nights at the Lockheed plant, the Stuarts permitted him to occupy the house here in question under the same terms and reduced rental that had applied to his tenancy prior to his employment at Lockheed. We are persuaded that appellant was in the employ, though possibly not in the exclusive employ, of the trustor at the time of her death.

[2] The guiding principle in a case such as the one now engaging our attention is, what was the intention of the trustor as expressed in the trust instrument? It is not a question of what the trustor intended to say, but what she intended by what she did say. In the trust instrument now before us the trustor did not specify that on the date of her death appellant should be in her "exclusive" employ, but simply stated "in the employ" of the trustor at the date of her death.

[3, 4] No citation of authority is required for the statement that unless one performing services for another is an independent contractor, he is a servant or employee. The courts have uniformly held that where there is a temporary suspension from a particular work in which the employee has been engaged, he is, nevertheless, within the "employment" of the person or company for whom he works during such temporary suspension, for the purpose of receiving a devise, the reception of which is dependent upon whether he is in the employ of the testator. In re Estate of Fletcher, 36 Cal.App.2d 567, 572, 97 P.2d 1039. As

was said by the court in the case just cited (at page 572 of 36 Cal.App.2d, at page 1042 of 97 P.2d), with reference to cases therein referred to, "The uniform attitude of the courts of various jurisdictions displayed in the foregoing decisions, are all favorable to the employee * * *." The findings of the court herein would indicate that it was under the belief that *continuous and exclusive* employment was required before appellant could take under the trust. As we read the provisions of the trust agreement before us, the apparent desire of the trustor was that appellant should receive the property in question in the event he was in her employ at the date of her death, regardless of whether or not the employment had been continuous or exclusive. We find no language in the trust agreement which indicates any idea on the part of the trustor of exclusive and continuous full-time employment. And as heretofore pointed out, appellant was actually rendering services for the trustor in delivering Christmas packages on the very date of her death. Under the undisputed evidence in the instant case, we do not think it can be said that appellant was fully discharged as an employee or that his employment by the Stuarts was severed or terminated; in fact all the evidence showed that he was at least a part-time employee at all times. That it was not the intention of the Stuarts to terminate appellant's employment, nor the intention of the latter to abandon his employment with them, is evidenced by remarks made by Mr. Stuart on different occasions while appellant was working nights at Lockheed, such as, "It is like old times. I am glad to have you drive me," and "It seems like old times. I will be glad when this mess is over so you can come back with us."

[5] We are persuaded that in the case at bar there was simply a temporary suspension of the *full-time* work in which appellant had been engaged, due to existing war conditions, when he could work at night in war activities, and be free to work for the Stuarts in the daytime, as he actually did. In other words, the arrangement amounted to an intention between both parties, not that the employment should be terminated, but that the actual full-time services should be temporarily dispensed with, and that the employment should continue as a part-time employment during the time appellant was engaged in war work, to be later resumed as a full-time employment at a later date, should the trustor so desire. To state it in another way, appellant was given a conditional leave of absence to render services in a war plant, and that arrangement was with the trustor's express consent. Authority for the foregoing reasoning is found in Re Estate of Cowell, 170 Cal. 364, 149 P. 809; In re Estate of Fletcher, supra; and Hovey v. Grier, 324 Mo. 634, 23 S.W.2d 1058.

In view of the foregoing conclusion at which we have arrived, we do not deem it necessary to discuss appellant's contention that by reason of his membership in the civilian auxiliary to the military police during the time he was employed by Lockheed Aircraft Corporation, he was inducted into the "land or naval forces" under Section 8 of the Selective Service and Training Act of September 16, 1940, 50 U.S.C.A.Appendix, § 308, and was considered as being merely on leave of absence from his civilian employment by the Stuarts.

For the reasons herein stated, the judgment is reversed and the cause remanded, with directions to the court below to enter judgment for the defendant, Frank B. Costa.

YORK, P. J., concurs.

DORAN, Justice (dissenting).

I dissent.

Appellant contends that, "The question presented on this appeal is whether appellant Costa was in the employ of Elma B. Stuart, trustor, at the date of her death within the meaning of the trust amendment executed by her."

From a review of the record, it appears to me that the only question presented by the appeal is whether the evidence supports the judgment. Whether appellant was "in the employ of the trustor at the date of her death," within the meaning of the trust indenture, obviously was a question addressed to the judgment of the trial court, and its determination of that question necessarily included a consideration of other evidence, not only as an aid to the interpretation of the trust indenture, but as to the application thereof as well. The judgment of the trial court represents the effect of the evidence and it is well settled that an appellate court is without power to substitute its judgment for the judgment of the trial court in such circumstances. In my opinion, the evidence supports the findings and judgment.

83 Cal.App.2d 312

SANDS et al. v. EAGLE OIL & REFINING CO., Inc.

Civ. 13296.

District Court of Appeal, First District, Division 2, California.

Jan. 20, 1948.

1. Brokers 🔑8(3)

Evidence authorized finding that real estate broker, who was engaged in securing gasoline service station leases for oil company, was the agent of oil company notwithstanding that broker was required to look to lessors for compensation.

2. Brokers 🔑19

A real esate agent owes the same obligation of undivided service and loyalty to his principal as is owed by a trustee in favor of his beneficiary, and violation of broker's trust is subject to same punitory consequences that are provided for a disloyal or recreant trustee.

3. Brokers 🔑19

A real estate broker, when engaged as the agent of one of the parties, is charged with duty of fullest disclosure of all material facts concerning the transaction that might affect principal's decision. Civ. Code, §§ 2228, 2230, 2322, subd. 3.

4. Principal and agent 🔑177(1)

Generally knowledge of an agent which he is under duty to disclose to his principal or to another agent of principal is imputed to principal. Civ. Code, § 2332.

5. Principal and agent 🔑177(1), 181

Where agent and third party act in collusion against principal or when third party knows that agent will not advise principal of agent's knowledge, principal is not bound by knowledge of agent. Civ. Code, § 2332.

6. Corporations 🔑428(8)

Where evidence established that oil company's real estate agent was confident that other agent of company to whom real estate agent had made disclosure had not discussed with and would not disclose to company officers the actual situation of real estate agent's adverse interest and self-dealing with respect to leases on gasoline service stations procured for oil company, and that real estate agent could continue his misrepresentations in reliance upon company's lack of knowledge, no constructive knowledge would be imputed to company, even if evidence were insufficient to prove collusion between real estate agent and other agent.

7. Brokers 🔑31

When a real estate agent concludes a real estate transaction with himself without knowledge of his principal such transaction will be set aside at option of principal notwithstanding that there may be no actual fraud in the transaction or undue advantage for agent or injury to principal.

8. Brokers 🔑31

When a real estate agent concludes a real estate transaction with himself, only ratification by principal after full knowledge of all facts can defeat principal's right to avoid transaction.

9. Cancellation of instruments 🔑37(5)

Oil company's allegations that real estate broker was its agent to procure leases on gasoline service stations, that broker, acting through a dummy, leased a station in which he owned an interest to company at an amount in excess of fair value stated a cause of action to rescind the lease and to recover overpayments.

10. Pleading 🔑212

Defects of form, such as allegation of a material fact by inference, uncertainty and ambiguity, which are subject to special demurrer but can be cured by amendment, are waived where no special demurrer is interposed.

11. Cancellation of Instruments ⚷47, 53

Evidence and findings that oil company's real estate agent, operating through a dummy, leased to oil company, for an amount in excess of fair value, gasoline service station in which he had an interest adverse to oil company and which he was under duty to disclose, authorized judgment for oil company against agent for cancellation of a lease and recovery of alleged overpayments.

12. Principal and agent ⚷69(3)

Although a transaction by which agent deals with himself without consent of principal in a matter in which he is employed as an agent is not absolutely void, because it may be ratified by principal upon full knowledge of all the facts, where there is no such ratification it may be treated as void without a formal rescission for want of meeting of minds of parties.

13. Landlord and tenant ⚷62(1)

Fraud or misrepresentations used to induce lessee to enter into lease relieve him from estoppel to dispute lessor's title.

14. Landlord and tenant ⚷213(5)

Where oil company's real estate agent secretly owned a gasoline service station which had been leased to oil company by a dummy lessor, in oil company's action against agent to recover rents in excess of fair value, agent could not rely on defense that a lessee whose possession has not been disturbed cannot question lessor's title.

15. Landlord and tenant ⚷150(1), 158

In absence of anything to show that repairs and improvements made on premises by lessor did not increase value thereof, lessor was not entitled to reimbursement from lessee.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by V. Sands against Eagle Oil & Refinery Company, Inc., originally instituted in justice's court, to recover unpaid rent under an alleged written lease from plaintiff to defendant wherein defendant cross-complained for relief beyond the jurisdiction of the justice's court and named J. H. Tarman as a cross-defendant. By supplement to the complaint cross-defendant Tarman was substituted as plaintiff. From a judgment for the defendant, Sands and Tarman appeal.

Affirmed.

Marvin Sherwin, of Oakland, and Gerald Wallace, of Sacramento, for appellants.

Keith, Creede & Sedgwick, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This action was instituted in the justice's court by appellant V. Sands for the recovery of unpaid rent under an alleged written lease from him to respondent, Eagle Oil & Refining Company, Inc. Respondent denied that the parties entered into said lease and with authorization of the court filed a cross-complaint bringing in appellant J. H. Tarman as a cross-defendant. As amended the cross-complaint alleged in substance that said Tarman was respondent's agent for the negotiation of the lease but that he secretly acted in his own interest and as agent of Sands and induced respondent by certain knowingly false representations as to the ownership of the property, the advantages of the lease and the fairness of the rental demanded to enter into the purported lease with Sands, who was not the owner of the premises, and to pay under that lease a monthly rent of $65 whereas the fair and reasonable rental value of the premises was $40 per month, with prayer for repayment of the money had and received by Sands, damages for fraud of Tarman and rescission of the purported lease. As the recovery sought in the cross-complaint was in excess of the jurisdiction of the justice's court the cause was transferred to the superior court for the county of Alameda. A supplement to the complaint recited that Sands had transferred the property to Tarman after the commencement of the action, and asked that Tarman be substituted as plaintiff. Sands and Tarman appeal from a judgment that they take nothing and pay $215 with interest and costs to respondent.

Respondent, a producer and distributor of petroleum products with headquarters near Los Angeles, entered the Bay area in January, 1941, and came in the market for leases on filling stations. Appellant Tarman, a real estate broker experienced in securing service-station leases for oil companies, offered his services as a broker to respondent, which services were accepted. It was agreed that respondent would not pay any commissions to Tarman, the customary procedure being that in matters of leasing commission is paid by the lessor. During 10 months of the year 1941 Tarman secured a number of leases for respondent. During that time respondent did not request any other broker to look for locations and no locations submitted by other brokers were accepted. Tarman worked very closely with respondent's employees on all leasing. He searched the title records in respondent's behalf and once submitted a bill for such research which respondent declined to pay. On a few occasions respondent paid his traveling expenses. About May or June, 1941, respondent furnished Tarman with Eagle Oil Company business cards designating him as "real estate representative." He was, however, not an employee.

Approximately a month before March 10, 1941, Jack Campbell, local division manager of respondent under Cecil L. Foster, the assistant vice-president in charge of the Bay area, mentioned to Tarman the service station at 5318 College Avenue in Oakland, involved in this suit, and asked him to find out about the title and to fix up a deal. After Tarman originally proposed a rental of $100 a month, Campbell and he decided on a rent of $65 monthly for the first two years and $75 monthly after that, this rental being figured on the basis of estimated future sales of 6500 gallons a month. Campbell visited the premises more than once and sent in a report when he submitted the lease to headquarters. Tarman and Campbell flew to Los Angeles at respondent's expense to discuss this and other locations with the general manager of respondent. The lease is dated March 10, 1941. Appellant Sands, mentioned by Tarman as the owner, is designated lessor, the rental being payable care of J. H. Tarman at Tarman's home address.

The lease proved disadvantageous; the sales did not in any month amount to more than approximately 3600 gallons. The service station was closed in July, 1941, but respondent continued to pay rent. After respondent had discussed with Tarman trying cancellation of the lease, Tarman wrote respondent under date of February 18, 1942, that he had talked to Sands about cancelling the lease and that Sands would consider $1500 for full cancellation; he, Tarman, believed he could get it down to $1250. No agreement was reached. When in May, 1942, respondent stopped payment of the monthly rent, suit was brought with Sands as plaintiff in which $130 for two months' rent was recovered. The pleadings of this earlier suit were introduced in evidence by appellants to show that respondent then admitted the execution of the lease; at that time the unsuccessful defense was frustration by wartime restrictions. On December 19, 1942, Knowles, a division manager of respondent, called on Sands to try to get out of the lease. Sands then told him that he did not have a lease with respondent and did not own the property leased in his name. He gave a written statement to that effect, received in evidence. He further told Knowles that Tarman had no authority to do anything for him. After the rent recovered in the first suit no further rent was paid by respondent.

At the trial in this, the second suit, Tarman testified that the College Avenue property was his own property. He purchased it at the beginning of the negotiations for the lease to respondent before the lease was signed. He would not have purchased it but for the lease. He took the property in the name of Galise, the elevator boy in his office building, as a dummy, and when Galise left town Tarman had it transferred in the name of Sands, his brother-in-law. On the lease Tarman signed the name of Sands as lessor. He testified he had a general power of attorney from Sands but could not produce it when demand for it was made. Sands confirmed the existence of a power of attorney; however all his testimony was full of contradictions. The evidence from the recorder's office showed that the deed to Galise was executed and acknowledged on March 11, 1941, recorded

March 26, 1941, the deed from Galise to Sands executed and acknowledged on March 24, 1941, and also recorded March 26, 1941. There was evidence that the date of March 10 on the lease was the date of the preparation of the lease in Oakland, after which date it was sent to headquarters where it was later signed by Mr. Sterling for respondent. Tarman contended that the officers of respondent knew that Sands was a dummy and that he had himself informed Mr. Sterling of the manner in which he treated such leases. Campbell testified that he knew from the beginning that Sands was a dummy and who the owner was, but his superiors Foster and Sterling denied any such knowledge prior to the statement of Sands of December 19, 1942. Respondent tried to impeach Campbell's testimony by bringing out that he was in the real estate business with Tarman for some time after he left the employment of respondent, that during his employment with respondent he took, together with Tarman, a lease on a gas station for a rent of $25 a month, which station they then rented through a dummy to respondent for $100 a month—a fact denied by Campbell—and that as to the College Avenue service station he reported to headquarters an estimated sale of 9000 gallons a month.

The findings of the court were in all respects in accord with respondent's allegations except that the fair and reasonable rental value of the premises was found to be $50 a month and the amount overpaid by respondent $215. As a conclusion of law the court found respondent entitled to rescission of the purported lease but no rescission was pronounced in conformity with a finding negativing the execution of the lease.

Appellants contend mainly that fraud was not sufficiently pleaded and that the evidence did not support the court's findings, of non-execution of the lease, of existence of the relation of agent and principal between Tarman and respondent, of misrepresentations of Tarman as to the advantages of the lease and the fairness of the rent, of reliance by respondent on misrepresentations of Tarman, and of detriment suffered by respondent in reliance on said misrepresentations. Other minor contentions of appellants will be noticed later.

Of appellants' contentions the question of the existence or non-existence of an agency relation between Tarman and respondent is of primary importance as the requirements of pleading and proof in case of constructive fraud by breach of a confidential relation differ from those as to actual fraud.

[1] Although not all professional contact between a real estate broker and a person desiring to buy or lease real estate need lead to a relation of agency between them, as the broker can act solely in behalf of the adverse party (Hicks v. Wilson, 197 Cal. 269, 273, 240 P. 289) or sometimes only as a middleman whose duty is performed when he has brought the parties together (Anderson v. Thacher, 76 Cal.App.2d 50, 67, 172 P.2d 533), the facts above stated support the finding of an agency relation in the present case. The fact that Tarman was required to look to the lessors for compensation does not militate against his being the agent of respondent. Stephens v. Ahrens, 179 Cal. 743, 746, 178 P. 863; Stewart v. Drew, 101 Vt. 47, 140 A. 488, 490; Curry v. King, 6 Cal.App. 568, 571, 92 P. 662. The custom that commission for the conclusion of a lease is paid by the lessor cannot deprive the lessee of the possibility of having the confidential assistance of a broker. The fact that the Eagle Oil Company business cards, the clearest indication of the intimate relation of the parties, were furnished to Tarman some time after the conclusion of the transaction here under review does not diminish their importance as there is no contention that the relation between the parties differed at different times and the general tenor of the testimony of Tarman and Campbell clearly shows that in the College Avenue transaction Tarman acted in the same way and in the same capacity as in his other transactions with respondent during the year 1941. The latter circumstance distinguishes the present case from Baker v. Brown, 82 Cal. 64, 22 P. 879, relied on by appellant, which case goes very far in denying as to a specific transaction an agency relation between a client and her normal broker. Moreover in the

Baker case reversal was at any rate required because of the improper character of the relief granted.

[2, 3] If it be accepted that a relation of principal and agent existed between respondent and Tarman, then the evidence clearly supports the conclusion that Tarman violated his fiduciary duties as an agent. " 'The law of California imposed on * * * the real estate agent, the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitory consequences that are provided for a disloyal or recreant trustee. King v. Wise, 43 Cal. 628.' Langford v. Thomas, 200 Cal. 192, 196, 252 P. 602, 603. Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. (Citations.)" Rattray v. Scudder, 28 Cal.2d 214, 222, 223, 169 P.2d 371, 376, 164 A.L.R. 1356; subdivision 3 of section 2322 together with sections 2228 and 2230 of the Civil Code. The latter code section and a great number of decisions, among which Burke v. Bours, 92 Cal. 108, 28 P. 57, is a leading authority, show that the law prohibits an agent from concluding with himself directly or indirectly any transaction in which he is employed as an agent, without the fullest disclosure of the fact and all circumstances relating to it, and without permission or acquiescence of the principal with full knowledge of all these facts. Here Tarman himself testified that he was the lessor concealed behind the dummy Sands. However, appellants argue that the knowledge of this fact, admitted at the trial by Campbell, must be imputed to respondent and that therefore there was no concealment, although the trial court was entitled to believe the testimony of Campbell's superiors that they had no actual knowledge of the fact that Sands was a dummy for Tarman or at all.

[4-6] It is true that in general the knowledge of an agent which he is under a duty to disclose to his principal or to another agent of the principal, is to be imputed to the principal. Rest. Agency, sec. 275; Herzog v. Capital Co., 27 Cal.2d 349, 353, 164 P.2d 8; Civil Code, sec. 2332. However this rule is not without exceptions pertinent to this case. One is that if the agent and the third party act in collusion against the principal the principal will not be held bound by the knowledge of the agent. First Nat. Bank of Reedley v. Reed, 198 Cal. 252, 259, 244 P. 368. Another excludes application of the general rule when the third party knows that the agent will not advise the principal. Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U.S. 613, 622, 36 S.Ct. 676, 680, 60 L.Ed. 1202, 1211 where it is said: "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealings. (Citations.)" In Thompson v. Stoakes, 46 Cal.App.2d 285, 292, 115 P.2d 830, 834, the exception is given wider scope by the following statement: "As between two innocent parties, notice to the agent of one is notice to the principal, but, as between the principal and the fraudulent agent, notice of another agent should not be imputed to the principal." Tarman's letter of February 18, 1942, nearly a year after the signing of the lease, as to his pretended cancellation negotiations with Sands, shows that he was confident that Campbell had not disclosed and would not disclose the actual situation and that he could continue his misrepresentations in reliance on respondent's lack of knowledge. Under these circumstances no constructive knowledge should be imputed to respondent in appellants' behalf even if the evidence were insufficient to prove actual collusion between Campbell and Tarman.

[7, 8] When, as in this case, the agent concludes a real estate transaction with himself without the knowledge of his principal such a transaction will always be set aside at the option of the principal. Absence of actual fraud in the transaction; of undue advantage for the agent; of injury

to the principal or of other similar features is then immaterial. The rule is intended to prevent temptation and the possibility of wrong. Only ratification by the principal after full knowledge of all facts can defeat his right to avoid the transaction. Burke v. Bours, 92 Cal. 108, 28 P. 57; Sterling v. Smith, 97 Cal. 343, 347, 32 P. 320; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 44, 190 P. 359; Butler v. Agnew, 9 Cal. App. 327, 332, 99 P. 395; Silver v. Logue, 127 Cal.App. 565, 572, 16 P.2d 183. In Curry v. King, 6 Cal.App. 568, 92 P. 662, a case that presents many points of resemblance with the case here under review but where King, the agent of the seller, surreptitiously purchased for himself and relatives, the court concluded on pages 577, 578 of 6 Cal. App., at page 666 of 92 P.: "The only questions to be determined were: Was King the agent of the plaintiff, and, if so, did he purchase the property for himself under circumstances violative of the good faith with which an agent is charged in his dealings as such with his principal?"

[9-11] Therefore the only allegations required as to the cause of action of respondent were those relating to the existence of the agency, the violation by surreptitious transaction in the agent's own behalf and the difference between the amounts paid under the lease and the fair value of the use of the premises which respondent received. We hold that respondent's allegations in these respects were sufficient to state a cause of action. Even if the agency relation were only alleged by interference, as contended by appellants, or if the allegations as to the manner in which Tarman took a concealed adverse interest in the transaction were uncertain or ambiguous, such defects of form, which are subject to special demurrer but can be cured by amendment, were waived where no special demurrer was interposed. Hill v. Haskin, 51 Cal. 175; Colton v. Onderdonk, 69 Cal. 155, 157, 10 P. 395, 58 Am.Rep. 556; People v. McDonald, 200 Cal. 716, 717, 255 P. 180; Abos v. Martyn, 31 Cal.App.2d 705, 708, 88 P.2d 797. The findings responsive to said allegations were supported by the evidence, and they fully support the judgment. It is then immaterial whether other findings objected to are sustained by the evidence or not. Kellerman v. Maier, 116 Cal. 416, 422, 48 P. 377; Hatton v. Gregg, 4 Cal.App. 542, 546, 88 P. 594. They may be disregarded as surplusage. West Coast Lumber Co. v. Apfield, 86 Cal. 335, 342, 24 P. 993; Starr Piano Co. v. Martin, 119 Cal.App. 642, 644, 7 P.2d 383; Bank of Perris v. Sandor, 24 Cal.App.2d 349, 352, 75 P.2d 87.

[12] Although a transaction by which an agent deals with himself without the consent of the principal in a matter in which he is employed as an agent is not absolutely void, as it may be ratified by the principal upon full knowledge of all the facts (Petray v. First Nat. Bank, 92 Cal.App. 86, 90, 267 P. 711, and authorities there cited), nevertheless, where there is no such ratification, it may be treated as void without a formal rescission as there is no meeting of the minds of two parties. 1 Cal.Jur. 798; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 362, 78 P. 550, 104 Am.St.Rep. 42; Salisbury v. Yawger, 184 Cal. 783, 789, 195 P. 682; Cisco v. Van Lew, 60 Cal.App.2d 575, 585, 141 P.2d 433; Stiebel v. Lissberger, 166 App.Div. 164, 151 N.Y.S. 822, 824, 825.

[13, 14] Appellants' contention that respondent as lessee whose possession was not disturbed could not question the title of the purported lessor is without merit. Fraud or misrepresentations used to induce the lessee to enter into the lease relieve him from the estoppel to dispute the lessor's title. Kearney Investment Co. v. Golden Gate Ferry Co., 198 Cal. 560, 563, 564, 246 P. 322. Moreover not Sands' lack of title but Tarman's hidden interest in the lease is the decisive element in the case.

[15] Appellants' claim that in equity respondent should be required to reimburse appellants for an amount of approximately $900 spent by Tarman for repairs and improvements in the College Avenue service station as condition for the signing of the lease by respondent has no basis in pleadings or evidence. There is nothing to show that the repairs and improvements made did not increase the value of the station owned by Tarman.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

83 Cal.App.2d 375

MALINSON v. BLACK.

Civ. 13448.

District Court of Appeal, First District,
Division 2, California.
Jan. 27, 1948.

1. Automobiles ⚷208

Statute requiring motorist, who has stopped at entrance to through highway, to yield right of way to other vehicles which have entered intersection from through highway or which are approaching so closely as to constitute an immediate hazard, does not require a motorist approaching an arterial highway to refrain from crossing until the highway is free from all traffic, but places on him the duty of determining, in exercise of ordinary care, when a crossing will not constitute an immediate hazard. Vehicle Code, § 552(a).

2. Appeal and error ⚷1008(1)

In action for damage resulting from automobile collision at intersection when plaintiff, after stopping at stop sign, attempted to cross through highway at time when defendant was allegedly 80 yards from intersection, whether plaintiff was contributorily negligent was for trier of facts. Vehicle Code, § 552(a).

3. Negligence ⚷136(26)

Only in rare instances does the question of contributory negligence become a question of law.

4. Appeal and error ⚷1008(1)

Where plaintiff, after stopping at stop sign, attempted to cross through highway at time when defendant was allegedly 80 yards from intersection, whether defendant's automobile constituted an immediate hazard within meaning of statute, so as to require plaintiff to refrain from entering the through highway, was a fact question for trier of the facts. Vehicle Code, § 552(a).

5. Automobiles ⚷168(2)

Proof that a motorist was not violating the speed limit at time of an accident does not establish his freedom from negligence.

6. Automobiles ⚷244(11, 36)

When plaintiff, after stopping at stop sign, attempted to cross through highway at time when defendant was allegedly 80 yards from intersection, evidence sustained finding that defendant was negligent and that his negligence proximately caused collision. Vehicle Code, § 552(a).

7. Damages ⚷191

The amount paid or expense incurred for medical attention is some evidence of reasonable value in a personal injury action, and, in the absence of any showing to the contrary, such evidence is sufficient.

8. Damages ⚷185(1)

In personal injury action, plaintiff's testimony that his shoulder was injured, that his arm was in a sling for one month, that he was unable to work for two months, that he suffered pain, and that estimated expenses for medical care were a certain amount, was sufficient to prove damages, though no medical testimony was offered.

9. Damages ⚷133

In personal injury action by carpenter who was unable to work for two months because of his injuries, wherein there was evidence that current wages for carpenters were $12 a day, court properly allowed carpenter $600, or 50 days wages at $12 a day, for loss of time, though carpenter, who was working for himself, had allegedly shown only an expenditure of between $300 to $400 for employment of third person to take his place in doing construction work.

10. Damages ⚷191

In action for damage to automobile, the cost incurred by plaintiff to repair automobile is some evidence of the reasonable value of repairs and, in absence of contradictory testimony, is sufficient to support an award.

11. Damages ⚷191

In action for damage to automobile, award of damages was properly based on plaintiff's testimony that $100 was cost of repairing fender and running board and that $25 was the cost of replacing a wheel and tire, where defendant offered no testimony to contradict such amounts as to the reasonable value of necessary repairs.

12. Damages ⚷106

An owner's recovery for being deprived of the use of his automobile is generally determined with reference to the period of time reasonably required to make repairs.

13. Damages ⚷62(3)

Generally, even though an automobile be used only for pleasure, the owner is entitled to damages for loss of use, despite owner's failure to hire another automobile to take the place of the damaged automobile.

14. Damages ⚷139

In action for damage to automobile, allowance of $100 damages for loss of use of automobile during ten-day period when it was being repaired, was proper, in absence of evidence to show that ten days was not a reasonable period for necessary repair work.

15. Costs ⚷234

Respondent was entitled to costs on appeal from judgment of $1,000 for general damages for personal injuries and property damage and $850 for special damages, where judgment was affirmed after amendment eliminating $15 of award for special damages because award exceeded the prayer by $15.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Ernest R. Malinson against Paul Black to recover for personal injuries and property damage as result of automobile collision. From a judgment for the plaintiff, the defendant appeals.

Judgment amended and, as amended, affirmed.

Bergen Van Brunt, of San Francisco, for appellant.

McCarthy & Rowell, of Redwood City, for respondent.

NOURSE, Presiding Justice.

This is an appeal by defendant from a judgment in favor of plaintiff for $1000 general damages and $850 special damages. The case was tried without a jury. Defendant's motions for nonsuit and for a new trial were denied.

On the morning of November 23, 1945, appellant Paul Black was driving his Packard sedan southerly from San Francisco on highway 101, a six lane paved arterial highway, commonly known as El Camino Real, when his car came into collision with a Plymouth coupe operated by respondent Ernest Malinson, in the (right-angle) intersection of highway 101 and Ralston Avenue in Belmont. Respondent's car was struck on its left side toward the rear, crushing the left rear fender and denting the running board and left front fender. The impact threw respondent from his car, rendering him unconscious. Appellant's car remained standing practically at the point of impact. There was evidence that the Packard had left very short skid marks.

Respondent had entered the highway driving in an easterly direction on Ralston Avenue, a two lane paved street running easterly and westerly. There was a "stop" sign posted on Ralston Avenue at its west entrance to El Camino Real. Respondent testified that he stopped at this sign, saw no cars to the right, and observed that the nearest car to his left was about 80 yards north of the intersection, traveling in the middle lane of El Camino Real. He entered the intersection and proceeded across at what he testified he thought was a speed of about 25 miles per hour. A witness who was driving behind respondent testified that he saw appellant's car two or three hundred feet north of the intersection at the time respondent entered it.

It is contended that respondent was guilty of contributory negligence as a matter of law; that his admitted conduct constituted a violation of section 552 of the Vehicle Code which requires that "(a) The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constiutite an immediate hazard."

[1] The statute does not require a driver approaching an arterial highway to refrain from crossing until the highway is free from all traffic. It places on him the duty of determining, in the exercise of ordinary care, when a crossing would not "constitute an immediate hazard."

[2, 3] Respondent testified that he came to a complete stop at the boulevard stop sign, surveyed the highway, saw that no cars were approaching from the right, and that the nearest car, presumably appellant's approaching from the left, was at a distance of approximately 80 yards north of the intersection. Having concluded that he had plenty of time to safely cross the intersection, he proceeded in, looking straight ahead. Respondent may have been mistaken in his judgment of the distance of appellant's car from him. Or he may have incorrectly estimated the time it would take him to drive his own car from a standing stop past the center line of the highway. Whether such a mistake of judgment constituted negligence was a question of fact. It is only in rare instances that contributory negligence becomes a question of law. De Priest v. City of Glendale, 74 Cal.App.2d 464, 471, 169 P.2d 17. It can be said here, as was said in Granath v. Andrus, 70 Cal. App.2d 99, 160 P.2d 129, 131, "It is apparent that plaintiff misjudged the speed of the truck and was mistaken as to his ability to cross Anaheim Street in front of it with safety. However, every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care." Appellant stresses the admission that respondent did not look again toward appellant's car after he had stopped and observed its distance from him. But we cannot declare such conduct to be negligence as a matter of law. "Where a driver sees an approaching car, whether he acted as a reasonable man in not keeping his eye on that car, is generally a question of fact for the trier of the fact." Breland v. Traylor Eng. & Mfg. Co., 52 Cal.App.2d 415, 422, 423, 126 P.2d 455, 459; Lundgren v. Converse, 34 Cal.App.2d 445, 93 P.2d 819; Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105.

[4] The evidence on the issue of respondent's negligence herein being subject to conflicting inferences, it cannot be said that he entered the intersection in violation of section 552 of the Vehicle Code, for whether or not appellant's car constituted an immediate hazard to a reasonably prudent person at that moment was clearly a question of fact. That the accident occurred is not proof that respondent violated section 552. He had almost cleared the center of the highway when his car was struck on the left side toward the rear. The trial judge here presumably concluded that respondent was lawfully crossing the arterial, and that it was appellant's failure to yield the right of way that proximately caused the accident. As was pointed out in Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 708, 98 P.2d 539, and cited with approval in Glynn v. Vaccari, 64 Cal. App.2d 718, 149 P.2d 409, 411, many motorists "have the impression that every motorist who attempts to enter a main highway from a side road, does so at his peril. This misconception of the law is a prolific source of accidents. As we have shown, such motorist has very definite rights granted to him by the provisions of the Vehicle Code, and those users of the main highway who ignore such rights must be prepared to pay the penalty."

[5, 6] Appellant contends that there is no proof of his own negligence, inasmuch as he was proceeding at a legal rate of speed on the highway and when entering the intersection. It is true that there is evidence to establish that appellant was not exceeding the legal speed limit, but proof that one did not violate the speed limit does not establish freedom from negligence. One may observe one rule of the road but violate others. The evidence was in conflict as to the relative positions of appellant and respondent when respondent made his entrance into the intersection. There was evidence from which the trial court could have inferred that appellant was not keeping a proper lookout, since his view of the side road was unobstructed for several feet past the stop sign, and yet he admitted not seeing respondent's car until it started across the arterial. The court could have inferred a

failure to act with the care of a reasonably prudent person. We cannot say, therefore, after reviewing the entire record, that there is no substantial evidence to support the inference of negligence on the part of appellant, or that such negligence could not be held to have proximately caused the accident.

[7, 8] Appellant argues that the damages in regard to physical injury were not proven, since no medical testimony was offered, and respondent's own testimony on the subject was uncertain and confused. It is not surprising that respondent, a carpenter, did not describe the injuries to his shoulder with the same clarity that would be expected of a physician. Respondent was competent to testify to the fact that his shoulder was injured, that his arm was in a sling for a period of one month, that he was unable to work for about two months, that he still suffered pain at night as a result of the injury. He gave an estimate of the expenses he had incurred for medical care, and appellant complains that the testimony does not clearly show that such expenses were paid, nor whether such amount is the reasonable value of the services. It is well settled that the amount paid is some evidence of reasonable value and in the absence of any showing to the contrary such evidence has been held to be sufficient. Likewise, it would seem that evidence of the expense incurred would be some evidence of reasonable value. Dewhirst v. Leopold, 194 Cal. 424, 433, 229 P. 30; Laubscher v. Blake, 7 Cal.App.2d 376, 383, 46 P.2d 836; Caulfield v. Market Street Ry. Co., 20 Cal. App.2d 220, 66 P.2d 752. The case of Fisk v. Poplin, 46 Cal.App. 587, 591, 189 P. 722, cited by appellant is not in point, for in that case the holding was that evidence of the expense incurred was not admissible under an allegation that such expense had been paid.

[9] Appellant also attacks the award of $600 damages allowed for respondent's loss of time as unproved, uncertain, speculative, and excessive. There was evidence that respondent was a carpenter and that current wages in that trade were $12 per day. He was unable to work for approximately two months. The court allowed $600, or 50 days wages at $12 per day. Appellant contends that such damages are unreasonable in view of the fact that respondent was working on buildings for himself, and that there is no proof he was damaged at all by the delay. Furthermore he has only shown an expenditure of between $300 to $400 for a man to take his place in doing this construction work. There was no error in the method used by the court in computing respondent's damages for loss of earnings. See Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 P. 72; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Perry v. McLaughlin, 212 Cal. 1, 297 P. 554; Wilcox v. Sway, 69 Cal.App.2d 560, 572, 160 P.2d 154.

[10, 11] As to the award of damages to the car respondent testified that $100 was the cost of repairing the fender and running board, and that $25 was the cost of replacing a wheel and tire. Appellant offered no testimony to contradict these amounts as the reasonable value of necessary repairs. The cost incurred for repairs is some evidence of reasonable value, and in the absence of contradictory testimony, will be held sufficient to support the award. The case of Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336, cited by appellant, is not in point. That case held that although the owner of property may, without being qualified as an expert, testify as to his opinion of the value of that which he owns, the rule does not extend to the giving of testimony as to the cost of repairs. However, that holding was made in regard to estimates of future repairs by an owner, not in regard to expenses actually incurred or paid out.

[12-14] The court allowed respondent $100 damages for loss of use of his car during the ten day period when it was being repaired. Appellant offered no testimony to show that ten days was not a reasonable period for the required work. An owner's recovery for being deprived of the use of his car is generally determined with reference to the period of time reasonably required to make repairs. Valencia v. Shell Oil Co., 23 Cal.2d 840, 844, 147 P.2d 558. It is the general rule that even though a car be used only for pleasure, the owner is entitled to

damages for loss of use, despite failure of the owner to hire another car to take the place of the injured vehicle. Pittari et al. v. Madison Ave. Coach Co. Inc., 1947, 188 Misc. 614, 68 N.Y.S.2d 741.

We have reviewed all rulings attacked by appellant on the admission or rejection of evidence and we do not find that they were sufficiently prejudicial to appellant to constitute reversible error.

[15] The award of special damages exceeds the prayer by $15 and that sum should be eliminated. The judgment is amended by striking the sum of $15 from the award of special damages and, as so amended, is affirmed.

Respondent to recover his costs on this appeal.

GOODELL and DOOLING, JJ., concur.

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83 Cal.App.2d 405

PEOPLE v. DOGGETT et al.

Cr. 655.

District Court of Appeal, Fourth District, California.

Jan. 28, 1948.

Hearing Denied Feb. 26, 1948.

1. Criminal law 🔑444

Photographs are admissible when it is shown that they are correct reproductions of what they purport to show, which showing is usually by the testimony of the one who took the picture, although showing may be made by testimony of anyone who knows that picture correctly depicts what it purports to represent.

2. Criminal law 🔑444

In prosecution for sex perversion, photographs showing defendants in the act of committing the offense, when considered with expert testimony that pictures were not composites and that photograph was taken by one of the parties to the act, and other testimony positively identifying defendants as the persons portrayed and identifying physical objects appearing in photograph as those in defendants' apartment, were admissible. Pen.Code, § 288a.

3. Criminal law 🔑1158(4)

Conflict of evidence as to whether defendant's confession was obtained under threats and under a promise of partial immunity, when resolved against defendant by both trial judge and jury, would not be reviewed on appeal.

4. Sodomy 🔑6

In prosecution for commission of crime against nature, where only evidence directly connecting defendants with commission of offense were certain photographs which had been taken by one of the defendants and photographs, although suggestive of the offense and justifying an inference that it had been committed, did not clearly establish offense, conviction was not authorized. Pen.Code, § 286.

5. Criminal law 🔑238

Evidence at preliminary hearing need only be sufficient to show reasonable or probable cause.

6. Criminal law 🔑238

Photographic evidence adduced at preliminary hearing was sufficient to authorize order holding defendants to trial on charges of commission of crime against nature and of sex perversion as against motion to dismiss information. Pen.Code, §§ 286, 288a, 995.

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

Benjamin F. Doggett and Mauree Doggett were convicted under one count charging sex perversion, and under a second count charging commission of the crime against nature, and, from the judgment and from an order denying a new trial, they appeal.

Affirmed as to first count and reversed as to second count.

Harry M. Umann, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with the violation of section 288a of the Penal Code and, in a second count, with the violation of section 286 of that code. A jury found them guilty on both counts and they were sentenced accordingly, the sentences to run consecutively. A motion for a new trial was denied and each defendant has appealed from that order and from the judgment.

The defendants, who are husband and wife, occupied a furnished apartment in Indio. They also carried on from this apartment a business under the name of "Artistic Studios." As a result of an investigation carried on by the post office department, a police officer, with a search warrant, went to this apartment to search for obscene pictures and photographic equipment. He found a lot of such equipment, and facilities in the kitchen for developing pictures. He also found several boxes of pictures, among which were a number which were introduced in evidence in this action. These pictures apparently showed the defendants in certain positions in this apartment. One of them, if genuine, pictures the defendants in the act of violating section 288a. This was introduced as Exhibit 6. The next day the officers took some pictures in this apartment, which were also introduced in evidence, showing various furniture, articles and surroundings in the apartment which correspond exactly with the same furniture, articles and surroundings as they appear in the other pictures.

It appears that the defendant Mauree Doggett was charged, in a prior proceeding, with a violation of section 288a only. She was arraigned and informed of her constitutional rights. Thereafter, she was shown the photographs relating to this offense which were found in the apartment, and certain other evidence, and expressed a desire to admit the charge. She was taken into the justice court where, under oath, she admitted her guilt and testified that Exhibit 6 was an actual photograph taken while they were living in the apartment. For some reason which does not appear that proceeding was then dismissed and the present joint proceeding was begun.

At the preliminary hearing in this proceeding the pictures in question were introduced in evidence over the objection of the defendants. The landlord of the apartment house positively identified the two people appearing in these photographs as being the defendants and testified that these photographs were a fair and faithful representation of the interior of this apartment and of certain furniture and articles therein at the time in question, but testified that he had never seen the defendants conduct themselves in the manner portrayed in the photographs and that he could not say that these were a fair representation of what actually took place when the photographs were taken. An officer testified that he took the other photographs in this apartment, and that these fairly disclose certain furniture, articles and surroundings therein. It clearly appears that the physical objects appearing in both groups of photographs are the same.

The defendants were held to answer and later, in the superior court, moved to dismiss both counts of the information under section 995 of the Penal Code. This motion was denied, whereupon the defendants declined to plead. A plea of not guilty as to each count was entered by the court and a trial before a jury followed.

At the trial similar evidence was received fully establishing the period of time during which the pictures were taken, the place where they were taken, and identifying the persons shown in the first group of photographs as the defendants. Also that certain fixtures in the kitchen of this apartment had been used for developing pictures, and that photographic equipment and these pictures were found in the apartment. One group of these pictures, and particularly Exhibit 6, if accepted as genuine photographs, fully and completely disclose a violation of section 288a by the defendants. Another group of these photographs would justify an inference that the defendants, at the time the pictures were taken, were violating section 286, but would not conclusively establish that fact. There was also testimony by an expert witness, with long experience in the photographic field, who gave his opinion that these were not composite or faked photographs. He gave his reason for this opinion in detail and his evidence was in no way discredited by the cross-examination. He testified, giving good reasons therefor, that certain physical elements in the photographs themselves clearly disclose that they were taken by one of the defendants who appear therein, and that they were genuine photographs which could not have been built up or faked. The photographs were introduced in evidence. The court reporter's transcript of the former proceeding in the justice's court covering the confession and statement made by the defendant wife at that time was read in evidence, being admitted only as against that defendant. The defendants put in no evidence and did not take the stand except that the defendant wife testified on voir dire in an effort to prevent the introduction of her former confession and statement, it being claimed that she had made these statements by reason of a threat and under a promise of partial immunity. The defendants were convicted on both counts and this appeal followed.

While it is not disputed, and could not be, that some of these pictures, if they are genuine photographs, clearly and completely show a violation of section 288a by these defendants, it is earnestly contended that these photographs were not sufficiently verified or authenticated to make them admissible into evidence, and that without them the corpus delicti was not established and there is no evidence in the record showing that this offense was committed. It is argued that while the witnesses were able to identify the furniture and surroundings depicted in the pictures as being those in this apartment, and the people shown in the pictures as being the defendants, they were not able to, and did not, testify of their own knowledge that they had seen the offense committed, or that the pictures fairly represented things which were actually being done in the apartment at the time the photographs were taken.

The main question presented, insofar as the violation of section 288a is concerned, is as to whether a sufficient foundation was laid to justify the admission of these photographs into evidence. The appellants rely on the usual rule that in order to be admitted photographs must be verified or authenticated by some other evidence. No case directly in point here has been cited, but it is argued that no cases are to be found in which it has been held that authentication by other evidence is not necessary. While this is true, it is equally true that no cases are to be found in which it has been held that the essential element must be proved in a particular manner and can be proved in no other. In Section 730, 20 Am.Jur. 610, it is said: "The question of the sufficiency of the preliminary proofs offered to identify the photograph or to show that it is a fair and accurate representation of the objects which it purports to portray is a matter within the discretion of the trial court."

[1] The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show. This is usually shown by the testimony of the one who took the picture. However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent.

The essential element is that it be shown in some way that the picture does correctly depict what it purports to show, in other words that it be verified or authenticated as a genuine picture of what it purports to depict. This being the purpose it is not required that the photographer himself be produced where other evidence is available to accomplish the same end. The effect and probative value of such other evidence is the important consideration, and not that the way or manner of making the requisite showing should be exactly the same in all cases.

There is no reason why the essential element should not be shown in a particular case by other evidence which varies somewhat from the usual pattern, provided it is sufficient to give an equally satisfactory result. There is no reason why it should not be shown by the testimony of witnesses, assisted by other matters, including those which are an inherent part of the picture itself, aside from the relative matter which it purports to depict, provided these other or inherent matters reliably appear and provided that they, with the testimony, sufficiently disclose the authenticity and genuineness of the photograph.

[2] Where parties have the equipment for and are carrying on a business of producing photographs in an apartment in which they are living; where such equipment and such photographs as these are found in that apartment; where it is conclusively shown by other testimony that these pictures correctly represent and depict the parties who occupy that apartment and the surroundings, furniture, pictures on the walls and other articles which are shown to have been in and to have been a part of that apartment at the time in question; where there is unimpeached expert testimony, supported by sound reasons, that the camera which took these pictures was operated by one of the parties appearing in the pictures and living in the apartment; where there is unimpeached expert testimony that the pictures themselves contain physical elements which are pointed out, which disclose that they are not "composite" or "faked" photographs but are genuine photographs and "contact prints" made from "straight photograph" negatives; and where there is an entire absence of anything which might tend to raise the slightest doubt about the matter, it would seem that the verification or authentication was as satisfactory and reliable, to say the least, as that in the ordinary case where it depends upon the memory and integrity of a third party who may be directly interested in the result. In such a case, it can neither be said that other evidence is entirely lacking nor that proof of the requisite element is not sufficient to support a trial court's action in receiving such pictures in evidence.

That is the situation existing here. It was rather conclusively shown that these were actual and genuine photographs, taken by one of the defendants themselves. There was nothing to justify a contrary inference and no other possible explanation either appears or was attempted. Under these particular circumstances it must be held that a sufficient showing was made in this regard and that these photographs were properly admitted into evidence.

Insofar as the defendant wife is concerned, in connection with the violation of section 288a, there was also evidence of her prior admissions and testimony under oath that Exhibit 6, which clearly shows the consummation of the act by these defendants, was a true picture which was actually taken while they were occupying this apartment, and that she had at that time committed the act shown in the picture. This evidence was admitted only as against her and the jury was instructed not to consider it as against her husband.

[3] It is contended, however, that this evidence was not admissible even as to her because the confession and statements were not voluntarily made but were induced by a threat and a promise of partial immunity made to her by the deputy district attorney. Mrs. Doggett testified in this connection that before going over to the justice's court the deputy district attorney told her that he had other charges which he could bring; that if she did not plead guilty the other charges would be brought; that if she pleaded guilty no other charges would be brought and she would have a chance to get out right away; that she was told she would get probation; that she was taken immediately to the justice court; and that she made the statments and gave the testimony there "because I thought—felt sure I was going to get released, and that is why I did it." On cross-examination, she was evasive in answering a number of questions concerning what had been said to her by the district attorney. Again, when asked whether she had not tesified freely and voluntarily in the justice's court she replied "Well, I answered the questions you asked me." She also admitted that she went over to the justice's court and testified there because she "thought that was the best thing to do." The deputy district attorney denied that he had told Mrs. Doggett that he would not file other charges if she pleaded guilty to a violation of section 288a, or that he had told her anything to that effect. He testified that he had shown her the pictures and certain letters

and that she had asked him whether other charges would be brought; that he told her that they had evidence of other charges which could be brought but made no statement in any manner whatever that other charges would not be brought; that after seeing the pictures she asked him what he thought was the best thing for her to do; that "I told her that I thought the best thing for her to do was to go into court and admit the truth, and to apply for probation"; that she asked him what this meant and that he told her that this meant that she would be taken into court and given the privilege of admitting the charge of violating section 288a, that if she admitted this and pleaded guilty in the superior court the matter would be referred to the probation officer who would make an independent investigation and report to the judge, and that, based on that report, the judge would exercise his discretion in what kind of sentence he would give her.

The matter of whether or not these admissions were voluntarily made was first passed upon by the trial judge and then submitted to the jury on complete and appropriate instructions. The conflict in the evidence was decided against this defendant by the trial judge and the jury, and no reversible error appears in this connection. People v. Sameniego, 118 Cal.App. 165, 4 P.2d 809, 5 P.2d 653.

[4] A somewhat different situation appears with respect to the charge of violation of section 286, under the second count of the information. The general situation with respect to the introduction of evidence and the amount of evidence received is the same on this count as on the first count. On this count also the photographs which were admitted constitute the only evidence received which might indicate the guilt of the defendants on this charge, or which bears directly on that issue. A number of pictures were introduced in this connection and the original exhibits are before us. Unlike those involved in the first count these pictures do not clearly or definitely show a violation of section 286. While they are suggestive of that, and while they might justify an inference to that effect, this does not clearly or certainly appear. Moreover, we think this does not appear beyond a reasonable doubt. Several explanations are possible under which these pictures would not indicate that the defendants were guilty of this particular offense. The result is that there was no satisfactory evidence of guilt on this charge and that proof of guilt rests only on one of several possible inferences and on surmise and conjecture. It follows that the conviction of the defendants on this second count cannot be sustained.

[5, 6] A number of other points are raised which require little attention under our views with respect to the main ground of appeal. Aside from matters which relate merely to the order of proof, it is contended that the evidence at the preliminary examination was insufficient to justify holding the defendants for trial in the superior court; that the information was invalid since it was based upon an illegal foundation for the same reason; that the motion made pursuant to section 995 of the Penal Code should have been granted for the same reason; and that it follows that the superior court had no jurisdiction to proceed with the trial of the action. These contentions are based on the theory that these photographs were inadmissible and that no evidence was presented at the preliminary hearing which tended to connect the defendants with the commission of the crimes charged. These contentions cannot be sustained. The evidence at the preliminary hearing was sufficient to show reasonable or probable cause, which is all that was required. Aside from any other considerations, the other objections are without merit under the views above expressed.

The judgment and order are affirmed as to each defendant insofar as the first count is concerned, and on the second count are reversed as to each defendant.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

GRIFFIN, J., concurs.

In re WELCH'S ESTATE.

JOHNSON v. KISHEL (two cases).
Civ. 3810, 3811.

District Court of Appeal, Fourth District, California.
Jan. 27, 1948.

Rehearing Denied Feb. 20, 1948.
Hearing Denied March 25, 1948.

1. Wills 🔑630(12)

When determining intention of testator, words expressive of future time are to be referred to the vesting in possession if they reasonably can be, rather than to the vesting in right.

2. Courts 🔑89

A case involving determination of testator's intention as expressed in his will is one which, to a large extent, must depend upon its own peculiar facts, since the will must be construed in accordance with intention of testator. Probate Code, § 101.

3. Wills 🔑441, 470

A will and its entire scheme of disposition of testator's property should be viewed as a whole, and words used should be considered in reference to the context and construed according to their surrounding and a construction favorable to testacy should obtain where the language used reasonably admits of such construction. Probate Code, § 101.

4. Wills 🔑629

The law favors the vesting of interests, and a presumption in favor of such vesting will prevail unless an intention to the contrary clearly appears in a will. Probate Code, § 28.

5. Wills 🔑629

In the construction of wills, words which raise some doubt in regard to the vesting of interests are usually taken as not indicative of an intent to postpone the vesting in right and as relating to the time of taking effect in possession, and not to the time of taking effect in interest. Probate Code, § 28.

6. Wills 🔑629

When there is no "gift over" in the event of the death of a minor, the estate will be presumed to have vested at the time of the testator's death to aid in determining the testator's intention. Probate Code §§ 28, 101.

7. Appeal and error 🔑1008(3)

Where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, an appellate court will not substitute another interpretation which may be equally tenable.

8. Wills 🔑630(13)

Devise of realty to testator's daughter as trustee "to vest" in her with uncontrolled discretion to use income to provide for care of minor beneficiary until he became 25, to accumulate income not used, to control receipt and disbursements of income to the end that beneficiary "had no vested right" in income or principal until the age of 25, and to convey to beneficiary the accumulated income and principal at that age, gave beneficiary a vested interest passing to his heirs upon his death prior to his reaching the age of 25, in view of the presumption that a vested disposition is intended, and in light of language of the entire will in failing to provide a "gift over". Probate Code, §§ 28, 101.

9. Executors and administrators 🔑510(12)

Where, on appeal, it appeared that only a perfunctory hearing was had on accounts of an executrix, no intelligible vouchers accompanied the accounts which were not numbered or connected with items in the account, and it was apparent from the record that no careful scrutiny had been made in the trial court, orders of approval were reversed and a rehearing required.

◆

Appeals from Superior Court, San Bernardino County; A. D. Mitchell, Judge.

Proceeding in the matter of the estate of Thomas R. Welch, deceased, brought by Vella Johnson, individually and as executrix of the will of said deceased, and opposed by Loreta Jeannette Kishel, as executrix of the will of Thomas Kenneth Welch, deceased, and also as guardian of the estate of Thomas Kenneth Welch, Jr., a minor, and also individually, to determine heirship and for approval of accounts, and action by Vella Johnson against Loreta Jeannette Kishel, formerly Loreta Jeannette Welch, as executrix of the last will of Thomas Kenneth Welch, deceased, and as guardian of the estate of Thomas Kenneth Welch, Jr., a minor, to quiet title. From orders approving the accounts, and decrees determining heirship and quieting title, opponents and defendants appeal.

Orders and decrees, and each of them reversed.

Herbert W. Whitten, James Fortino, and Ware & Ware, all of Chico, for appellants.

Wilson & Wilson and Fred A. Wilson, all of San Bernardino, for respondent.

BARNARD, Presiding Justice.

Thomas R. Welch died in April, 1933. His only heirs were his daughter, Vella Johnson, and a grandson, Thomas Kenneth Welch, who was the son of a deceased son. This grandson, who was eight years old at the time of the testator's death, was killed in a plane crash over Belgium in 1945, while serving in the Army Air Forces. He was married in 1943, and his surviving wife and child are the appellants here.

Thomas R. Welch left a will which was admitted to probate in May, 1933, his daughter Vella Johnson, being appointed executrix, and his estate is still in the course of administration. By his will he left one-half of his real property in trust to his daughter for the benefit of his grandson, and left the rest of his estate to his daughter. Admittedly, the daughter paid nothing for the support or education of the grandson during the twelve years between the death of the grandfather and the death of the grandson.

Apparently, the daughter filed an account in 1935 which was approved and which is not involved here. In 1940, she filed a second account covering a period from November 1, 1935, to March 24, 1940, which was not then brought on for hearing. In July, 1946, she filed a third account covering the period from March 25, 1940, to July 1, 1946. She also filed a petition to determine heirship, alleging that upon the death of the grandson before the age of 25 years she became entitled to distribution of the entire estate. This petition and the second and third accounts were then noticed for hearing. At the same time the daughter, Vella Johnson, brought a quiet title action against the appellants alleging that since the death of the grandson she has been the owner and entitled to the possession of all of the property, and asking that the appellants be enjoined from asserting any right, title or interest therein.

These four matters were heard together. The court entered orders approving the second and third accounts, and entered a decree determining heirship in which it was decreed that the grandson died at the age of 19 years and some months; that at the time of his death he had no right, title or interest in or to this estate; that upon his death the trust created by the will of the testator for his benefit terminated; and that upon his death the daughter, Vella Johnson, became and is now entitled to have the entire estate distributed to her. A decree was also entered in the quiet title action in favor of the daughter, Vella Johnson. Separate appeals were taken from these two decrees and from two orders approving the accounts, and all four appeals are here presented on one set of briefs.

The main question presented is as to the proper construction of the two provisions of the will which purport to dispose of the property of the deceased. So far as material here, these provisions read as follows (omissions are indicated in brackets and emphasis is ours):

"*First:* I give and devise unto my daughter Vella Johnson, as Trustee, one-half of all of the real property owned by me at the date of my death, subject to the following uses and trusts, and with the following powers, to wit:

"(a) [To collect rents and profits];

"(b) [To pay certain costs];

"(c) [To lease or sell any portion] * * * it being my intent to *vest* in said trustee uncontrolled and unrestricted discretion and judgment [in this matter];

"(d) To use and/or disburse all or any portion of the net income of said trust estate, or all or any portion of the principal of said trust estate, in providing for the care, maintenance and education of my grandson, Thomas Kenneth Welch, until he shall have attained the age of twenty-five years, it being my intent that said trustee shall have [exclusive discretion in determining the manner and circumstances in which disbursements shall be made for this purpose];

"(e) To accumulate all of the net income of said trust estate which shall not be used or disbursed in providing for such care, maintenance and/or education of said grandson;

"(f) [To pay certain costs];

"(g) To have and exercise exclusive custody and control over the receipt and disbursement of all of the net income from said trust estate, as well as the proceeds derived from any encumbrance thereon or conveyance thereof, it being my intention to *vest* in said trustee uncontrolled and unrestricted custody and right to the possession of all of said net income and/or moneys derived from the encumbrance or transfer of the principal of said trust estate, to the end and purpose that said grandson shall have no *vested* right in the net income or principal of said trust estate until he shall have attained the age of twenty-five years, save and except to the extent that in the judgment and discretion of said trustee such income or such principal of said trust estate shall be used and disbursed by said trustee in providing for the care, maintenance and education of said grandson as aforesaid.

"(h) To execute all of the powers hereby conferred upon said trustee without any restriction or limitation whatsoever, it being my intent to *vest* in said trustee uncontrolled and unrestricted discretion and judgment in the exercise of each and all of the powers hereby conferred upon or *vested* in said trustee;

"(i) To convey unto my said grandson, Thomas Kenneth Welch, upon his attaining the age of Twenty-five years, the whole of the net income and/or principal of said trust estate then remaining in the possession of said trustee.

"Second: I give, bequeath and devise unto my daughter, Vella Johnson, all of the rest, residue and remainder of my estate."

[1] The question presented is whether the intention of the testator, as disclosed by the language of the will, was to make a present gift to the grandson, with possession deferred until he reached a certain age, or was to give him only a contingent interest which would arise only in the event he reached that age. The court found, in this regard, that the testator's intention was to give no present right, title or interest in the trust property to the grandson and that only in the event he reached the age of 25 years was the trustee authorized to convey to and vest in him any such right, title or interest. The respondent argues that this construction is supported by the absence of words of transfer to the grandson, it being given to the daughter as trustee; by the presence of words transferring it to the daughter, although in trust; by the use of the word "convey", usually used to indicate a transfer of title, in empowering the trustee to turn over the property to the grandson when he reached the age of 25 years; by the absence of any absolute right in the grandson to receive the income during the interim; by the use of the conditional words "until" and "upon" in referring to the time when the grandson should reach the age of 25 years; and by the declaration of the testator's intention that the trustee shall have exclusive custody and control of all net income or proceeds from the trust estate. While such matters are to be considered in determining the intention of the testator, they are not necessarily controlling. In re Estate of Riemer, 69 Cal.App.2d 634, 159 P.2d 677; In re Estate of Newman, 68 Cal.App. 420, 229 P. 898, 902. In the latter case, it was said: "Words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right."

[2-6] While precedents may be looked to for the general principles which have been established, it is well recognized that a case involving the determination of a testator's intention as expressed in his will is one which, to a large extent, must depend upon its own peculiar facts. In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893. A will must be construed in accordance with the intention of the testator (Sec. 101, Prob. Code), and this is the paramount rule. In re Estate of Lawrence, supra. It is well

settled that the will and the entire scheme of disposition of the testator's property should be viewed as a whole, and the words used should be considered in reference to the context and construed according to their surroundings. In re Estate of Franck, 190 Cal. 28, 210 P. 417. A construction favorable to testacy should obtain where the language used reasonably admits of such construction. In re Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094. Several presumptions are provided by statute or are well established by the decisions. Testamentary dispositions, including a devise to a person on attaining his majority, are presumed to vest at the testator's death. Sec. 28, Prob. Code. The law favors the vesting of interests and a presumption in favor of such vesting will prevail unless an intention to the contrary clearly appears in the will. In re Estate of Newman, 68 Cal.App. 420, 229 P. 898; In re Estate of Ritzman, 186 Cal. 567, 199 P. 783, 784. In speaking of words which raise some doubt in this regard but which are used as a part of some other provision the court said, in Re Estate of Ritzman, "Such words so used are usually taken as in no way indicative of an intent to postpone the vesting in right, and as relating 'to the time of taking effect in possession and not to the time of taking effect in interest.'" Another strong presumption arises where there is no devise over in the event of the death of the beneficiary. In Re Estate of Riemer, 69 Cal.App.2d 634, 159 P.2d 677, 678, the court said: "Another rule of interpretation which is equally well settled is that when there is no 'gift over' in the event of the death of the minor the estate will be presumed to have vested at the time of the testator's death." This rule was recognized in Re Estate of Blake, 157 Cal. 448, 108 P. 287, as being of great importance in determining the testator's intention. To the same effect, see In re Rogers, 94 Cal. 526, 29 P. 962; In re Estate of Klein, 23 Cal.App.2d 708, 74 P.2d 79; In re Estate of Yates, 170 Cal. 254, 149 P. 555.

Viewing this will as a whole in the light of the established rules, we think it does not clearly appear that the testator intended a delayed gift as distinguished from a mere delayed right of possession. A contrary conclusion is supported both by the applicable presumptions and by the language of the will in its entirety, with proper regard to the context and connection in which certain words are used. The first subdivision of the will rather clearly discloses an intention to establish a trust for the benefit of the grandson. While it is given to the daughter, it is given to her only in trust and subject to the uses and trusts named. While she is given complete control in the interim, she is directed to use the trust estate, only for the sole purpose of providing for the support and education of the grandson until he reaches the age of 25, with the expressed intention that the manner and circumstances in which disbursements shall be made for this purpose shall be within her discretion. She is then directed to accumulate all of the net income which is not used for this purpose. Subdivision (g) then provides that she shall have complete right of possession in the meantime and that this right of possession may not be interfered with. Subdivision (i) then provides that the remaining balance of the trust estate is to be conveyed by the trustee to the grandson when he reaches the age of 25 years. Having been given the legal title, a conveyance from her was necessary. Having thus disclosed an intent to completely dispose of this part of his property the testator then, in the second subdivision, gives all the rest of his estate to his daughter, absolutely. The only reasonable interpretation of the language used is that the testator intended this second subdivision to apply to the rest of his estate which had not been covered by the first subdivision or made subject to the trust therein contained. It seems clear that the testator intended to thus dispose of his entire estate, giving a part to his grandson to be held in trust for a time, and giving the remainder to the daughter, absolutely. That he intended to give this part to the grandson is further indicated by the fact that while he exercised extreme care in providing for the control and possession of the trust estate, he made no specific provision for its disposal in the event his grandson died before reaching the age of 25 years. In view of this important omission, and the care used in other respects, it would require a strained construction of the language used to hold that he regarded the bequest to his daughter in paragraph (i) as a disposal of the trust estate in the event the grandson did not reach the age of 25 years. It would appear from the will, as a whole, that the absolute bequest to the daughter was intended to apply only to such property as had not already been disposed of under the first subdivision of the will.

The only thing in the entire will which could raise any doubt that the testator intended a present gift to the grandson, with deferred possession, is the clause in paragraph (g) "to the end and purpose that said grandson shall have no vested right (to the income or principal) until he shall have attained the age of twenty-five years, save," etc. This clause is a part of a paragraph containing only one sentence, and devoted to the matter of possession. It contains a specific declaration of an intention to vest exclusive possession of the trust estate in the trustee. The clause in question then follows and is qualified by the expression "to the end and purpose that." As a part of the declaration of his intention to vest unrestricted possession in the trustee, the testator declares that this is done for the purpose of providing that the grandson shall have no vested right in the income or principal until he reaches the age of 25 years, save and except for such portion as the trustee, in her discretion, may have used for his support and education. In four other places in the will, one in paragraph (c), one in paragraph (g) and two in paragraph (h), the testator uses the words "vest" or "vested", and in each of those four cases it clearly appears that he did not use the word "vest" in its technical sense. The words "vested right" in the clause here in question must be interpreted in the light of the context and in the connection in which they are used. In our opinion, these words are used in the clause in question only as a part of the intention which the testator was expressing to give complete right of possession to the trustee during the period of the trust, and only as meaning that the grandson should have no vested right of possession which could interfere with the complete and unrestricted right of possession which was, by that sentence as a whole, being vested in the trustee.

While it clearly appears that the testator intended to give his daughter complete control and possession of the trust estate during the existence of the trust, it also clearly appears that she was to use it only for the support and education of the grandson, that she was to accumulate any portion of the income which was not used for that purpose, and that she was to turn any remaining balance over to the grandson. We think it also clearly appears that the testator did not intend to give the trust property to the trustee, absolutely, at any time.

[7, 8] There is a well-settled rule, as argued by the respondent, that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, an appellate court will not substitute another interpretation which may be equally tenable. In our opinion, these two interpretations of this will are not equally tenable and the construction adopted by the trial court does not appear to us to be consistent with the intention of the testator as disclosed by the terms of the will, and with due regard to established rules and applicable presumptions. The cases relied on by the respondent, In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Rogers, 94 Cal. 526, 29 P. 962, and In re Estate of Kruce, 10 Cal.App.2d 426, 51 P.2d 1174, are distinguishable upon their facts, and they are not controlling under the circumstances which here appear.

[9] With respect to the appeals from the orders approving the second and third accounts it appears that only a perfunctory hearing was had in this connection, probably for the reason that the trial court, as well as the respondent's attorney, felt that the matter was of little importance under the view that the respondent executrix was entitled to the entire estate. No intelligible vouchers accompanied the accounts Among the exhibits are a large number of receipts given over a period of many years. These are not numbered or in any way connected with items in the accounts, and it is fully apparent from the record that no careful scrutiny of them was made in the

trial court. Moreover, while the executrix admits that she occupied one of the houses belonging to the estate for all these years, she credits herself with the expenses of upkeep on this house and does not charge herself for any part of the rental value thereof. If, as we think, the appellants are entitled to the grandson's share in this estate there should be a rehearing on these accounts, to the end that the exact situation may be determined and such orders made as shall be just to both parties.

The orders and decrees appealed from, and each of them, are reversed.

MARKS and GRIFFIN, JJ., concur.

83 Cal.App.2d 357

FISHER v. FISHER.

Civ. 15746.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1948.

1. Partnership 🔑259½

If there is no time prescribed by agreement for duration of a general partnership, it may be totally dissolved by the expressed will of any partner. Civ.Code, § 2425.

2. Partnership 🔑262

Where uncle and nephew entered into a partnership agreement, and about four months later the nephew sought dissolution of the partnership in order to enter into another business, and uncle agreed to dissolution, there was a dissolution by mutual consent.

3. Account stated 🔑4

An account stated may be oral.

4. Account stated 🔑8

Where parties to business arrangement have reached an understanding and have agreed on an accounting, courts must not undo such mutual, extrajudicial determinations.

5. Partnership 🔑262

A contemporaneous division of assets of a partnership, or arrangements for such division, is not necessary to effect a dissolution of the partnership.

6. Partnership 🔑296(3)

Evidence sustained findings that partnership between plaintiff and defendant was terminated on certain date, that two days thereafter parties had an accounting at which they verbally believed that partnership was terminated, and that certain sum was to be paid to defendant by plaintiff on consummation on an existing escrow, and that therefore defendant was not authorized in thereafter attempting to rescind the dissolution agreement.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action for declaratory relief by Martin Fisher against Albert Fisher. From a judgment decreeing that a copartnership existing between the parties had been terminated by mutual consent of the parties, that an accounting was had, that plaintiff should pay defendant certain amount, and that each of the parties was entitled to a one half interest in certain real estate broker's commissions, defendant appeals.

Judgment affirmed.

Henry C. Rohr, of Los Angeles, for appellant.

David A. Matlin, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by the defendant from a judgment in which it was decreed that the copartnership existing between plaintiff and defendant, uncle and nephew, respectively, by virtue of a written agreement dated September 1, 1945, was terminated by the mutual consent of the parties on December 24, 1945; that an accounting was had on December 26, 1945; that plaintiff pay to defendant $741.97; and that they were each entitled to an undivided one-half interest in any real estate broker's commissions in any escrows pending on December 26, 1945, and out of which the former partnership was entitled to commissions.

It appears from the record herein that under a written agreement dated September 1, 1945, appellant and respondent became copartners for the term of one year in the real estate brokerage business. On December 24, 1945, the partners discussed the termination of the partnership, appellant stating that he had an opportunity to buy a delicatessen business with two other men and he wanted to be released from the partnership agreement. On December 26, 1945, they orally agreed as to the amount of their cash assets, the amount of the unpaid commissions and to an equal division thereof, to-wit: respondent was to pay appellant the sum of $741.97, representing $559 invested in the business by appellant; $15 being one-half of the utility deposits made by the partnership; $189.97, being one-half of the partnership bank account, less $22, representing one-half of unpaid current bills. Appellant was also to recieve one-half of the pending escrows from which the partnership had not then received any commissions. The foregoing facts are uncontradicted.

The point in conflict is the time when the money was to be paid by respondent to appellant. Appellant testified he understood the money was to be paid to him the following Monday, December 31, 1945. Respondent testified he told appellant on December 26, 1945, that he would pay the money as soon as his personal escrow cleared, referring to some lots that he had sold in Whittier, which sale was then in escrow; and that he also told appellant he had no other money out of which to pay the sum agreed upon. Around January 10th, appellant telephoned the office of respondent's attorney to ask if his money were there and was told that he would have to wait sixty days. On January 15th, appellant telephoned to respondent saying he had changed his mind and was coming back, to which respondent replied: "Well, you can't do that, I have made other plans." On January 16th, appellant did return to the partnership office, whereupon respondent removed the books, records and listings to his home. Some time during the month of February, 1946, appellant relinquished the partnership office, which was thereafter reoccupied by the respondent.

The instant action for declaratory relief was commenced on January 23, 1946, resulting in the judgment from which this appeal is prosecuted.

Appellant urges that the written agreement of partnership cannot be terminated by an unexecuted oral agreement of the parties. In this connection he asserts that "an agreement as to when the money was to be paid was an essential element of this dissolution agreement, and unless the minds of the parties met upon that factor of the oral agreement it would be incomplete and unenforceable."

As heretofore indicated, the principal fact in dispute is when the money was to be paid to appellant by respondent, appellant contending that it was to be paid him within five days after December 26, 1945, the date of the account stated. He also directs attention to the fact that, while respondent testified that he would pay the money out of the proceeds of an escrow involving the sale of his own property, he also testified on cross-examination that he understood the money was to be paid at once. An examination of the record on this point discloses that on redirect examination, respondent denied he ever stated to appellant that he would pay the money at once.

Respondent also testified that on January 14, 1946, there were insufficient funds in the partnership account to pay a check signed by him in blank, which he mailed to his attorney for delivery to appellant, but that on the Saturday preceding the issuance of the check, to-wit: January 12, 1946, he had borrowed $850 from Mr. and Mrs. Korn and had deposited it in said account. From this the trial court could have assumed that on January 15, 1946, when appellant purportedly rescinded the oral agreement of dissolution, sufficient funds were then available in the partnership account from which to pay appellant the sum agreed upon by the accounting of December 26, 1945.

[1] In the case of Marvland Casualty Co. v. Little, 102 Cal.App. 205, 210, 282

P. 968, 970, it is stated: "If there is no time prescribed by agreement for the duration of a general partnership, it may be totally dissolved by the expressed will of any partner. Section 2450, Civ.Code; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; McCauley v. Eyraud, 87 Cal.App. 121, 261 P. 760; Wilson v. Brown, 96 Cal.App. 140, 273 P. 847. After the dissolution of a partnership, one partner cannot create any new obligation in the name of the partnership. Sections 2458, 2462, Civ.Code.

"Throughout this case respondent has confused the dissolution of a partnership with the liquidation of its affairs. The partnership may be dissolved by agreement of the partners, or the will of one of them, where there is no fixed term of its existence. Such agreement, or the will of one, may be proven by all the circumstances of the case as well as by direct evidence. Complete cessation of partnership business and a division of all, or a major portion of its assets without any objection, express or implied, is strong evidence of an agreement to dissolve. If not explained or refuted, it is sufficient to force the conclusion of a dissolution by agreement. Nielson v. Gross, 17 Cal.App. 74, 118 P. 725. After dissolution, liquidation of the partnership follows. It does not usually precede dissolution, and because the affairs of the partnership are not entirely liquidated, and some bills remain unpaid, and some property is not divided, cannot overcome satisfactory evidence of dissolution. Dissolution represents the demise of a partnership, and liquidation the settlement of the estate."

[2] In the instant cause, the partnership agreement was for a period of one year; appellant sought its dissolution and respondent agreed thereto. This constituted a dissolution by mutual consent of the partners. See Lytle v. Kroenke, 67 Cal.App.2d 596, 602, 154 P.2d 919, citing section 2425, Civil Code, and Shuken v. Cohen, 179 Cal. 279, 176 P. 447. Also, see 40 Am.Jur. 292, sec. 235, where it is announced: "Notwithstanding a time for the dissolution may be fixed by the partnership articles, or may provide for the duration of the partnership for a given period of time, the partners may by their mutual assent dissolve their relation by agreement before such time, *and this may be accomplished either by an express agreement or by words and acts implying an intention to dissolve the partnership.*" (Emphasis added.)

[3] It is undisputed that the parties hereto not only agreed to a dissolution of the partnership, but they also had an accounting. The case of Zenos v. Harden, 129 Cal.App. 545, 551, 19 P.2d 67, 70, holds that "An account stated may be oral. Converse v. Scott, 137 Cal. 239, 70 P. 13."

[4] And, as stated in Griffeth v. Fehsel, 61 Cal.App.2d 600, 605, 143 P.2d 522, 524: "Parties to any sort of a business arrangement are their own best judges of the accounts between themselves. They understand their own plans and purposes as well as their settlements and after they have reached an understanding to dissolve and have agreed upon an accounting, courts must not undo such mutual, extra-judicial determinations. Branger v. Chevalier, 9 Cal. 353, 363; 20 Cal.Jur. 819, 820."

[5] With respect to the distribution of the property of a partnership, the following is excerpted from 20 Cal.Jur. 804, sec. 102: "It is not necessary to effect a dissolution that there be a *contemporaneous* division of assets, or arrangements therefor. Shuken v. Cohen, 179 Cal. 279, 176 P. 447." (Emphasis added.)

Recapitulating the above principles, it conclusively appears that a partnership for a fixed term may be dissolved by mutual assent of the parties thereto; that such dissolution may be accomplished either by an express agreement or by "words and acts implying an intention to dissolve" (40 Am.Jur. 292); and that after dissolution, liquidation follows which includes an accounting and a division of the partnership assets.

[6] An examination of the record discloses substantial evidence in support of the trial court's findings (1) that the partnership herein was terminated on December 24th; (2) that on December 26th, the parties had an accounting at which time they verbally agreed that the partnership was terminated; and (3) that the sum of $741.97 was to be paid to appellant by re-

spondent upon the consummation of an existing escrow in which respondent was a party. The record also discloses, as hereinbefore discussed, that sufficient funds were available in the partnership account to pay the said sum of $741.97 on January 15, 1946, the date on which appellant purported to rescind the dissolution agreement.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

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83 Cal.App.2d 384

MODLIN v. WALTER'S FUR SHOP et al.

Civ. 13558.

District Court of Appeal, First District,
Division 2, California.

Jan. 27, 1948.

Hearing Denied March 25, 1948.

1. Venue ⇨63

Failure of notice of motion for change of venue to specify grounds for transfer, may be cured when notice contains statement that motion will also be based on demand or affidavit served, and such document, together with notice of motion, states sufficient grounds for motion for change of venue.

2. Appeal and error ⇨233(1)

Where notice of motion for change of venue stated that motion would be made and based on such notice and on affidavit of nonresident defendant, and that affidavit alleged that resident defendant was not actually a defendant but properly a party plaintiff, question whether resident defendant was a proper party defendant was duly raised in the trial court and could be considered on appeal. Code Civ.Proc. § 395.

3. Venue ⇨34

Provisions of Code section relating to change of venue are remedial in character and must be liberally construed. Code Civ. Proc. § 395.

4. Venue ⇨41

In action for loss of plaintiff's fur coat stolen while at nonresident defendants' fur store, or for goods sold and delivered, complaint alleging that plaintiff delivered coat to resident defendant who in turn delivered it to nonresidents, and that coat was stolen while in nonresidents' possession, alleged no cause of action against resident defendant and failed to showed that he was a "proper party defendant", and therefore nonresidents' motion for change of venue should have been granted.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party Defendant".

5. Pleading ⇨193(5)

Where allegations of facts were insufficient to support a cause of action against resident defendant for damages for fur coat stolen while in possession of nonresident defendants, common count which sought recovery for same amount and which incorporated all allegations of the preceding count, would be deemed not to state a cause of action against the resident defendant.

6. Principal and agent ⇨183(1), 188

Even if an agent for plaintiff, in delivering goods to defendants, does not disclose that he is acting as agent, plaintiff is entitled to sue defendants in his own name for loss of the goods, and the agent is not a necessary party.

7. Venue ⇨72

The right to a change of venue depends on pleadings as they exist at the time the motion is first made.

◆

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Action by Robert Modlin against Walter's Fur Shop, Walter G. Kurkjian and Charles W. Kurkjian, as individuals and doing business under the firm name and style of Walter's Fur Shop, and G. Giacomini, to recover damages for a mink coat which belonged to plaintiff, and which was stolen while at Walter's Fur Shop, or for judgment for goods sold and delivered. From a judgment denying the motion of all defendants except G. Giacomini, for change of venue, they appeal.

Judgment reversed.

Clyde E. Cate, of Fresno, for appellants.

Jacobs, Blanckenburg & May, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by the defendants Walter's Fur Shop, Walter G. Kurkjian and Charles W. Kurkjian, as individuals and doing business under the firm name and style of Walter's Fur Shop from an order denying their motion for change of venue from the City and County of San Francisco to the County of Fresno, where they have their residence.

The complaint mentions as codefendant G. Giacomini, a resident of San Francisco. In this complaint it is further alleged in substance that said G. Giacomini delivered to appellants certain furs and fur coats, including one natural wild mink coat of a value of $3,250, which was the property of plaintiff, for inspection for 24 hours only with the distinct understanding that they remain the property of the plaintiff until bill of sale is rendered by him; that the written agreement further provided: consignee shall be responsible for any loss from fire or theft or negligence. This merchandise is to be returned upon demand; that a photostatic copy of the written agreement is attached and made part of the complaint; that the natural wild mink coat was stolen from appellants' store by reason of which fact plaintiff was damaged in its value of $3,250.

The next paragraph of the complaint, numbered IX, reads:

"That plaintiff delivered said coat to defendant G. Giacomini who in turn delivered same to defendants Walter's Fur Shop, Walter G. Kurkjian and Charles W. Kurkjian; that said defendants Walter's Fur Shop, Walter G. Kurkjian and Charles W. Kurkjian assert that they have no business with plaintiff and do not know him in the aforesaid transaction whatsoever, and further assert their claim that they the said defendants did all their business with said defendant G. Giacomini, whereas, said defendant G. Giacomini asserts and claims that he had nothing further to do with said transaction involving said natural wild mink coat except to deliver the same for and on behalf of plaintiff to said defendants Walter's Fur Shop, Walter G. Kurkjian and Charles W. Kurkjian, and he, said defenant G. Giacomini denies any liability whatsoever. That because of the aforesaid facts said G. Giacomini is a necessary party to a complete determination or settlement of the questions involved in this action; that prior to the commencement of this action said G. Giacomini was requested to join as a party plaintiff in this action but he refused to join as such plaintiff and his consent to join cannot be obtained, for all of which reasons he is herewith made a defendant in this action."

A second cause of action as for goods sold and delivered, incorporating all the above allegations, is added.

The prayer is for judgment against defendants and each of them in the sum of $3,250 with interest.

The appended photostatic copy shows a consignment invoice to Walter's Fur Shop with a printed head of "Jac-a-me Furs, G. Giacomini, Wholesale, 140 Geary St., San Francisco 8," above which is written and next to which is stamped "Robert Modlin." Under the written specification of goods are printed the conditions stated in the body of the complaint with this variance that according to the printed clause the articles "remain the property of the manufacturer until bill of sale is rendered by the consignor."

The notice of motion for change of venue stated as grounds for change of venue that the Superior Court of the City and County of San Francisco did not have jurisdiction of appellants and that the appellants were residents of the County of Fresno, and further states: "Said motion will be made and based upon this notice and the affidavit of Charles W. Kurkjian, a copy of which is served herewith, and upon the pleadings, papers, records and files in this action." The affidavit served on plaintiff contains the statement that the defendant G. Giacomini "is not actually a defendant in the said action but is a proper party plaintiff * * * as is evidenced by the statements in the said complaint on file herein in Paragraph IX thereof * * *."

Appellants contend that under section 395 of the Code of Civil Procedure they were entitled to the transfer of the case to their place of residence as the resident defendant was joined as defendant solely because he refused to be joined as a plaintiff and no cause of action was stated as against him. Respondent denies these contentions but chiefly relies on the point that the notice of motion failed to specify as grounds for the motion that the resident defendant was joined fraudulently for the purpose of preventing the transfer of the action or that said defendant was not a real or necessary party in interest but only a nominal party and that therefore these grounds cannot be considered on appeal. McDuffie v. California Tehama Land Corp., 138 Cal.App. 245, 248, 32 P.2d 385.

There is no doubt that the notice of motion in itself, without reference to the affidavit and pleadings, fails to specify these grounds or any sufficient ground for transfer, as neither the residence of the defendant Giacomini in San Francisco is denied, nor any ground stated why his residence should be disregarded in determining the proper venue. "Where there are several defendants in a personal action, a nonresident defendant, moving alone, is not entitled to have the place of trial changed to the county of his residence in the absence of a showing that none of the other defendants are residents of the county in which the action was brought." Donohoe v. Wooster, 163 Cal. 114, 116, 124 P. 730.

[1] However, such defect may be cured when the notice contains the statement that the motion will also be based on the demand or affidavit(s) served, and said documents together with the notice of motion state sufficient grounds for a motion for change of venue. Westover v. Bridgford, 25 Cal.App. 548, 144 P. 313, where it is pointed out that a notice merely stating that the motion would be based on the grounds specified in the demand and/or affidavit served would be sufficient if those documents contained a sufficient specification.

[2, 3] In this case the statement in the affidavit of Charles W. Kurkjian that the resident defendant was not actually a defendant but properly a party plaintiff was sufficient to apprise plaintiff of the fact that the question whether the resident defendant was a proper party defendant would be raised by the motion. That plaintiff was in no way misled or prejudiced is shown by the affidavit of his attorney in opposition to motion for change of venue in which it is stated that the defendant Giacomini is a necessary party defendant and that it may be determined that said defendant is liable in one of the causes of action set forth in the complaint. We hold that the question whether defendant Giacomini was a proper party defendant was duly raised in the court below and can be considered on appeal. The cases of Henderson v. Cohen, 10 Cal.App. 580, 582, 102 P. 826, and McDonald v. California Timber Co., 151 Cal. 159, 161, 90 P. 548, relied on by respondent, are not in point. They hold that where it is sought to show that a party is "fraudulently" joined as a defendant for the purpose of preventing the transfer of the action to the proper place for trial, it is necessary that such fraud should be distinctly specified in the notice of motion before proof addressed thereto may properly be heard. It may be true that the pleadings in this case were insufficient to permit an inquiry whether the allegations with respect to the resident defendant were sham, but such is not the only possible ground for disregarding the residence of a codefendant in determining the proper place for trial of the action, and is not the ground relied on by appellant. Section 395 of the Code of Civil Procedure mentions as a separate and distinct ground: "If any person is improperly joined as a defendant." Such improper joining need not be intentional or fraudulent. The provisions of the statute relating to change of venue are remedial in character and must be liberally construed in favor of the remedy. Buck v. City of Eureka, 97 Cal. 135, 31 P. 845. In Donohoe v. Wooster, supra, 163 Cal. 114, 116, 124 P. 730, 731, it is said: "As was said in Smith v. Smith, 88 Cal. 572, 575, 26 P. 356, 357: 'The general spirit and policy of

the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. * * * It is intended to protect the defendant in the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that a plaintiff who would seek redress from a defendant must seek it in the county where he resides.' In conformity with this theory, it is settled that the joining as party defendant of one against whom no cause of action is stated does not deprive the other defendant of the right to have the action tried in the county of his residence. (Citations.)" The rule was followed by this court in Konnoff v. Fraser, 62 Cal.App.2d 788, 145 P.2d 368, in which case no intentional joining of an improper party was involved but the only inquiry was whether the cause of action alleged as to the resident defendant could be maintained as a matter of law.

[4] An analysis of the complaint in the case here under consideration shows that no cause of action whatever is stated therein against the defendant Giacomini and that he is not shown to be a proper party defendant.

[5, 6] The allegation of the complaint that said Giacomini was requested to join as a party plaintiff but his consent to join as such cannot be obtained tends to show that said Giacomini has no such interest as would entitle him to influence the place of trial, and that his position in the case, if any, would remain substantially that of a party plaintiff. Donohoe v. Wooster, supra, 163 Cal. 114, 117, 124 P. 730. Such joinder furnishes no valid reason for refusing to change the place of trial to the county where the other defendants have their domicile. Stesel v. Santa Ana R. Water Co., 35 Cal.App.2d 117, 127, 94 P. 2d 1052. Respondent tries to distinguish these cases on the ground that in the case at bar the same relief is asked against the defendant Giacomini as against the other defendants. However, no facts whatever are alleged which would entitle the plaintiff to any recovery from Giacomini. With respect to the other defendants the complaint clearly shows that they held as consignees a mink coat owned by plaintiff, that it was stolen from them, and that they had agreed to be responsible for loss by theft. With respect to defendant Giacomini it is only alleged that plaintiff delivered the coat to him and he to the other defendants. The relation in which he stood to plaintiff or to the coat remains obscure and no contractual obligation whatever of Giacomini to pay the value of the coat or to indemnify plaintiff is alleged. Neither is there any contention that the delivery of the coat by Giacomini to appellants was tortious or a breach of contract. Clearly no semblance of a cause of action for the amount prayed for is stated against defendant Giacomini. The added common count for the same amount incorporating all the allegations of the preceding count in which the facts are specifically pleaded adds nothing to the position of Giacomini in the suit. The common count must be considered in connection with specific facts pleaded. As the statement of those facts does not support a cause of action against Giacomini the common count will be considered not to do so either. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P. 2d 1248. Neither is the conclusion in the complaint that Giacomini is a necessary party to a complete determination or settlement of the questions involved in the action sufficiently supported by the facts alleged. They are in substance that the appellants assert that the transaction as to the mink coat was concluded not with plaintiff but with Giacomini, but that Giacomini claims to have acted as agent of plaintiff and denies any interest or liability. Where no basis whatever of liability of Giacomini to plaintiff is stated in the complaint and it is expressly alleged that Giacomini disclaims all interest in the matter it cannot be seen why he is a necessary party defendant. Even if Giacomini had not disclosed that he was acting as agent for plaintiff (although actually plaintiff's name is mentioned on the invoice made part of the complaint), plaintiff would have been entitled to sue appellants in his own name,

if in fact Giacomini has been his agent (1 Cal.Jur. 854, Agency, sec. 131; Cowan v. Tremble, 111 Cal.App. 458, 296 P. 91) and the agent would not be a necessary party (Churchill v. Woodworth, 148 Cal. 669, 672, 84 P. 155, 113 Am.St.Rep. 324; 1 Cal. Jur. 862).

[7] Neither in the affidavits in the court below nor in his brief on appeal does respondent explain the character of the cause of action he asserts against the defendant Giacomini nor does he intimate that a good cause of action could be stated by amending the complaint. Under these circumstances we can only look to the complaint itself in determining the position of defendant Giacomini. The pleadings existing at the time the motion for change of venue is first made are at any rate the normal basis on which to judge the right to the change. Konnoff v. Fraser, supra, 62 Cal.App.2d 788, 791, 145 P.2d 368 and authorities there cited. As stated before, the complaint does not show that defendant Giacomini is a proper party defendant.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

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83 Cal.App.2d 344

KARAPETIAN et al. v. CAROLAN et al.
Civ. 13495.

District Court of Appeal, First District, Division 1, California.
Jan. 26, 1948.

Rehearing Denied Feb. 25, 1948.
Hearing Denied March 25, 1948.

1. Fraud ⇨31

Purchasers, on discovering fraud, had an election of two inconsistent remedies, one to disaffirm the contract and rescind, and the other to affirm the contract and sue for damages.

2. Appeal and error ⇨197(7), 758(1)

Where defense of election of remedies was not affirmatively pleaded but evidence relating to claimed rescission came into case without objection by plaintiffs and plaintiffs neither in court below nor in their briefs made contention that such defense was not available to defendants because not made in pleadings nor tendered in instructions, defense would be disposed of on its merits.

3. Election of remedies ⇨3(2)

The remedy of rescission and an action for damages are inconsistent and a completed and effectual rescission terminates the contract and bars an action for fraud.

4. Contracts ⇨274

Where innocent party has a right to rescind because of fraud of other party and gives notice of rescission to that other party and offers to restore, the innocent party has the right to sue for recovery of all things of value received by the fraudulent party. Civ.Code, §§ 1688–1691, 1689.

5. Pleading ⇨53(2)

Defrauded party may set forth in his complaint against fraudulent party a cause of action for rescission of contract and in a second cause of action ask for damages, if for any reason recission is not granted.

6. Election of remedies ⇨7(1)

Notice of rescission of contract for fraud is not an irrevocable election until it is made effectual by innocent party's receiving back the consideration with which he has parted and where the fraudulent party prevents that from happening and innocent party is forced to an action, he may then affirm contract and sue for damages or disaffirm and sue for rescission. Civ.Code, §§ 1688–1691, 1689.

7. Election of remedies ⇨7(1)

Where purchasers sent to vendors two notices of rescission charging vendors with having fraudulently concealed defect during negotiations, tendered back a deed to premises and demanded return of down payment and cancellation of note and mortgages given to secure payment of balance of purchase price, but vendors refused to return consideration received by them and refused to accept key from purchasers, purchasers had not made an irrevocable election of remedies and could recover damages for fraud. Civ.Code, §§ 1688–1691, 1689.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Seragan Karapetian and another against Joseph T. Carolan and another to recover damages for alleged fraud and deceit. Judgment for plaintiffs and defendants appeal.

Affirmed.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for appellants.

John K. Hagopian, of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by plaintiffs against defendants to recover damages for the alleged fraud and deceit of defendants. The cause was tried before a jury, resulting in a verdict of $3,500. Defendants appeal from the judgment entered on that verdict.

Appellants do not challenge the sufficiency of the evidence to sustain the implied finding that they were guilty of fraud; in fact, the sole point made by them is necessarily predicated on the premise that they were fraudulent. Thus at all times it must be kept in mind that defendants stand before this court asking reversal of a judgment in a case where they have been found guilty of fraud and where they admit that the finding of fraud is supported.

The sole point relied upon by appellants arises because of the following facts: The evidence showed that the contract of sale here involved was closed August 8, 1945. While one of the respondents was on the witness stand it developed, on both her direct and cross-examination, and without objection by respondents, that prior to filing this action respondents had sent to appellants two notices of rescission, one dated August 23, 1945, and one dated September 13, 1945. In these notices the respondents informed appellants that rotting had been discovered in the foundations of the house purchased, charged appellants with having fraudulently concealed this defect during the negotiations, tendered back a deed to the premises, demanded the return of the $2,000 down payment made by them and the cancellation of a promissory note and two mortgages given to secure payment of the balance of the purchase price. Appellants refused to return the consideration received by them, and, after respondents had moved from the premises, refused to accept the key from respondents. Thus, as testified to by one of the respondents, the appellants did not "act upon this rescission." After this refusal by appellants this action for damages for the fraud was filed November 19, 1945.

[1] It is the theory of appellants that upon discovering the fraud the respondents had an election of two inconsistent remedies, one to disaffirm the contract and rescind, and the other to affirm the contract and sue for damages. That is undoubtedly the law. Appellants next contend that respondents made an irrevocable election when they notified appellants of their desire to rescind. It is their theory that the rescission became complete by the unilateral act of respondents in giving the notice of rescission, and thereafter their sole remedy was to recover the consideration paid by them. After the notice of rescission was sent, say appellants, the contract was forever disaffirmed and had no further existence, so that it could not, thereafter, be used as a basis of an action for damages. This conclusion, according to appellants, is inescapable under the appropriate code provisions as interpreted by the California cases.

[2] Before this point is discussed on its merits there is one preliminary matter to which reference should be made. The record shows that appellants did not raise this "election by notice of rescission" defense in their pleadings, but raised it for the first time in a motion for nonsuit. Appellants offer no excuse for not having pleaded this defense, and it does not appear that they offered any instructions which would have limited the jury's right to make an award in excess of the down payment made by respondents. Professor Williston

in his well-known work on Contracts, Vol. 5 (Rev. Ed.), § 1528, p. 4279, at p. 4285, states: "The defense of election of remedies must be affirmatively pleaded to be available." Thus, if this court desired to be technical, it could refuse to consider appellants' "election by notice of rescission" point for the reason that it was not properly raised. But in view of the facts that the evidence relating to the claimed rescission came into the case without objection by respondents, that respondents admitted sending the letters in question, and that respondents, neither in the court below nor in their respondents' brief, made the contention that this defense is not available to appellants because not made in the pleadings or tendered by the instructions, we have determined to treat the point as properly raised, and to dispose of it on its merits.

[3] There can be no doubt that the remedies of rescission and an action for damages are inconsistent and that a completed or effectual rescission terminates the contract and bars an action for fraud. McCready v. Bullis, 59 Cal. App. 286, 210 P. 638; Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039. The correct rule, supported by authorities, is stated as follows in 6 Cal.Jur. p. 388, § 233: "Upon the breach of a contract a party thereto may treat it as rescinded, and if he has advanced money on it, bring an action for its recovery; or he may treat the contract as still in force and maintain an action for damages for the breach, but he cannot pursue both courses. If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by breach of the covenants."

The real questions are, when does the rescission become so complete or effectual as to terminate the contract? Has the one defrauded made an irrevocable election by sending to the wrongdoer a notice of rescission, where the wrongdoer refuses to rescind? These questions have never been directly answered in California. An examination of the decided cases demonstrates that in some cases involving other phases of the law of rescission language can be found that can be used to support the conclusion that sending such a notice constitutes an irrevocable election, while language in other cases clearly indicates that the election does not become irrevocable until the contract has been "effectually" disaffirmed, and that such "effectual" disaffirmance occurs only when the defrauded party receives back his consideration. While this confusion exists in the language of the California cases, no such confusion exists in the Restatement of the Law of Contracts and the Restatement of the Law of Restitution.

Section 485(1) of the Restatement of Contracts provides: "Where a transaction is voidable for fraud or misrepresentation, and the injured party has exercised his power of avoidance, a subsequent manifestation of intent to affirm the transaction is inoperative, unless the party guilty of the fraud or misrepresentation also manifests assent thereto by refusal to accept return of the consideration or otherwise." In "Comment (a)" to this section appears the following: "Election to avoid when made is as conclusive as election to affirm. The first manifestation of either avoidance or affirmance is final. The wrongdoer, however, frequently desires that the transaction improperly induced shall be sustained. He may manifest such a desire by refusing to receive back consideration that he parted with, or in other ways. If the injured party then manifests a willingness to validate the transaction, this subsequent manifestation of mutual assent nullifies the previous avoidance." Under this section it would appear that when the innocent party sends the notice of rescission the contract is disaffirmed, but when the fraudulent party refuses to rescind that amounts to an offer to reinstate the contract which is accepted by the innocent party by bringing an action for damages.

The Restatement of Restitution reaches exactly the same result, but on a somewhat different theory. Section 68(2) provides:

"A person who avoids a transaction is not entitled subsequently to affirm the transaction, unless the avoidance was induced by the fraud, material misrepresentation or duress of the transferee. A person does not avoid a transaction until:

"(a) he has regained all or a substantial part of what he gave and to which he would be entitled only upon avoidance, or

"(b) he has obtained a final judgment or decree based upon the avoidance, or

"(c) the other party has changed his position in reliance upon a statement of disaffirmance or has manifested his consent thereto."

In "Comment f" to this section appears the following: "A manifestation of an affirmance of a voidable transaction made freely and without mistake cannot be rescinded; a manifestation of a disaffirmance, however, does not of itself operate as an avoidance. Thus a statement that one disaffirms, or ineffectual attempts to obtain what has been given, are not conclusive. Likewise, bringing a proceeding for restitution which, for any reason, is unsuccessful, does not prevent further proceedings or further action based upon the validity of the transaction. *There is no definitive avoidance until the person seeking to avoid has regained all or part of what he gave*, has obtained a judgment or decree by the enforcement of which he will be put back into his original position, has caused the other party to change his position in reliance upon the avoidance, or has contracted with the other party upon the basis of this disaffirmance." (Italics added.) The very first example given in the Restatement of the application of this rule is as follows: "By fraud A buys goods from B. Upon discovery of the facts B writes to A asking for the return of his goods and offering to return the purchase price. A refuses to do this. B is entitled to maintain an action of deceit against A." That is exactly the case at bar. The rationale of this rule seems to be that when the innocent party gives notice of rescission, and the fraudulent party does not comply, the fraudulent party has rendered the attempted rescission "ineffectual" and the innocent party should still have the right to elect to affirm or disaffirm. In the California annotations to §485(1) of the Restatement of Contracts it is stated "California is probably in accord," while the California annotations to §68(2) of the Restatement of Restitution states that this state is "in accord."

There can be no doubt that the rules announced in the Restatement are sound, and reach the fair and equitable result. This being so, such rules should be followed unless the statute or case law of this state compels or suggests a different result. As was said in Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 30, 87 P.2d 830, 844, "Although it is true * * * that the restatement does not constitute a binding authority, considering the circumstances under which it has been drafted, and its purposes, in the absence of a contrary statute or decision in this state, it is entitled to great consideration as an argumentative authority. It purports to accurately reflect the general common law of the United States, and where there is a conflict, to state the general and better rule on any given subject." See, also, Scholey v. Steele, 59 Cal.App.2d 402, 405, 138 P.2d 733. We turn then to the statute and case law of this state.

The governing code sections are to be found in the Civil Code, §§1688 to 1691. Section 1688 provides that "a contract is extinguished by its rescission." Section 1689 sets forth the grounds of rescission, subdivision 1 providing that one such ground is fraud, and subdivision 5 providing that a contract may be rescinded by consent. Section 1691 provides that "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, * * *

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

It is quite obvious that under these sections a rescission may be effected by the bilateral action of both parties, i. e., by consent, or by the unilateral action of the innocent party, where the basis of the rescission is the fraud of the other party.

But the code sections are not helpful and certainly not decisive in determining when an irrevocable election has been made.

[4] The cases are likewise not decisive on this issue. It is undoubtedly the law, as contended by appellants, that where the innocent party has a right to rescind because of the fraud of the other party, and gives notice of rescission to that other party and offers to restore, the innocent party then has the right to sue for recovery of all things of value received by the fraudulent party. Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 P. 978; Fitzhugh v. University Realty Co., 46 Cal.App. 198, 188 P. 1023. But these cases do not hold that such a notice of recission constitutes an irrevocable election on the part of the innocent party. Other cases cited by appellants do contain language helpful to them. Thus, in Ito v. Watanabe, 213 Cal. 487, 488, 2 P.2d 799, 800, appears the language: "But a rescission may be effected by notice and restoration or tender of the consideration, without the necessity of an action." In Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 731, 209 P. 995, 998, appears the following language: "It is said in Benjamin on Sales, 5th Ed., p. 461, that—'It is not necessary that there should be a judgment of court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party.'" In American Type, etc., Co. v. Packer, 130 Cal. 459, at page 467, 62 P. 744, 746, the court first stated that the innocent party had served a notice of rescission based upon the other party's failure to perform, and then stated: "From the evidence, the rescission was complete and perfect, and the court should have so found." In Loaiza v. Superior Court, 85 Cal. 11, 31, 24 P. 707, 711, 9 L.R.A. 376, 20 Am.St.Rep. 197, appears the following statement: "It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake, or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode, of rescission. They did not restore, because restoration was not accepted, but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought." Other cases could be cited to the same effect. These cases, while containing language that tends to indicate that the rescission is complete upon giving notice thereof, did not consider because they did not involve the question as to whether the giving of such notice of rescission, together with an offer to restore, constitutes an irrevocable election where the guilty party refuses to restore the consideration received by him.

[5] As opposed to these cases there are a series of cases that have developed the doctrine that for a rescission to constitute an irrevocable election it must be an "effectual" disaffirmance. This doctrine has been announced in several different kinds of cases. Thus it is now well settled that the innocent party may set forth in his complaint against the fraudulent party a cause of action for rescission, and in a second cause of action ask for damages, if for any reason rescission is not granted. One of the leading cases announcing this rule is Bancroft v. Woodward, 183 Cal. 99, 101, 190 P. 445, 446, where it was stated: "While it is true that a party induced to enter into a transaction by fraud affirms the transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently [citing case], it is not true that if he seeks to disaffirm, but ineffectually, he loses the right thereafter to maintain an action for damages. The right to damages exists unless and until the transaction is effectually disaffirmed. It could hardly be questioned, for example, that under a complaint which,

by proper and sufficient averments, set out that the plaintiff had been induced by fraud to enter into a contract and had endeavored to rescind it because of such fraud, and prayed relief upon the basis of a rescission, the plaintiff might be accorded damages in case the fraud were found but under such circumstances that the right of rescission did not exist. To put the matter in another way, it is wholly inconsistent for a party defrauded to ask for damages first and a rescission if he cannot have them. But there is nothing inconsistent in his asking for rescission first and damages if he cannot have it. The defendant here by his counterclaim and cross-complaint, filed at the same time, has gone no further than to say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former. There is nothing in this that constitutes an affirmance so that his right to rescission is gone." See, also, Murphy v. Sheftel, 121 Cal.App. 533, 9 P.2d 568.

It has also been held that where a party brings an action for rescission and it is held that such remedy is unavailable, such election is not irrevocable, but the innocent party may later maintain an action for damages. Papenfus v. Webb Products Co., 48 Cal.App.2d 631, 120 P.2d 60.

There are also cases holding that where the defrauded party sends a notice of rescission based upon fraud to the other party, but the fraudulent party has disposed of the property received from the innocent party, and so of course cannot restore the property, the innocent party may maintain an action for damages for the fraud, the notice of rescission not constituting an "irrevocable" election. The leading case announcing this rule is Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. There, as here, the fruadulent party contended that the sending of the notice of rescission constituted an irrevocable election. The Supreme Court answered this contention as follows 143 Cal. at page 88, 76 P. at page 966: "* * * there is no such rigid and inexorable rule as to election of remedies in cases of fraud as that for which the appellants contend. It is undoubtedly true that when one who has been defrauded in a contract elects to affirm it, after discovery of the full extent of the fraud, he cannot afterwards claim a rescission. This is simply a result flowing from the general doctrine of estoppel. But an election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, and especially if rendered impossible or difficult or of doubtful advantage by the act of the guilty party, bar an action based upon a subsequent affirmance of the contract, and the commencement of such an action is in itself an affirmance." This language, although used in a case where rescission was impossible because the fraudulent party no longer had the property received by him, is identical in effect with that used in the Restatement of Restitution above quoted. See, also, Waters v. Woods, 5 Cal.App.2d 483, 42 P.2d 1072.

Another case which is perhaps the most closely in point is Del Vecchio v. Savelli, 10 Cal.App. 79, 101 P. 32. There the innocent party gave a notice of rescission to the fraudulent seller. Later the innocent party determined that he had not acted promptly and so was not entitled to a rescission, and brought an action for damages. The fraudulent seller contended that an irrevocable election had been made, and that an action based upon affirmance of the contract would not lie. The court answered this contention as follows, 10 Cal.App. at page 83, 101 P. at page 34: "We do not understand that appellant claims that respondent, upon the discovery of the fraud, should have taken steps to rescind the sale to maintain this action, for he certainly had his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages for false and fraudulent representations. He does, however, seem to claim that, as respondent did give notice of rescission (although subsequently he concluded that too much time had elapsed to make rescission effective), he was bound to pursue that remedy, and that, therefore, he could not maintain this suit for damages. No authorities are cited to support this theory, and comment is unncessary."

Another case where a party was permitted to sue for damages after giving a notice of rescission is Hjorth v. Bernstein, 44 Cal.App.2d 561, 562, 112 P.2d 643. In that case the plaintiff had been defrauded in the purchase of certain oil royalties. The sellers were named Lison, but the fraudulent representations were made by Bernstein, who was not the agent of the Lisons. The Lisons were innocent of the fraud. The plaintiff served a notice of rescission on the Lisons, and then filed a complaint against both the Lisons and Bernstein asking, in the first count for a rescission, and in the second count for money had and received. No basis for a rescission against the Lisons existed, and the court so held, but it granted a money judgment against Bernstein for his fraud. Bernstein appealed, contending that by the notice of rescission the plaintiffs had irrevocably elected to disaffirm the contract. At page 564 of 44 Cal.App.2d, at page 644 of 112 P.2d, the court disposed of this contention as follows: "Appellant contends, secondly, that the law is well settled that a person claiming to be defrauded by false representations has a choice of two inconsistent remedies, to-wit, he may elect to rescind the contract; or, to affirm it and claim damages. He cannot do both. We quite agree with appellant in this connection. However, it is well settled in California that the right to damages exists in cases of this character unless and until the transaction is effectually disaffirmed. It is, of course inconsistent for the party defrauded to rely upon the contract and seek damages thereon for fraud, and in the event that he is prevented from recovery to thereafter file an action for rescission. But, in this case, an action for rescission was denied for the reason that the court deemed the same inequitable for the reason that the Lisons, who owned the oil royalty, had never participated in the fraud and for the further reason that appellant Bernstein, who had committted the fraud, was not an agent of the Lisons. Rescission, therefore, would have been ineffectual."

The court quoted at length from the Woodward case, supra, and then stated 44 Cal.App.2d at page 566, 112 P.2d at page 645: "In view of the rule of law enunciated in the Woodward case, we are of the opinion that the complaint and the evidence submitted without objection definitely entitles the plaintiffs to recover against the appellant Bernstein for damages for the fraud perpetrated by him." See, also, House v. Piercy, 181 Cal. 247, 183 P. 807.

[6, 7] From this analysis of the cases it would appear that while a few opinions have used language indicating that a notice of rescission once given constitutes an election to disaffirm, the majority and the best reasoned cases, where it appears that the fraudulent party has made the attempted rescission ineffectual, have held in exact accord with the Restatement rule that the rescission is not an "irrevocable" election. If, as was held in Montgomery v. McLaury, supra, where the fraudulent party has disposed of the consideration received by him, the notice of rescission by the innocent party does not constitute an irrevocable election and the rescission is not "effectual," it would appear obvious that where the fraudulent party makes the rescission "ineffectual" by refusing to return the consideration, the same rule should apply. The notice of rescission should not be held to be an "irrevocable" election until it is made "effectual" by the innocent party receiving back the consideration with which he has parted. Where the fraudulent party prevents that from happening, either by parting with the property or by refusing to disgorge his ill gotten gains, or otherwise, and the innocent party is forced to an action, he should be permitted, if he so desires, to then affirm the contract and sue for damages or to disaffirm and sue for rescission. That is the fair and just rule and the rule recognized in the Restatement. Inasmuch as neither the statute nor the case law of this state compels a contrary rule we are inclined to and do follow and apply the rule of the Restatement.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

83 Cal.App.2d 414

WILLOUGHBY v. SOUTHERN PAC. CO.

Civ. 13546.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1948.

1 .Waters and water courses ⚷125

Failure to allow any damages for loss of use of home for 18 days due to diversion of surface waters from defendant's right of way causing it to flood under plaintiff's home and remain there for several weeks and for annoyance and discomfort in living in home after plaintiff's return was error.

2. Waters and water courses ⚷125

Decrease in market value is a recognized element of damage to realty due to diversion of surface water.

3. Trial ⚷378

Evidence of decrease in market value of realty as a result of being flooded by diversion of surface water was properly before the court where no objection was made to introduction of such evidence on ground of variance from allegation as to cost of repairing alleged damage.

4. Waters and water courses ⚷126(2)

Failure to allow damages for substantial physical damage to house by reason of water flooding under house and remaining there for several weeks as a result of diversion of surface water by defendant was error in view of uncontradicted evidence of such damage.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Myron Willoughby against the Southern Pacific Company to recover damages suffered in the flooding of plaintiff's residence by the diversion of surface waters from defendant's right of way over plaintiff's land. From a judgment awarding only $75 damages, plaintiff appeals.

Judgment reversed with directions.

Dannenbrink & Graves, of Oakland, for appellant.

Johnson, Ricksen & Johnson, of Oakland, for respondent.

DOOLING, Justice.

Plaintiff brought this action to recover damages suffered in the flooding of his place of residence in 1945 by the diversion of surface waters from the defendant's right of way onto the plaintiff's land. It is undisputed in the evidence that the water flooded under the plaintiff's home and stood there for a matter of some weeks damaging the furnace. It is likewise without dispute that the walls and floors of the home were damaged my moisture from the water standing underneath. Not only did the plaintiff and others of plaintiff's witnesses so testify but the only witness called by the defendant corroborated the fact of damage to walls and ceiling. The evidence further shows that plaintiff and his wife lived away from their home for 18 days because of the unlivable condition created by the flooding, and were inconvenienced after their return by dampness and lack of heat which, among other things, compelled them to sleep in the living room instead of their bedroom. The trial court gave judgment for plaintiff for $75 expended by him to repair the furnace and found that plaintiff suffered no other damage.

[1] Plaintiff prayed for $900 general damages. Under the evidence it was error for the trial court not to allow some damages for the loss of use of the home for 18 days and the annoyance and discomfort in living there after the plaintiff's return. Le Brun v. Richards, 210 Cal. 308, 320, 291 P. 825, 72 A.L.R. 336.

[2-4] The complaint alleged damage to the real property which it would reasonably cost $1,950 to repair. The plaintiff made no effort to prove the cost of repairing the damage but instead produced a real estate broker who testified as an expert that the real property before it was damaged had a market value of from $7,000 to $7,500 and that after the damage its market value was $6,000. Decrease in market value is at least one of the recognized measures of damages in cases such as this. Natural Soda Prod. Co. v. City of L.A., 23

Cal.2d 193, 200, 143 P.2d 12; Le Brun v. Richards, supra, 210 Cal. 308, 319, 291 P. 825, 72 A.L.R. 336. Since no objection was made to the introduction of the evidence of difference in value on the ground of variance this evidence of damage was properly before the court (21 Cal.Jur. 276, 277) and the court erred in the face of the uncontradicted evidence of substantial physical damage to the property in making no award for that item.

The judgment is reversed with directions to retry only the question of the amount of plaintiff's damages.

NOURSE, P. J., and GOODELL, J., concur.

PEOPLE v. HAMILTON et al. *

Cr. 2491.

District Court of Appeal, First District, Division 1, California.

Jan. 19, 1948.

Rehearing Denied Feb. 3, 1948.

Hearing Granted Feb. 17, 1948.

1. Criminal law 🔑742(2)

The credibility of an accomplice who had admitted a prior conviction of a felony was for the jury.

2. Criminal law 🔑510

The testimony of witness as to burglary to which he was accomplice was required to be corroborated.

3. Criminal law 🔑511(2)

Corroborative evidence in itself must be of an inculpatory character and must tend without aid of testimony of accomplices to implicate the defendant in the commission of the crime. Pen.Code, § 1111.

4. Criminal law 🔑511(5)

Testimony of various witnesses placing defendants and accomplice at points mentioned in accomplice's testimony narrating events occurring on evening of burglary was sufficient to corroborate accomplice's testimony. Pen.Code, § 1111.

5. Witnesses 🔑337(6)

In burglary prosecution, admission, in connection with district attorney's examination of defendant, of judgment showing that defendant had been sentenced to county jail for burglary was error, since impeachment of witness because of prior conviction is limited to convictions of felony. Code Civ.Proc. § 2051.

6. Criminal law 🔑633(1)

Accused persons are constitutionally entitled to have their guilt or innocence determined according to law and to have their substantive rights protected.

7. Criminal law 🔑1186(4)

Under constitutional provision precluding reversal for improper admission of evidence in absence of a miscarriage of justice, injury or prejudice is never presumed from mere fact of error, and it must affirmatively appear to satisfaction of reviewing court that accused may well have been prejudiced by the error. Const. art. 6, § 4½.

8. Criminal law 🔑1186(4)

Where reviewing court is satisfied that accused could have been prejudiced by error, but is unable to determine from the circumstances whether he actually was prejudiced, court should order a new trial. Const. art. 6, § 4½.

9. Criminal law 🔑1186(4)

In prosecution of defendants for burglary, error in admission of judgment showing that one of defendants had previously received jail sentence for burglary required reversal, where conviction was based primarily on testimony of an accomplice and the corroborating evidence was not strong. Code Civ.Proc., § 2051; Const. art. 6, § 4½.

10. Criminal law 🔑824(7)

In burglary prosecution based largely on testimony of an accomplice, instruction to effect that testimony of an accomplice ought to be viewed with distrust should have been given, even though no request was made. Code Civ.Proc. § 2061, subd. 4.

WARD, J., dissenting.

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* Subsequent opinion 198 P.2d 873.

Appeal from Superior Court, San Mateo County; A. B. Cotton, Judge.

Joseph Roy Hamilton and Alfred Bundy were convicted of burglary and they appeal.

Orders denying motions for new trials and the judgments appealed from reversed.

Milton Stansky and Kenneth Carlton Zwerin, both of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and Leo T. Englert, of San Francisco, for respondent.

BRAY, Justice.

Defendants were charged in an information with three counts of burglary. The first count charged the burglary of Lester's Market in San Carlos, San Mateo County. The second count charged the burglary of the Tower Market, San Mateo, and the third count charged the burglary of the Carlos Food Market, San Carlos. Defendant Hamilton was acquitted of the first two counts and convicted of the third count. Defendant Bundy was acquitted of the second count, but convicted of counts one and three.

Three points are made upon this appeal: (1) insufficiency of the evidence; (2) error in admitting evidence of a misdemeanor conviction; and (3) error in failing to give a cautionary instruction concerning the testimony of the accomplice.

On December 23, 1946, between 10:30 p. m. and midnight, the Carlos Market in San Carlos was broken into and a desk ransacked, although nothing was taken. The connecting of the defendants with this transaction depends mainly upon the testimony of the witness Johnson, and the sufficiency of the evidence depends in a large degree upon whether his testimony, as he is admittedly an accomplice as to this crime, is corroborated. Johnson testified that he had known the defendants slightly; that on December 23 he met Bundy in San Francisco and "I asked him about cutting me in on some money." Johnson owned a 1946 Buick sedan, and Bundy suggested that Johnson "go with them and bring whiskey in my automobile." For this Johnson was to get $300. Hamilton joined them later, and all three discussed taking the back seat out of the automobile so it would hold twenty cases of whiskey. Bundy had a light blue Lincoln Zephyr. Hamilton and Johnson got into the Buick and followed Bundy in the Zephyr. When they stopped, Hamilton and Johnson took the back seat out of the Buick. The back seat was also taken out of the Lincoln. Bundy then drove his car out the Bayshore Highway, followed by Hamilton and Johnson in the Buick. Just before reaching the county line between San Francisco and San Mateo counties, a traffic officer stopped Bundy and gave him a ticket for speeding. With Bundy's car in the lead the cars then proceeded to Redwood City. Hamilton told Johnson that the latter was supposed to haul some whiskey and that Bundy knew where it was and also that Hamilton knew where to follow him. In Redwood City, they parked the cars in front of a certain house, and Hamilton and Johnson entered the Bundy car. With Bundy driving, they drove around San Mateo and San Carlos, engaged in what the jury very reasonably could, and evidently did, regard as "casing" markets, including the Carlos Market. As they passed the Lucky Tower Market (the market mentioned in count two), Bundy said that "we" had taken about 40 cases of whiskey from that market, explaining how they were taken. As they went by Lester's Market (count one) Bundy said "We got two grand out of there" and "a nice little safe." Hamilton did not comment either time. Back in Redwood City they again stopped at the house where Johnson had left his car. They all went inside and Johnson was introduced to Hamilton's girl friend who lived there. About twenty minutes to eleven they left. Bundy in his car again preceded Hamilton and Johnson in the latter's car. Johnson stopped at a filling station and got gas, Hamilton paying for it. Hamilton directed Johnson how to find Bundy and they drove down to the Carlos Market. Bundy's car was parked there and Bundy was standing at the side of the building. Hamilton directed Johnson to drive around the building. They then parked down the street on the opposite corner from the market, where they could see the back of the market. Bundy got into his car and parked it behind a building to the rear of the market.

Johnson and Hamilton stayed in their car and Bundy went into the market. Later he came out of its back door. Hamilton then got out of Johnson's car and went over to Bundy. They spoke for a short period. Bundy went back in the market and Hamilton stayed outside. Bundy then came out of the market to Hamilton and after saying something they both went into the market.

(We will now leave Johnson's testimony and proceed with the evidence as developed through other witnesses.)

About 10:55 p. m. two San Carlos police officers in a patrol car saw a dark Lincoln Zephyr sedan parked approximately where Johnson had testified Bundy's Lincoln Zephyr was parked. The Zephyr had a dent on the left front fender, also on the left side a radio antenna with some unusual object on it. Later one of the officers identified Bundy's car as the Zephyr he saw that night. Bundy's car had a dent on the left front fender, and a radio antenna on the left side with an unusual object on it. They then observed the Buick with Johnson sitting in it. They went over to that car to look into it and found the back seat had been taken out. When they ordered Johnson to leave the car, Johnson threw the car in gear and drove rapidly away. They fired six shots at the car, and reentering their car they took off in pursuit. They chased him through San Carlos and followed him on the Bayshore Highway, almost to San Mateo, when he outdistanced them. They turned back and went to the Carlos Market, found the rear door open, and the glass above the marquee broken, the office door open, a desk and file cabinet open, and evidence that the office had been searched. They then noticed that the blue Lincoln Zephyr was gone.

In the meantime, while escaping the officers following him, Johnson ran into another car, killing its occupant. Johnson was injured and was taken to the hospital, where the next morning he told his story incriminating Bundy and Hamilton. Johnson was charged with manslaughter. No burglary charge was placed against him.

[1, 2] Defendants contend that the testimony of Johnson was unworthy of belief because of his background, bias, prejudice, and interest in the outcome both of this case and the manslaughter charge. He admitted a prior conviction of a felony, "pimping." However, those matters were for the jury to consider. We cannot say, as matter of law, that his story is not true. As to the burglary of Lester's Market (count one), his story, if believed by the jury, is sufficient, as he was not an accomplice in that crime. Of course, as to the burglary of the Carlos Food Market (count three), he was an accomplice of the defendants, and therefore his story must be corroborated.

Both Bundy and Hamilton denied the salient parts of Johnson's testimony. Bundy admitted that he was given a traffic citation on the Bayshore Highway that evening and that while this was happening Johnson and another man passed in the Buick, stopped and returned to where Bundy and the officer were. He denied that Hamilton was the other man. Bundy claimed he went to the airport, which is on the Bayshore Highway between San Francisco and San Mateo, to pick up a girl friend arriving on a plane, and then returned to San Francisco where he gave his car to a James William to give to his roommate, A. B. Brown, who had asked to borrow it. He then went to bed. He denied having been in San Mateo or San Carlos at all that night. Hamilton claimed that he drove his girl friend to Oakland about 6:30 or 7 o'clock in the evening and stayed there until about 2 o'clock in the morning and at no time was in San Carlos or San Mateo.

As corroboration there was the following evidence, in addition to the identification by the police officer of Bundy's Zephyr as being present at the scene of the crime: Defense witness Brown testified that he saw Bundy about 7:30 p.m. at the corner of Post and Buchanan Streets in San Francisco, which is about the place Johnson said Bundy, Hamilton and he were and from which they started their night's enterprise. Brown is mistaken about the time and must have seen Bundy earlier in the evening, as the traffic ticket shows Bundy on the Bayshore Highway at 7:40. Bundy admitted that he was on the Bayshore

Highway that evening, was given a ticket, and that he saw Johnson there. Witness Frey, a service station operator in Redwood City testified that about 10:30 p.m. two colored men in a Buick bought gas from him; that they were apparently in a hurry. He was "reasonably positive" that Johnson was the driver and Hamilton the man who handed Johnson the money to pay for the gas. They were the only colored men who came into the station that night.

Defense witness Brown testified that he received the car after midnight from a man named James. Apparently this was not the man named Williams that Bundy claimed he had given the car to give to Brown. Brown told the police officer Jackson that Bundy had given him the car around 3 a.m.; that Bundy told him that he (Bundy) was in trouble. Brown's testimony that he received the car after midnight did not refute Johnson's claim that Bundy used it in the Carlos Market burglary, for had Bundy returned to San Francisco immediately, he would have arrived there by midnight or shortly after.

Witness Delaney testified that around 11:20 p.m. he came upon a wreck in which a maroon colored Buick was involved on the Bayshore Highway. While there two colored boys came up and asked him if any one had been killed and what happened to the man in the Buick. Delaney could not identify them, but said they were tall, slender boys, about the same height as the defendants.

Witness Mitvalsky, the wrecker who went to the scene of the accident, testified that about fifteen minutes after it happened two colored boys questioned him as to "what became of the *colored* man that was in the other car." (Emphasis added.) He could not identify the defendants, but stated that one of the boys was tall and slender, and the other heavy and tall—"six footers."

The testimony of defense witness Etta Rae Moulton, Hamilton's girl friend, was indefinite, inconsistent and evasive. She was called to deny Johnson's claim that Bundy, Hamilton and he were at her house that night. While she denied that they were there on the night of December 23rd, she admitted that Bundy and Hamilton were in her house "around Christmas time." She could not remember which night. It is obvious that December 23rd is around Christmas time.

[3] The test of the corroboration necessary to be given to the testimony of an accomplice is set forth in People v. Garrison, 80 Cal.App.2d 458, at page 461, 181 P.2d 738, at page 739: "Although the decisions with respect to the scope and degree of corroboration required by section 1111, Penal Code, are in conflict and confusion (People v. Collier, 111 Cal.App. 215, 228, 295 P. 898) the decisions of our Supreme Court leave no doubt that to be sufficient the corroborative evidence in itself must be of an inculpatory character and must tend without aid of testimony of accomplices to implicate the defendant in the commission of the crime. [Citing cases.]" Also as said in People v. Parker, 80 Cal.App.2d 128 at page 133, 181 P.2d 16 at page 19: "It is now too well settled to require extended discussion that all of the elements of the offense need not be shown by corroborating testimony. The testimony of the accomplice is alone sufficient to establish the commission of the crime charged, and all that the law requires in addition to the testimony of the accomplice is some evidence which tends to connect the defendant with the commission of the offense or from which such connection is reasonably inferable."

[4] Independently of the testimony of Johnson there was sufficient evidence from which the jury could reasonably find that the accomplice's testimony was corroborated. The witness Brown places Bundy at the starting point of the expedition. The traffic violation incident places Bundy and Johnson and another man on the road to San Carlos. Etta Mae Moulton's testimony was that Bundy and Hamilton were at her house around Christmas time. The witness Frey identifies Johnson and Hamilton as the two colored boys who purchased gas from him about 10:30 that night while in a hurry. Officer Edlin identifies Bundy's car as the car parked near the Carlos Market a few minutes later, at the same time he saw Johnson's car parked nearby. A

reasonable inference from the testimony of Delaney and Milvalsky is that the defendants were the men who were concerned about what had happened to Johnson in the accident.

[5] While the district attorney was examining Bundy, the following occurred:

"Q. Where had you been just prior to coming to San Francisco? A. I had been in Los Angeles.

"Q. What were you doing in Los Angeles? A. I was in jail.

"Q. Have you ever been convicted of a felony? A. I will let my lawyer answer that for me.

"Mr. Stansky [for the defense]: I beg your pardon?

"Mr. Wyckoff [for the People]: I ask the witness be instructed to answer the question.

"The Court: Answer the question, have you ever been convicted of a felony? A. Well, I don't know what that is.

"Mr. Stansky: Q. Have you ever been sent to a State Prison? A. No, sir.

"Mr. Stansky: Then you haven't been convicted of a felony.

"Mr. Wyckoff: Have you ever been convicted of a felony, yes or no? A. I don't know the law, I don't know what to say.

"Mr. Wyckoff: If Your Honor please, I offer into evidence at this time a certified copy of a judgment of conviction issued in the Superior Court of the State of California, in and for the County of Los Angeles and certified by J. F. Moroney by D. M. Forbes, dated the 5th day of March, 1947, and I show that document at this time to counsel.

"Mr. Stansky: If the court please, I beg leave to object to the introduction of the document into evidence.

"The Court: It may be admitted. (Whereupon the document in question was received in evidence and marked People's Exhibit 27 by the clerk of the court).

"Mr. Wyckoff: He said he had served a County Jail sentence.

"Mr. Stansky: No, he said he was convicted for pimping.

"Mr. Wyckoff: No, he said he served a County Jail sentence.

"Mr. Stansky: I didn't hear him say that.

"Mr. Wyckoff: Q. What felony were you convicted for? A. Burglary." The relevant portion of the judgment introduced into evidence reads as follows: "Whereas the said Alfred Bundy having been duly found guilty in this Court of the crime of Burglary, a felony, as charged in the information, which the Court found to be Burglary of the second degree. It is Therefore Ordered, Adjudged and Decreed that the said Alfred Bundy be punished by imprisonment in the County Jail of the County of Los Angeles for the term of six months." As the defendant only received a county jail sentence, there can be no question but that the offense referred to "became and should have been deemed 'a misdemeanor for all purposes.' Pen. Code, § 17; Doble v. Superior Court, 197 Cal. 556, at page 557, 241 P. 852." People v. Lando, 92 Cal.App. 405, 409, 268 P. 439, 441. Nor can there be any question that the admission of this judgment was error. The attorney general concedes this, as he must. Impeachment of a witness by evidence of a prior judgment of conviction is limited to convictions of felony. Sec. 2051, Code Civ.Proc.; People v. McGee, 24 Cal. App. 563, 141 P. 1055; People v. Alfonso, 77 Cal.App. 377, 246 P. 818; People v. Trimble, 18 Cal.App.2d 350, 63 P.2d 1173; People v. Rowland, 19 Cal.App.2d 540, 65 P.2d 1333; People v. Lando, supra.

The error, too, was not a technical one. It was a substantial error. Under our law, the jury had no more right to have before it the fact of conviction of misdemeanor burglary than of conviction of assault and battery. Actually, knowledge by the jury of the latter type, would be far less harmful to a defendant charged with burglary than knowledge of a prior burglary.

Without minimizing the error, it is interesting to note that defendant, in objecting to the introduction of the judgment, did not specify any grounds, merely stating, "I beg leave to object to the introduction of the document in evidence." Nor did he make any objection to the district attorney's question, "What felony were you convicted for?" On the other hand, this was not a situation of a prosecuting officer, in the heat of a forensic battle, inadvertently causing error. The district attorney had before him the judgment which showed on its face that it was merely a misdemeanor conviction, and yet he deliberately offered it in evidence. This is the kind of conduct which the court held in People v. Lando, supra, 92 Cal. App. at page 409, 268 P. at page 441, to be highly reprehensible. "As the record was easily available to the district attorney, it was distinctly bad practice for him to attempt to create a prejudice against the defendant by compelling him to admit such former conviction."

It is contended in the dissenting opinion that the provision in section 2051 of the Code of Civil Procedure providing that a witness may be impeached by showing that he has been convicted of a felony, is met by showing the verdict of the jury alone. This contention purports to be based principally upon the opinions in People v. Ward, 134 Cal. 301, 66 P. 372, and People v. Williams, 27 Cal.2d 220, 163 P. 2d 692. However, it is based upon a misconception of the decisions in those cases. In People v. Ward, the defendant on a prior occasion had been convicted by a jury of a felony (what felony does not appear). He had not been sentenced. It was held that the verdict of guilty constitutes a "conviction" for the purposes of section 2051. In People v. Williams, the defendant, on a prior occasion, had plead guilty to the crime of burglary. The trial court fixed the degree as second degree, and committed the defendant to the Preston School of Industry. On a subsequent trial for a later offense, this record was admitted into evidence for the purpose of impeaching the defendant. In holding it properly admitted, the Supreme Court followed the Ward case, in holding that the verdict constitutes the "conviction" required under section 2051 of the Code of Civil Procedure. It then goes on to point out that burglary in the second degree is punishable by imprisonment in the state prison and is therefore a felony, but that it is also punishable by a county jail sentence, and that its status as a felony "can be changed only by 'a judgment imposing a punishment other than imprisonment in the state prison'" (27 Cal.2d at page 228, 163 P.2d at page 696), quoting section 17 of the Penal Code. It then holds that in a commitment to Preston the court does not impose a punishment, but suspends sentence on the conviction, and hence such a committal is not a "judgment imposing a punishment other than imprisonment in the state prison." But the court in the Williams case indicates that it recognizes the fact that although the verdict of the jury is the "conviction," if such verdict is of a crime that can be either a felony or misdemeanor, depending solely upon the punishment chosen by the court, and is actually followed by a county jail sentence, the conviction becomes, then, *"for all purposes,"* a misdemeanor. (Emphasis added.) For example, the court uses such language as that quoted above from page 228 of 27 Cal.2d, page 696 of 163 P.2d: "* * * its status can be changed only by 'a judgment imposing a punishment other than imprisonment in the state prison.'" It then states 27 Cal.2d at page 229, 163 P. 2d at page 696, referring to In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237: "This principle is stated in no uncertain terms in the Rogers case as follows, 20 Cal.App.2d at page 400, 66 P.2d at page 1238: 'The necessary inference to be drawn from the language of section 17 of the Penal Code that "when a crime punishable * * * by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes *after a judgment imposing a punishment other than imprisonment in the state prison,"* is that *the offense remains a felony* except when the discretion is actually exercised and the prisoner is punished only by a fine or imprisonment in a county jail.'" (Italics added by the court.) And then follows: "Defendant's plea of guilty to the burglary charge in 1941, under the record, constituted proof of his conviction of a felony (27 Cal.Jur. § 117, p. 142; People v. Dail, 22 Cal.2d 642, 652, 140 P.2d 828; People v. Jacobs, 73 Cal.App. 334, 351, 238 P. 770), but his commitment to the Preston School of Industry—*unlike a county jail sentence, the alternative penal term* *prescribed by statute*—was not 'a judgment imposing a punishment other than imprisonment in the state prison,' so that under authority of section 17 of the Penal Code it should thereafter be deemed a mere misdemeanor." (Emphasis added.)

Thus the Williams case holds, in effect, that the verdict is the "conviction," whose status, if of a felony, can only be changed by a county jail sentence, and when so changed becomes a misdemeanor "for all purposes."

If the verdict of guilty of burglary were final for impeachment purposes, the court need only to have said so, instead of going on at length to distinguish the committal to Preston from a sentence to the county jail. It is significant, too, that section 2051 of the Code of Civil Procedure states "except that it may be shown by the examination of the witness, *or the record of the judgment*, that he had been convicted of a felony." (Emphasis added.)

[6] Being error, the question is, was the action of the district attorney prejudicial error? Section 4½ of article VI of the Constitution states that no judgment shall be set aside on the ground of the improper admission of evidence unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. It is not always easy to determine this question. To point out that the evidence is sufficient to support the judgment is not a complete answer. Accused persons are constitutionally entitled to have their guilt or innocence determined according to law, and to have their substantial rights protected. People v. Adams, 76 Cal.App. 178, at page 186, 244 P. 106, at page 110, contains an excellent compilation of cases which have discussed the test to be applied. As there said, "The courts have not attempted to frame a definition of 'miscarriage of justice' which can be applied to the varying circumstances of the many cases where the constitutional provision is invoked * * *." Among other quotations is one from People v. Wilson, 23 Cal. App. 513, 524, 138 P. 971, 975, where the court says that the phrase "miscarriage of justice" "is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied." Certainly in our case the essential rights of the defendants were disregarded in the admission of this evidence.

We are in the situation of the court in People v. MacPhee, 26 Cal.App. 218, at page 226, 146 P. 522, at page 525, as disclosed in its language: "After a most careful consideration of the entire cause, including the evidence, but without the presence of the actual witnesses before us, we are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article 6 of the Constitution can be given application to uphold the judgment in the case at bar. [Citing cases.]"

[7, 8] In People v. Baskins, 72 Cal.App. 2d 728, 165 P.2d 510, the rule is stated a little differently than it is set forth in People v. MacPhee, supra. At page 733 of 72 Cal.App.2d, at page 512 of 165 P.2d, the court says: "Injury or prejudice cannot be presumed from the mere fact of error. To justify a reversal of a judgment of conviction it must affirmatively appear to the satisfaction of the appellate court from an inspection of the entire record, including the evidence, that the accused may well have been substantially injured by the error of which he complains, and unless the appellate court can say, after such examination, that a miscarriage of justice has resulted the judgment must be affirmed." This language does not negative the ruling in the MacPhee case, supra. In fact, it is consistent with it. Under section 4½ of article VI of the Constitution, injury or prejudice is never presumed from the mere fact of error, and it must affirmatively appear to the satisfaction of the reviewing court that the accused may well have been prejudiced by the error. But, as said in the MacPhee case, supra, when this court is in a position where it is satisfied that the accused could have been prejudiced by the error, but is unable to determine, from all the circumstances, whether he actually was so prej-

udiced, it is the duty of this court, in order to assure that the defendant shall have had that fair trial, the right to which is a fundamental part of our law, to send the case back for a trial in which such error will not be committed.

People v. Crowl, 28 Cal.App.2d 299, at page 313, 82 P.2d 507, at page 515, states: "In discussing a similar question, in People v. Black, supra [73 Cal.App. 13, 238 P. 374], it was said (page 383):

" 'Can we say that there has not been a miscarriage of justice in the one particular disclosed by the error of the court in excluding from the jury the evidence upon the question whether the confessions were freely and voluntarily made? Can we say that the jury would have been bound under the evidence to reach the same conclusion upon that point as was arrived at by the judge? Can we say that they possibly would not have arrived at that conclusion, upon a just consideration of the evidence upon the subject which is unfolded to us from the cold record? * * *

" 'It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say "whether appellant would or would not have been convicted but for the errors of the court." People v. Degnen, 70 Cal.App. 567, 234 P. 129. The same rule is susceptible of an application to the special feature of the present cause which is now under consideration. Can we say whether or not the jury would have decided that the confessions were to be considered if its members had been permitted to pass upon the question whether they were freely and voluntarily made? We certainly cannot say that.' "

Again the court 28 Cal.App.2d at page 313, 82 P.2d at page 515, quotes from People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189, referring to section 4½ of article VI of the Constitution: " ' "* * * we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." ' "

In People v. Long, 63 Cal.App.2d 679, at page 689, 147 P.2d 659, at page 665, the court said "But where grave error has been committed and the reviewing court cannot with a feeling of assurance say that without the error a conviction would have been had, it becomes the duty of the court to reverse the judgment. [Citing cases.]"

[9] While we are unable to determine whether the defendants in the absence of the erroneous matter would have been convicted, we are satisfied "from an inspection of the entire record, including the evidence, that the accused may well have been substantially injured by the error" (People v. Baskins, supra, 72 Cal.App.2d 728, 733, 165 P.2d 510, 512) and that therefore a miscarriage of justice has resulted.

The evidence of corroboration, while sufficient, was not strong. While the corroborating evidence, standing alone, tended to implicate defendants in the crime, it could not be contended that it was sufficient to convict. The conviction is based primarily on the testimony of the accomplice Johnson, an admitted felon, and one whose testimony, by reason of the manslaughter charge pending and the fact that no burglary charge had been filed against him, was, to say the least, open to suspicion. It was a case of his word against that of the two defendants. We cannot say that the fact that the jury was informed that Bundy had theretofore been convicted of a charge of burglary may not have been the determining factor in its choice of whom to believe. Undoubtedly, in view of the use of the word "felony" in the judgment and the district attorney's evident effort to make the offense appear a felony, the jury believed Bundy had been convicted of a felony. They would have no way of knowing that the sentence imposed reduced the offense to a misdemeanor. There is a universal inclination to feel that a man having once committed an offense is more inclined to offend again. A deliberate attempt to get the jury to believe this is shown, not only by the erroneous offer of the prior misdemeanor conviction, but by the following question asked by the district attorney, without any foundation therefor whatever:

"Q. In your discussions did you ever hear a rumor or report that along about September 13th, 1941 in Kansas City, Missouri, Mr. Bundy was in trouble for burglary? A. I never knew Bundy before he was in California.

"Q. I am asking you what you heard about his reputation, did you ever hear a rumor or report he had been in trouble along about that time in Kansas City? A. I have not."

The court instructed the jury that "a witness may also be impeached by proof that he has been convicted of a felony." While this instruction applied to the other witnesses who had admitted prior felony convictions, it also could have been understood by the jury as the court telling them that Bundy had been impeached.

The witness Heath, called as a character witness for Bundy, admitted that he had heard a rumor or report that Bundy had been in trouble for burglary in Los Angeles about November 28, 1944, and testified that Bundy had told him "that he had been in a little trouble * * * and every time somebody got in some trouble about burglary the finger always pointed toward him, and they would put him in jail." Bundy, when asked what he was doing in Los Angeles just prior to coming to San Francisco, stated, "I was in jail." However, all this evidence is far short of showing a conviction of any crime. We have in mind, too, that Brown, who was an associate and friend of both defendants and a character witness in their behalf, was a felon. While the defendants were not particularly choice in their selection of a friend, this fact does not take away the seriousness of the error in proving improperly that Bundy had once been a burglar. Because of the evidence that Bundy had been in jail and that it had been rumored that he had been in trouble in Los Angeles for burglary, the proof of his conviction of burglary may have taken on more weight in the eyes of the jury. At least, we cannot say that it did not.

The only definite evidence that corroborates Johnson's testimony that Hamilton participated in the burglary is the "reasonably positive" identification of him by the service station attendant. Thus, the evidence of corroboration is not so strong against Hamilton as it is against Bundy. In view of that fact, the improper admission of evidence of Bundy's conviction undoubtedly would influence the jury against Hamilton as well as Bundy. The fact that Hamilton associated with the admitted felon Brown would not reduce appreciably the effect of this evidence. Moreover, if the jury were influenced (and we cannot say they were not) by this evidence, in their decision to accept Johnson's story rather than Bundy's they would thereby determine that Hamilton's story would fall with Bundy's.

Of course, as pointed out heretofore, as Johnson was not an accomplice in the burglary of Lester's Market, his testimony did not require corroboration as to the first count. However, the other evidence alone would not have been sufficient to convict, without Johnson's testimony. Hence, in the conflict between Johnson and Bundy, any error which would cause the jury to look with suspicion on Bundy, would assume considerable proportion. There was very little besides the one statement of Hamilton to tie Bundy into the burglary of Lester's Market other than the fact that certain tools were found later on in Bundy's car, while the car was not in his possession, which experts testified were in their opinion used in the burglary. The market was entered on the night of November 6, 1946, or the early morning of November 7, and a safe taken. The safe was later found broken open at a spot on the road about four miles away. On November 11 officers of the San Francisco police saw Hamilton and a man named Marlowe sitting parked in Bundy's Lincoln Zephyr in a service station in San Francisco. On searching the car, a .45 automatic and the following tools were found in it: tire iron, machinist's hammer, lighter machinist's hammer, two pry bars, flash light, tiny cold chisel, wire cutter, and screw driver. Officer Maillard of the San Carlos Police Department testified that the screw driver fitted in an indentation mark on the inside of the door stop of the door at Lester's Market which had been forced open the night of the burglary.

Witness Burd, criminologist with the State Division of Crime Identification and Investigation, testified that certain markings on the safe coincided exactly with test markings which he made with the irregular edge of one of the bars found in Bundy's car; also certain marks on the safe were of the same size and appearance of test marks made with the cold chisel, and in his opinion the marks found on the safe had been made with these tools; also that the screw driver fitted the impression in the wood from the door stop and could have been used to make the indentation.

Both Bundy and Hamilton denied knowing that the tools were in the car, and also denied being in San Carlos the night of the burglary. Both defendants were previously tried and acquitted of the charge of possession of burglar's tools. Bundy claimed that he was at a party at the home of a Hubert Walton in Richmond that night. The witness Heath corroborated him. Hamilton claimed that he was in Chicago, and did not arrive in San Francisco until November 10th.

Johnson testified that as they passed Lester's Market on the night of December 23 Bundy said "We got two grand out of there" and "mentioned there was a nice little safe." It is evident from Johnson's testimony that he intended the jury to infer that by "we" Bundy meant himself and Hamilton. But as Hamilton was not even in California at the time, the jury acquited Hamilton of this charge. Of course, as to this count, the testimony of Johnson did not have to be corroborated, as he did not participate in the crime and therefore was not an accomplice. However, as in the case of the third count, there is sufficient evidence to sustain the conviction, but we cannot say that the jury was not influenced in its determination by the erroneously admitted evidence. As said in People v. Richardson, 74 Cal.App.2d 528, at page 537, 169 P.2d 44, at page 51, "the introduction of evidence merely having a tendency to show that the accused is of a bad character may deprive * * * the defendant of a fair trial." Again, at page 544, of 74 Cal.App.2d, at page 55 of 169 P.2d, "This court is zealous in guarding the constitutional right of every person charged with crime to have a fair and impartial trial. Although the main question in a criminal case is to determine if there is evidence to support the verdict that the defendant is guilty of the crime charged, in the face of the record in this particular case, it must be held that the defendant did not have a fair and impartial trial because of the presentation to the jury of the records of his criminal career * * *."

[10] As the case must be tried over again, it is not necessary to discuss at any length defendants' third point, the failure of the court to instruct as required in subdivision 4, section 2061, Code of Civil Procedure, to the effect that the testimony of an accomplice ought to be viewed with distrust. This instruction should be given even though no request for it is made. People v. Koenig, 29 Cal.2d 87, 173 P.2d 1; People v. Dobkin, 74 Cal.App.2d 269, 168 P.2d 729. Undoubtedly the court will give it.

The orders denying the motions for new trials and the judgments appealed from by both defendants are reversed.

PETERS P. J., concurs.

WARD, Justice.

I dissent.

I agree with the statement in appellants' opening brief: "Appellants freely recognize the rule that if a corpus delicti has been established, in order to justify conviction of the accused, it is necessary only to prove his participation in the crime, and further recognize that an extra judicial admission, coupled with an independently proven corpus delicti, can be sufficient for conviction."

I agree with the conclusion in the majority opinion that on the first count the evidence was sufficient to convict Bundy, and that the credibility of Johnson as an accomplice witness on the third count was a matter for the jury to determine. I also agree that independently of the testimony of Johnson there was sufficient evidence from which the jury could reasonably find that the accomplice's testimony was corroborated.

Each defendant was acquitted on the second count. Hamilton was acquitted and Bundy convicted on the first count. As Johnson did not appear as an accomplice witness to prove the allegations of the first count, the suggestion by appellants that his testimony was not corroborated on the first count need not be considered.

Appellants contend that the failure to instruct the jury as required by Code of Civil Procedure section 2061, subd. 4, was prejudicial error. The subdivision provides: "That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." The majority opinion does not hold that such failure was prejudicial error, but, upon the assumption that there will be a new trial, suggests that such an instruction will undoubtedly be given on the next trial. As I believe there should be no next trial, it is necessary to consider whether the failure to give the instruction was prejudicial.

The trial court should give instructions in accordance with statutory command "on all proper occasions." (Code Civ.Proc., sec. 2061.) However, it may be noticed that in the greater number of decisions the neglect to give such instruction has not been determined to be prejudicial. The neglect of the court to adopt the precise language used in sec. 2061 did not prejudice the rights of either Bundy or Hamilton. The court instructed that it was necessary to corroborate the testimony of an accomplice, which by itself is an indication that the testimony of an accomplice ought to be received with some misgiving and suspicion. The court also instructed: "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant's or an oral confession by him." Finally, the court instructed that a witness may be impeached by proof that he has been convicted of a felony. On the third count Johnson was an accomplice and had been convicted of a felony. Under the last instruction the jury could not only view Johnson's testimony with distrust but could disbelieve it entirely. The statement in People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1, 5, is appropriate here: "In view of the record in this case, however, it is improbable that had this instruction been given, the jury would have discounted this testimony to such an extent that it would have returned a different verdict."

I differ mainly with my associates on (a) the construction placed upon article VI, sec. 4½ of the Constitution of California; (b) whether Penal Code section 17 is controlling over the provisions of Code of Civil Procedure, sec. 2051; and (c) I contend that there is no warrant in law or justification in fact in ordering the reversal of the judgment against Hamilton who was legally and factually not a party against whom the majority view could apply under the provisions of Code of Civil Procedure, sec. 2051 or Penal Code, secs. 17 and 461, subd. 2.

The majority opinion states that "Under section 4½ of article VI of the Constitution, injury or prejudice is never presumed from the mere fact of error, and it must affirmatively appear to the satisfaction of the reviewing court that the accused may well have been prejudiced by the error." The majority opinion also states: "* * * we cannot say that the jury was not influenced in its determination by the erroneously admitted evidence." The evidence referred to is the fact that Bundy had been "convicted" of a felony, namely, burglary in the second degree.

The majority opinion correctly declares that whether an error is prejudicial under the rule set forth in article VI, section 4½ of the Constitution the court shall consider whether the error complained of has resulted in a miscarriage of justice. The majority opinion cites several cases, including People v. MacPhee, 26 Cal.App.

218, 146 P. 522, wherein the court was unable to conclude that the evidence was prejudicial and upon that basis declared an inability to uphold the judgment. The majority opinion in this case states: "While we are unable to determine whether the defendants in the absence of the erroneous matter would have been convicted, we are satisfied 'from an inspection of the entire record, including the evidence, that the accused may well have been substantially injured by the error' * * * and that therefore a miscarriage of justice has resulted." The quotation within the statement made by the majority in this case is from People v. Baskins, 72 Cal.App.2d 728, 165 P.2d 510. The full quotation is also quoted in the majority opinion. As I read the Baskins case, 72 Cal.App.2d at page 733, 165 P.2d at page 512, the foundation and test of the rule is not that an accused may well have been or could have been injured and that any error may be declared prejudicial but "unless the appellate court can say, after such examination, that a miscarriage of justice has resulted the judgment must be affirmed." This construction is borne out by the language used in article VI, section 4½: "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * the improper admission or rejection of evidence, * * * or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Section 4½ also refers to instructions to the jury. In People v. Valentine, 28 Cal.2d 121, at page 146, 169 P.2d 1, at page 16, the main opinion does not mention section 4½, but in a short and vigorous dissent the following appears: "The administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions to the jury. This practice was overly indulged prior to 1911 when the people of this state took the reviewing courts in hand and prescribed the mandate that no misdirection of the jury should cause a reversal unless the error complained of resulted in a miscarriage of justice." It is said in 2 Cal.Jur., sec. 597, pp. 1006–1007: "Under this amendment it is not only within the power but it is also the duty of the appellate court to review the conflicting evidence for the purpose of ascertaining whether or not an error has resulted in a miscarriage of justice." In People v. Dail, 22 Cal.2d 642, 659, 140 P.2d 828, 837, the court said: "In considering the effect of article VI, section 4½ of the Constitution, 'We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence.' People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042, 1046; see, also, People v. Roe, 189 Cal. 548, 561, 209 P. 560. As stated in Tupman v. Haberkern, 208 Cal. 256, 263, 280 P. 970, 973, 'Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section [4½] was to require the court to declare as a matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.'" In Hobart v. Hobart Estate Co., 26 Cal.2d 412, 447, 159 P.2d 958, 977, there appears the following: "In passing upon the sufficiency of the evidence to support the verdict all conflicts must be resolved in favor of the implied findings of the jury, since it is the sole judge of the credibility of the witnesses and the weight of the evidence; but in determining whether a judgement must be reversed because of errors in instructions, we are required to examine the entire cause including the evidence and decide whether in our opinion the errors *have* resulted in a miscarriage of justice." (Emphasis added) See, also, People v. Simeone, 26 Cal.2d 795, 161 P.2d 369; People v. Bender, 27 Cal.2d 164, 163 P.2d 8. In People v. Braun, 14 Cal.2d 1, 7, 92 P.2d 402, 405, it is said: "Whether the misconduct of a prosecuting attorney has prejudiced the substantial rights of a defendant must rest largely upon the facts of each case. An appellate court may only reverse the judgment when it appears from all the facts that there has been a miscarriage of justice, Const., Sec.

4½ art. VI," and not when the court is in doubt.

Primarily upon the basis that there has been a miscarriage of justice, the judgments against Hamilton and Bundy are reversed. There are a few authorities holding that a judgment of conviction should not be sustained if a reviewing court is unable to say whether an error is prejudicial. These cases do not conform to the language used in the Constitution (article VI, sec. 4½) and to the views as expressed in the greater number of decisions by the Supreme Court of this state.

However, in the present case there was no miscarriage of justice for the simple reason that there was no prejudicial error. In fact and in law there was no error.

The prosecuting attorney had the right to ask the defendant whether he had been convicted of a felony. The introduction of the certified copy of the judgment showing that punishment for the felony had been adjudged to be confinement in the county jail instead of the state prison could not prejudice defendant Bundy. The difficulty with this case is that there are a few prior decisions that failed to note the difference between "punishment" for burglary in the second degree (Penal Code, secs. 17 and 461, subd. 2) and that a witness *may be* impeached by evidence that an accused has been previously "convicted" of a felony (Code Civ.Proc., sec. 2051).

A witness may be impeached by the party against whom he is called if it is shown by the examination of the witness that he has been *convicted* of a felony or by the production of the judgment evidencing *such conviction.* Code Civ.Proc., sec. 2051. There are other means or methods approved by judicial decision or legislative enactment whereby evidence of other offenses under certain circumstances may be admissible against one on trial for crime. The citation of a decision approving or disapproving one means, as applied to the facts of a particular case, as authority for the use or non-use of the method or means on any entirely different state of facts may have caused some confusion.

In People v. Peete, 28 Cal.2d 306, 169 P.2d 924, the question of the relevancy of evidence tending to prove other crimes was of great importance. The defendant had been convicted of murder in 1921 and sentenced to the state penitentiary. Subsequently she obtained a release from prison. In 1944 she was charged with a second murder alleged to have been committed after her release. In each case it was the theory of the prosecution that defendant had conceived a definite plan or scheme to obtain money. In the first case her aim had been thwarted. However, there appeared a striking resemblance in the conduct of Mrs. Peete in each case. It was held 28 Cal.2d at page 319, 169 P.2d at page 932, that evidence of a similar motive, knowledge, method of operation and "good faith" on defendant's part was admissible.

The previous conviction had been charged as a "prior conviction" the truthfulness of which is a matter for the benefit of the trial court in imposing "punishment" after "conviction." The entire judgment role was admitted in evidence. In discussing the matter, the Supreme Court as a further reason for the admission of the evidence stated 28 Cal.2d at page 320, 321, 169 P.2d at page 933: "The record of the judgment was admissible in any event to impeach defendant's testimony (Code Civ.Proc., § 2051 * * *) * * * although when no judgment has been pronounced, a conviction may be proved by the record of the verdict (People v. Ward, 134 Cal. 301, 307, 66 P. 372), when a judgment has been rendered, the record thereof establishes the previous conviction beyond dispute, and the record of the earlier proceedings is cumulative. See Code Civ.Proc., §§ 1838, 2044; People v. Peak, 66 Cal.App.2d 894, 913, 153 P.2d 464. Defendant was not prejudiced by the introduction of the record of proceedings preceding the judgment in the Denton case, however, for these proceedings added little information to that related in the judgment. * * * Affirmation on appeal as relevant, however, to a determination of the weight to be given on a previous conviction. See People v. Hardwick, 204 Cal. 582, 589, 269 P. 427, 59 A.L.R. 1480. Such a conviction may be shown by examination of the witness to impeach him. Code Civ.Proc., § 2051." It must be noted that the "whole" judgment roll, including the affirmation on appeal was admitted. Of course the record of a judgment "establishes the previous conviction beyond dispute" when the "conviction" and the "judgment" are in perfect accord, as in the Peete case, and therefore one might be considered merely cumulative evidence of the other. There is no reference in the Peete case to section 17 of the Penal Code to the effect that the "judgment" or the "commitment" and not the "conviction" is the ground work for impeachment.

Another instance wherein evidence of "other offenses" may be referred to when there has not been a conviction therefor is "reputation evidence." A witness may be impeached by evidence that his reputation for truth, honesty or integrity is bad but not by evidence of a particular wrongful act. Sec. 2051. However, it is not evidence of the conviction or even of the commission of an act that may tend to impeach under this part of the provisions of the section, but it is the repute in which the party is held that may be considered. It is the repute and not the commission of a wrongful act that constitutes "reputation."

In a case wherein the defendant charged with burglary placed his reputation in issue by calling witnesses to testify as to his "honesty and integrity as a law abiding citizen," it was held proper to refer to the offenses. "On cross-examination they were asked by the district attorney whether they had ever heard 'that the defendant was charged with burglary in the city and county of San Francisco in February, 1899,' and also whether they had heard 'that he was convicted of petit larceny on February 20, 1899, before the police court of the city and county of San Francisco.'" People v. Perry, 144 Cal. 748, 750, 78 P. 284. The purpose of such examination is to determine the credibility of the accused. People v. Gordan, 103 Cal. 568, 569, 573, 37 P. 534; People v. Mayes, 113 Cal. 618, 624, 45 P. 860.

In a case wherein a witness has been convicted of a felony and such fact is sought to be proven as a method of weighing the testimony of the witness so "convicted", if the record of the judgment should be produced all that is necessary to ascertain is whether the party whose impeachment is sought has been "convicted of a felony." Any recitation of the punishment meted out to the party is of no consequence in determining the credibility of a witness. "That such verdict does constitute a conviction, within the ordinary as well as the technical meaning of the word, seems to be well settled. Blackstone (book 4, p. 362), after speaking of the verdict of acquittal, says: 'But if the jury find him guilty, he is then to be convicted of the crime whereof he stands indicted; which conviction may accrue two ways,—either by his confessing the offense and pleading guilty, or being found so by the verdict of his country.' * * * In U. S. v. Gibert, Fed.Cas.No.15,204, 2 Sumn. 19, 40, Story, J., said: 'And here, in order to avoid ambiguity, it may be proper to state that conviction does not mean the judgment passed upon the verdict; but, if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted.' See, also, Bouv. Law Dict., and cases there cited, especially Commonwealth v. Lockwood, 109 Mass. [323] 325, 12 Am. Rep. 699, and Nason v. Staples, 48 Me. [123] 126. The words 'convict' and 'conviction' are used in the Penal Code in the sense above stated. 'A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or an acquittal of the offense charged in the indictment.' Pen.Code, § 1151. 'Whenever the crime is distinguished into degrees, the jury, if they *convict* the defendant, must,' etc. Pen.Code, § 1157. At common law persons convicted of an infamous crime were *incompetent* to testify, and this incompetency was required to be shown by the record which included the judgment. * * * Our statute does not in any manner affect the competency of the witness. It does not brand him as 'infamous,'—a quality determined by the character of the punishment inflicted. It deems him still capable of telling the truth, but permits the fact of conviction to be shown as a side light upon his moral character, thus affecting his credibility." (People v. Ward, 134 Cal. 301, 307, 308, 66 P. 372, 374. People v. Ward was approved unanimously by the present Supreme Court in People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692, 696, where it is said: "In this state the testimony of a witness may be impeached by proof that he has suffered the prior conviction of a felony. Code Civ. Proc., § 2051. This rule applies to a defendant who testifies in his own behalf in a criminal trial despite the fact that such evidence may tend to prejudice him in the eyes of the jury. People v. La Verne, 212 Cal. 29, 32, 297 P. 561; People v. Romer, 218 Cal. 449, 452, 453, 23 P.2d 749. The nature of the crime of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction. People v. David, 12 Cal. 2d 639, 646, 86 P.2d 811, and cases there cited. *That a 'conviction' for purposes of impeachment means nothing more than a verdict of guilty* is firmly held in People v. Ward, 134 Cal. 301, at page 307, 66 P. 372 at page 374." (Emphasis added)

It is true that in the Williams case, after approving the doctrine in the Ward case, the court uses certain language primarily based upon a statement found in In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237, wherein Penal Code section 17 is quoted. Section 17 was not applicable to the facts of People v. Williams. This is recognized by the Supreme Court 27 Cal.2d on page 231, 163 P.2d on page 697, the last page of the Williams decision, as follows: "In either case proof of the defendant's unchanged status with regard to his prior conviction of a felony is the governing factor for impeachment purposes. * * * But, as above stated, here defendant's prior felony conviction was unaffected as the result of the order of commitment to the Preston School of Industry, since it did not involve 'penal punishment.' People v. De Fehr, 81 Cal.App. 562, 572, 254 P. 588."

The facts in In re Rogers, supra, do not have the slightest bearing upon the question of impeachment. Code Civ.Proc., sec. 2051. The question presented involved the determination of Rogers' status as an habitual criminal. Penal Code, sec. 644. On page 400, of 20 Cal.App.2d, on pages 1237, 1238, of 66 P.2d, the court, referring to Penal Code section 17 said: "By the provisions of that section a felony punishable by either imprisonment in the state prison, or in the county jail, in the discretion of the court, after such *punishment* 'other than imprisonment in the state prison,' shall be deemed to be a mere misdemeanor." The court in the Rogers case, 20 Cal.App.2d at pages 400, 401, 66 P.2d at page 1238, had in mind that section 17 is applicable in fixing punishment for a subsequent offense: "It remains a felony for all purposes except that *'after a judgment* imposing a punishment other than imprisonment in the state prison,' it shall thereafter be deemed to be a mere disdemeanor. One of the chief reasons for this change in the nominal character of the offense as a result of imposing a jail sentence is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a *prior conviction* of a felony for the purpose of increasing the penalty for a subsequent crime." (Second emphasis added.)

Penal Code section 644 provides that criminals who have been previously twice "convicted" or three times "convicted" and who have "served" separate terms therefor in a state prison as punishment, are habitual criminals and may have "judgment" pronounced of imprisonment for life. Among other purposes Penal Code section 17 is pertinent to sec. 644 as one of its objects is to determine the effectiveness of punishment. Punishment is meted out by judgment and sentence. Under the provisions of section 644 an accused charged with a felony, convicted of a felony but sentenced to fine or imprisonment in the county jail shall be deemed to be in the misdemeanor class "for all purposes" after a judgment. This applies to "punishment" but not to "credibility." However in the matter of punishment the rule does not seem to be without elasticity. In People v. Clapp, 67 Cal.App.2d 197, 153 P.2d 758, a former conviction was set forth after the indictment charged the later offense. At page 200 of 67 Cal.App.2d at page 760 of 153 P. 2d, the court said: "Appellant contends that at the time of the filing of the information and at the time of the trial he had not been convicted because his judgment of conviction in the former case was on appeal. This contention has been disposed of repeatedly. People v. Ward, 134 Cal. 301, 66 P. 372; Ex parte Brown, 68 Cal. 176, 8 P. 829;

People v. Acosta, 115 Cal.App. 103, 1 P.2d 43. The jury, or the court where a jury has been waived, convicts the accused. Penal Code, §§ 689, 1157. Conviction does not mean the judgment based upon the verdict, but it is the verdict itself. People v. Ward, supra, 134 Cal. at page 308, 66 P. 372. It is the ascertainment of guilt by the trial court. People v. Acosta, supra. A person has been convicted even though the judgment should be suspended during appeal, Ex parte Brown, supra, or while the convict is on probation. People v. Christman, 41 Cal.App.2d 158, 106 P.2d 32. In the case of People v. Braun, 14 Cal.2d 1, 92 P.2d 402, it was held that although an adverse judgment in a former case was on appeal a prior conviction might be shown for the purpose of impeachment. A judgment though not final may be proved for any purpose for which it is effectual. People v. Braun, supra; McKannay v. Horton, 151 Cal. 711, 721, 91 P. 598, 13 L.R.A.,N.S., 661, 121 Am.St.Rep. 146. The courts of other jurisdictions have likewise upheld the practice of alleging the prior conviction even though the judgment based thereon was on appeal at the time of the trial for the second offense. State v. Eisminger, 124 Kan. 464, 260 P. 661; State v. Smith, 128 Ore. 515, 273 P. 323; People v. Morlock, 234 Mich. 683, 209 N.W. 110; Shaffer v. State, 124 Neb. 7, 244 N.W. 921."

Penal Code section 17 is found in that part of the code generally providing for "punishment." If it was the intention that one convicted of a felony but sentenced to the county jail could not be impeached under the provisions of Code of Civil Procedure section 2051 it would have been an easy matter to insert such provision in the section.

"For all purposes" is similar but not quite as broad as the phrase "for any purpose whatever." In Douglass v. Mayor of Placerville, 18 Cal. 643, 649, the court said: "The general phrase, 'for any purpose whatever,' was obviously not meant to extend the taxing power to objects foreign to the corporation, but to limit that power, except in a given event, even in respect to corporate objects; the meaning of the phrase being as if it read, 'for any object whatever within the purview of the corporate powers before given.' The rule of construction is that general words in a proviso limiting or qualifying a previously granted power are never to be construed as an enlargement of the power." See, also, 17 Words and Phrases, Perm.Ed., page 228. An exception was made of the term "for all purposes" in People v. Williams, supra, where the defendant had been asked whether he had ever been convicted of a felony, and the holding was that a previous commitment to the Preston School of Industry was not a judgment imposing a punishment other than in a state prison. As stated in People v. Williams, supra, the confinement was not in the county jail. The latter language was not necessary to determine the problem in the Williams case. It is primarily upon this language that the majority of this court rest the conclusion that if one is convicted of a felony but punished by confinement in the county jail it is prejudicial error to ask the witness if he has been convicted of a felony as a ground work for impeachment. Sec. 2051, Code Civ.Proc. If the majority view is correct and likewise People v. Williams, a minor convicted of a felony—burglary in the second degree—but sent to a reformatory may be asked upon a trial for a subsequent offense whether he has been convicted of a felony; but to ask the same question of an adult convicted of the same offense in a like degree who has been sentenced to the county jail results in prejudicial error.

However, section 17 has been amended. It now provides that when a defendant is committed to the "California Youth Authority" it makes no difference whether the crime of which the youth has been "convicted" is punishable by imprisonment in the state prison or by fine or by *imprisonment in the county jail,* the crime may be a *felony* in the discretion of the court. There is a provision that the crime upon which the youth was "convicted" may be under certain circumstances subsequently declared a misdemeanor—after the youth has been discharged from control. Stats.1947, Ch. 826, sec. 1.

I am convinced that there was no legal error on the part of the prosecuting attorney. In 1932 this court declared the difference between a conviction and the pronouncement of judgment. "As pointed out in Corpus Juris (volume 16, pp. 1266, 1267), the conviction on the merits relates to a plea or verdict of guilty, either of which ascertains and publishes the fact of guilt; while the pronouncement of the judgment of sentence denotes the action of the court in declaring the consequences of the fact thus ascertained. In other words, the sentence is no part of the conviction, but is based thereon." Plum v. Becket, 120 Cal.App. 507, 508, 510, 7 P.2d 1111, 1112. In passing it may be well to once more note that Code of Civil Procedure section 2051 does not provide that a witness *is* impeached but that a witness *may be* impeached by proof that the witness has been convicted of a felony.

The majority opinion cites People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44, 52. It was held in that case that a misdemeanor conviction may not be recognized as a "prior conviction within the meaning of Penal Code sec. 644." It was also held that the voluminous evidence introduced of the bad character of the accused deprived him of a fair trial. Such evidence consisted of several large pages noting the arrests of the defendant on numerous misdemeanors. It was an historical account of arrests, some without prosecution or even filing a complaint, which was no part of the proof of the prior conviction set forth in the information. In criminal parlance it was a "rap sheet."

The acquittal of Bundy and Hamilton on the second count, and the conviction of Bundy and acquittal of Hamilton on the first count indicate that the jury was not misled by any statement made by the prosecuting officer. Johnson was an ex-convict, but if he testified, as suggested by appellants, against Bundy because he feared the district attorney, it would have been an easy matter for him to relate the admissions of guilt made by Bundy as coming in part from Hamilton.

The reversal of the Bundy judgment by the majority of this court raises quite a problem as to the disposition of co-defendant Hamilton's appeal. The evidence shows that on the only count upon which Hamilton was convicted Bundy was the planner, the manipulator, the director of the three parties involved. It was Bundy who engaged Johnson to aid in the burglary; it was Bundy who rode alone from one county to another, with Hamilton and Johnson following. It was Bundy who first arrived at the premises selected for the burglary. It was Bundy who entered first and went outside again to bring Hamilton in. Bundy was the leader in this nefarious enterprise.

During the trial it was in the interest of Bundy and Hamilton that witnesses—one an ex-convict—testify to the good character of defendants. On appeal the points raised are primarily in the interest of Bundy. The reason upon which the majority of this court reverse the judgment is based upon an impeaching question applicable only to Bundy. Attention is also called to the "fact that Hamilton associated with the admitted felon Brown. The evidence shows that "felon Brown" was called as a witness on behalf of the defendants Bundy and Hamilton, and testified: "I haven't known him [Hamilton] as long as I have Bundy."

It is a hard task to reverse the judgment in favor of Bundy and affirm the judgment against Hamilton. The majority opinion holds that the alleged improper admission of evidence of Bundy's conviction undoubtedly would influence the jury against Hamilton. There was no special objection presented by Hamilton that he would be prejudiced by the evidence of Bundy's former conviction. The appeal appears to be in the interest of Bundy. The majority opinion makes no reference to the matter except to state its conclusion that "undoubtedly" it influenced the verdict against Hamilton. If this rule is permitted to stand, *all* co-defendants should be entitled to a reversal of a judgment of conviction if a ruling is made by a reviewing court that the court is unable to determine as to one defendant whether a miscarriage of justice has occurred.

83 Cal.App.2d 400

DE MIRJIAN et al. v. IDEAL HEATING CORPORATION.

Civ. 15878.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1948.

1. Landlord and tenant ⚷101

Under provision in lease for its termination in event of fire causing such damage that premises could not be restored for less than 50 per cent of fair value prior to fire, provided that in case of disagreement as to extent of damages, lessors should designate architect to make final determination, report of architect who did not know that he had been designated under the lease that building was damaged "75 per cent" did not establish lessor's right to termination.

2. Appeal and error ⚷1011(1)

Under lease providing for its termination in event of fire causing such damages that premises could not be restored for less than 50 per cent of fair value prior to fire, where evidence of extent of damage was conflicting, trial court's finding could not be disturbed.

3. Landlord and tenant ⚷291(10)

In unlawful detainer action by lessors who relied on provision in lease for its termination in event of fire causing such damage that premises could not be restored for less than 50 per cent of fair value prior to fire, evidence by lessee as to extent of damage was properly admitted.

◆

Appeal from Superior Court, Los Angeles County; B. C. Hawkins, Judge.

Action by George DeMirjian and others against the Ideal Heating Corporation for unlawful detainer. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Pearlson & Singer, of Los Angeles, for appellants.

John W. Preston and Morris Bordon, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by plaintiffs from an adverse judgment in an action for unlawful detainer. Plaintiffs are the successors in interest of the original lessors, who leased certain real property in the City of Los Angeles to defendant corporation for a period of five years with an option to renew for an additional five years, which option the defendant exercised. On April 12, 1946, while the lease was in force under the renewal and the defendant was in possession, the premises were damaged by fire, whereupon the plaintiffs, purporting to act under the provisions of the lease, demanded that defendant surrender possession and made a tender of unearned rent. Possession being refused, this action was commenced.

Paragraph 16 of the lease reads in part as follow: "Should said premises, or the building of which they are a part, be wholly destroyed by fire or other calamity; or be so greatly damaged during the first five (5) years of this lease that they may not be put in their former state of repair for less than fifty per cent of the fair value thereof immediately prior to such fire or other calamity and within thirty working days thereafter; * * * then, upon tendering to Lessee all unearned rental heretofore paid Lessors by it, calculated at a daily rate based on the regular monthly rate, Lessors may forthwith terminate this lease, and re-enter and take possession of said premises and remove all persons therefrom. However, in the event of such partial destruction, other than during said last twelve months of the term hereof, and if such restoration may be made at less expense than said fifty per cent of the fair value thereof immediately prior to such fire or other calamity, and within said thirty working days, or should said premises or building be less than fifteen per cent damaged during the last twelve months of said term, then Lessors shall with reasonable diligence effect such restoration and redeliver said premises to Lessee under the provisions hereof and during the time required for restoration a like proportion, to that portion of the premises damaged or destroyed, of rental to be paid by Lessee hereunder shall be rebated or abated to it. * * * *It is agreed that unless the parties to this lease can and do agree forthwith upon the extent and amount of damages and the time required for repair and restoration, Lessors shall promptly designate a certified architect of the City of Los Angeles who shall determine the extent and amount of the damages and the time required for repair and restoration and whose determination shall be final and binding upon the parties to this lease; provided, always, however, that the architect so appointed must be responsible, experienced, and as regards both Lessors and Lessee, disinterested."*

By their complaint plaintiffs alleged that the lease had "become terminated, voided and nullified by reason of the said premises being approximately eighty-five per cent (85%) destroyed by fire as provided and set forth and caused as stated in Paragraph 16 of said lease. * * *". The complaint contained no allegation as to the appointment of an architect to determine the extent of the damage, as provided for in the last sentence of Paragraph 16 of the lease. By its amended answer defendant denied that the premises were 85% destroyed and alleged that the damage amounted to less than 30% of the fair market value of the premises immediately prior to the fire, and also that the premises could be restored within 30 working days immediately following the fire. By a separate defense defendant alleged that the parties failed to agree upon the extent of the damage or the time required to repair; that plaintiffs failed to appoint an architect as required by Paragraph 16 of the lease and that no determination of the damage and the time required to restore the premises was made prior to the commencement of the action.

The trial court found that the partial destruction "was in an amount of less than 50% of the reasonable value of said premises at the time of the fire" and that "said premises can be repaired to its condition immediately before the fire within thirty working days from the date of the fire"; and that "it is untrue that the lease referred to in plaintiffs' complaint has become terminated, voided and nullified by reason of the provisions contained in Paragraph 16."

Appellants contend that they have complied with the provisions of Paragraph 16 providing for the appointment of an architect to determine the extent of the damage, and that his determination, in the absence of fraud or undue influence, is conclusive. Respondent contends that under the evidence, the architect designated by the lessors made no such determination of extent of damage or time required for repair as is required by the lease. Respondent's contention, in our view, is well taken, and is determinative of the case.

The fire took place on April 12, 1946. On April 15, 1946, plaintiffs served upon defendant a notice of termination of the lease upon the ground that the building was damaged more than 50% of its fair value and could not be repaired within 30 working days. The notice contained no reference to designation of an architect. Defendant replied on April 18, stating that "The Ideal Heating Corporation disagrees with your conclusions" as to the extent of the damages, refusing to accept the tender of unearned rent, and demanding that lessors take immediate measures to restore the building. The action was commenced May 16, 1946.

[1] At the trial, plaintiffs produced as a witness Mr. Saunders, a certified architect, who testified that he had designed the building in question six or seven years previously; that he examined the building a week or ten days after the fire, and on April 24 sent to plaintiffs a written report, as follows: "In response to your request for an estimate of the percentage of fire damage to the Ideal Heating Company at 807 East Gage, I would estimate the damage at 75%."

Mr. Saunders further testified as follows: "I had no idea that I was doing anything more than adjusting insurance. * * * I supposed it was for insurance. I didn't ask particularly about it. * * * I went down with Mr. Koll to see the building and I supposed in the first place I was going simply to replace the building and *I knew of no controversy.* * * * I didn't appreciate that there was any different objective than the insurance. * * * (On cross-examination) I have very little recollection except that I was asked to give a valuation of the property and I simply supposed it was an insurance valuation for the insurance man and I answered it to the best of my ability and typed it and signed it. Q. Who paid you for the certificate or for this statement? A. I didn't ask anybody anything for that. I just made that statement thinking it was for the insurance company."

It thus appears that Mr. Saunders was not aware of the function he was supposed to perform in connection with his examination of the building. He did not know that he had been "designated" to determine whether the damage amounted to 50% of the "fair value" of the premises just prior to the fire. His report stated merely that the building was damaged "75%". This could be taken as meaning that the labor and material required for restoration would amount to 75% of the original labor and materials put into the building. It does not amount to a decision that the cost of restoration would amount to 50% of the "fair value" immediately prior to the damage. An examination of Mr. Saunders' testimony discloses that he steadfastly refused to pose as an expert as to the "fair value" immediately prior to the fire; and although the trial court ultimately held that he was qualified to testify as to such value, the witness at one time said, "I think that is a real estate man's job. * * * I can tell you the reasonable cost of replacing the building or the reasonable cost of rebuilding the building new, but what some man should conclude he should pay for the building and pay an inflation price, why those things are changing too fast for the architect to tell."

As was stated by the trial judge, "it is not a question of percentage of *destruction* but the percentage of *value.*" True, under the terms of Paragraph 16, defendant could not complain of the decision of a "responsible, disinterested and experienced" architect (and there is no question as to Mr. Saunders' qualifications in that regard); but when the plaintiffs themselves show by the testimony of their architect that he was not informed of the purpose for which he was appraising the damage and did not determine the damage in terms of the percentage of the fair reasonable value of the property before the fire, and did not at any time have an opinion as to the fair reasonable value of the property before the fire, it must be held that the trial court correctly concluded that plaintiffs had failed to prove their right to a termination of the lease under the last sentence of Paragraph 16.

[2,3] Our decision on this point disposes of the case. So far as the question of whether in fact the premises actually were damaged more than 50% of their fair reasonable value is concerned, the evidence was conflicting, and in accordance with well-established rules, the finding of the trial court on this point cannot be disturbed. The contention that the court erred in admitting evidence by defendants as to the extent of damage is without merit. Plaintiffs' complaint was based on the charge that the damage exceeded 50%; they did not by their complaint rely upon compliance with the provisions of the last sentence of Paragraph 16 requiring the designation of an architect, but stood upon the assertion that the damage exceeded 50% and would require more than 30 working days to repair. Having tendered this issue, they may not complain that evidence was admitted thereon. Although not necessary to this decision, it may well be doubted whether plaintiffs' complaint stated a cause of action, in that it failed to set forth a compliance with the provisions of the lease requiring the designation of an architect. But in any event, the finding of the trial court that the lease was not terminated under the provisions of Paragraph 16 thereof finds ample support in the evidence.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

83 Cal.App.2d 333

DUZE v. SOUTH ELSINORE MUT. WATER CO. et al.

Civ. 3477.

District Court of Appeal, Fourth District, California.

Jan. 22, 1948.

Hearing Denied March 18, 1948.

1. Waters and water courses 🔑252

Articles of incorporation authorizing water company to acquire wells, reservoirs, pipe lines, and waterworks for distributing water to its stockholders as should be provided by by-laws did not require company to deliver stockholder's share of water at highest point on his land, where for over 30 years company had delivered water only at its existing pipe lines and by-laws provided that stockholders should share equally in available water in proportion to shares of stock owned and not as to amount of land owned.

2. Waters and water courses 🔑263

Where water company was under no obligation to deliver water to stockholder at highest point on his land, stockholder was not entitled to recover damages allegedly sustained because of failure to furnish water in such manner during a specified crop year.

3. Appeal and error 🔑882(18)

Where directors of defendant water company made formal written offer to plaintiff, a stockholder, to supply water to him within 50 feet of his land and corporation presented to trial court a copy of such formal offer with affidavit showing water to be available at point 250 feet from plaintiff's land and that defendant was preparing to bring water within 50 feet of the land, judgment requiring company to deliver water within 50 feet of plaintiff's land and refusal of defendant's motion for leave to file answer setting forth facts shown was not prejudicial to defendant.

4. Appeal and error 🔑882(18)

In action by stockholder in mutual water company to compel delivery of water to him, granting plaintiff's prayer to enjoin company from selling plaintiff's stock in company for nonpayment of assessment for repairs and improvements until compliance with order requiring company to deliver water to stockholder, which had been invited by company's own actions, was not error.

Appeal from Superior Court, Riverside County; Elmer W. Heald, Judge.

Action by Irvin Duze, doing business as Duze Company, against South Elsinor Mutual Water Company and others for a writ of mandate directing defendants to supply and deliver water to plaintiff's land and to the highest point thereon, to enjoin defendants from selling plaintiff's stock in defendant water company because of his failure to pay assessments levied thereon until company should deliver water to him at highest point on the land, and for damages allegedly sustained because of failure to furnish water in such manner during the crop season of 1945. From parts of a judgment directing issuance of writ of mandate directing defendants to supply water within 50 feet of plaintiff's land, restraining defendants from selling plaintiff's stock for default in payment of assessments until defendants complied with writ of mandate, and denying plaintiff's third cause of action for damages, plaintiff and defendants separately appeal.

Affirmed.

Joe Wapner, of Los Angeles, for plaintiff

William A. Wood, of Riverside, for defendants.

BARNARD, Presiding Justice.

This is an action by a stockholder in a mutual water company to compel the delivery of water to him in a certain manner.

The defendant corporation was organized in 1912, and since that time has supplied water to its stockholders for domestic use, and for irrigation use upon lands within a certain area, although its name was changed to the present name in 1917. The company has certain wells, pumping plants, reservoirs and pipe lines extending through various portions of the area within the district it was designed to serve.

Since 1917, the company has relaid some of these pipe lines as they have worn out but, until after the trial of this action, has not extended these pipe lines or laid new ones. Since 1917, the company has not built any pipe lines to the property of its stockholders, and any additional pipe lines for the purpose of serving water to lands not previously served have been laid by the property owners and not by the company.

In August, 1944, the plaintiff purchased certain land at the edge of the area designed to be served by the company, and on higher ground which had not theretofore been served with irrigation water. The higher part of his land is from 75 to 100 feet higher than the lower portion. He also acquired certain shares in the defendant company. The company serves him with domestic water through a smaller pipe line, but irrigation water has never been furnished to any part of that land. The plaintiff attended a meeting of the defendant's board of directors in September, 1944, and in response to his request that irrigation water be furnished to him upon his land he was told that if he would lay his own line to hook up with the company system he would receive his proportionate share of available water.

In 1943, the company had secured a loan from the Farm Security Administration for the purpose of developing additional water facilities and for certain improvements. It was planned, among other things, to install a new well some 3000 feet from the plaintiff's land and to install a pipe line to a reservoir above plaintiff's land to serve lands in that area. The funds proved insufficient to complete the improvements planned. This new well was installed but a pipe line and reservoir could not be built, and a further loan was applied for which had not been received at the time of the trial. On September 22, 1945, the company levied an assessment on its stock for the purpose of making further repairs and improvements to its system.

On October 10, 1945, the plaintiff brought this action against the water company and its officers. The first cause of action sought a writ of mandate directing defendants to supply and deliver water to the plaintiff's land and to the highest point thereon. The second cause of action asked that the defendants be enjoined from selling the plaintiff's stock by reason of his failure to pay the assessment levied until such time as the company should deliver water to him at the highest point on his land. A third cause of action was for damages claimed to have been sustained by reason of the company's failure to furnish water in this manner during the crop season of 1945.

After a trial, the court entered a judgment directing the issuance of a writ of mandate requiring the defendants to supply and deliver water to within 50 feet of the plaintiff's land; restraining the defendants from selling the plaintiff's stock for default in the payment of assessments until such time as they had complied with the writ of mandate; and denying the plaintiff any relief on his third cause of action. The plaintiff and the defendants separately appealed from portions of this judgment. For convenience, the defendant corporation will be referred to as the defendant.

[1] On his appeal the plaintiff first contends that the articles of incorporation and by-laws of the defendant constitute a contract between him and the defendant; that it conclusively appears from this contract that the defendant was in duty bound to supply his share of water to him and to deliver that water to him at the highest point on his land; that the contract is capable of no other interpretation; and that the court erroneously misconstrued the contract in refusing to grant the requested relief to require the defendant to deliver his share of the water at the highest point on his land. He relies on the provisions of the articles of incorporation of the defendant, which state that the corporation may acquire wells, reservoirs, pipe lines, and other works "for distributing water, and furnishing and delivering water for irrigation and domestic uses to its Stockholders upon such lands as may come under the water system of said Corporation, as shall be provided in the by-laws thereof" and also "To engage in the business of distributing, supplying and deliver-

ing water for irrigation and domestic use. Said water to be distributed, supplied or delivered to owners of capital stock of this Corporation," and to provisions of the by-laws reiterating these purposes and providing that the water shall be delivered "through the pipe lines and conduits of the Company for actual use of the Stockholders."

If these provisions of the articles of incorporation and by-laws were alone considered the plaintiff's novel contention could not be sustained. If such a rule had been applied, few irrigation districts and water companies could have survived and the irrigation development of the state would still be in its infancy.

Aside from the proper interpretation of the provisions thus relied on by the plaintiff, he ignores other provisions of the by-laws. The by-laws also provide that the stockholders shall share equally in the available water in proportion to the shares of stock owned, and not to the amount of land owned or irrigated; that the available water shall be deemed to be the amount capable of actual delivery through the lines of the company; that the water represented by the shares of stock shall not be appurtenant to any specific parcels of land; that the directors may require the stockholders to designate each season the particular land upon which they propose to use their water; and that "the water produced or delivered by this Company shall only be used by its Stockholders, upon such land as shall be under the flow of the pipe lines or conduits of the Company, and upon which water can be delivered from the mains, conduits, gates and turnouts of the Company, without extra expense to the Company."

Moreover, the uncontradicted evidence very conclusively shows that during a period of at least thirty years the company had delivered water only at its existing pipe lines; that in no instance had it delivered water to stockholders by constructing at its own expense facilities designed to take water to the property of a particular stockholder; that in a number of instances it had refused to make such installations for the benefit of individuals, including company officers; and that in all cases stockholders had been required to build their own connecting lines where such were necessary. This custom and usage had been known and acquiesced in by all stockholders for many years. This usage and practice is fully confirmed, even by the few excerpts from the minutes of the corporation which were introduced in evidence by the plaintiff. The plaintiff argues that this usage was not binding upon him since it was not shown that he knew of it. The only inference which may reasonably be drawn is that this usage and practice was known to all of the stockholders for many years, and it must have been known to plaintiff's predecessor. It fully appears that he purchased his stock without making any investigation of any kind as to the method or manner in which the business of the corporation was being, and had been, conducted.

While the judgment in this respect may have been too favorable to the plaintiff it is not vulnerable to the attack made upon it by the plaintiff, to the effect that it does not go far enough and that it should have required the defendant to deliver water to him at the highest point on his land.

[2] The plaintiff further contends that the evidence is not sufficient to support that part of the judgment denying him relief on his third cause of action. This contention is without merit, both because the defendant was under no obligation to deliver water to the plaintiff at the highest point on his land and because the evidence on the damage issue fully supports the court's finding and judgment in that regard.

[3] The defendant gave notice of appeal from that portion of the judgment requiring it to deliver water to a point not more than 50 feet from the plaintiff's land, and from that portion of the judgment restraining it from selling the plaintiff's stock for nonpayment of assessment until it had complied with the other order. Neither of these matters are directly presented in defendant's brief. It is contended, however, that the trial court abused its discretion in denying defendant's motion for permission to file a supplemental answer.

It appears that at the time this case went to trial the nearest point on defendant's system at which the plaintiff could take irrigation water was several thousand feet distant from the plaintiff's land. After the trial but before a judgment was entered, the defendant had extended its system to a point 250 feet from the plaintiff's land. On July 2, 1946, the court filed a written opinion indicating an intention to enter a judgment requiring the defendant to supply water to the plaintiff at a point which was at a reasonable distance from plaintiff's land and from which the plaintiff might construct a necessary connecting line without unreasonable expense to himself. On August 1, 1946, an amendment to this opinion was filed changing the requirement just referred to so that the defendant should be required to furnish water at a point not more than 50 feet from the plaintiff's land. Apparently, the defendant had theretofore offered to do this and thereafter, under date of August 12, 1946, the directors of the defendant made a formal written offer to the plaintiff to supply water to him at a point 50 feet from his land. Thereafter, the defendant presented to the court a copy of this formal offer with certain affidavits showing that water was then available at a point 250 feet from plaintiff's land, and that the defendant was prepared to bring this water to a point within 50 feet of said land at the plaintiff's request, together with a copy of a proposed supplemental answer setting forth the same facts. The court later made an order denying permission to file this answer and entered judgment as above set forth.

[4] In view of the fact that the court adopted and inserted in its judgment the things which the defendant desired to allege in its supplemental answer no possible prejudice to the defendant resulted. No reason appears in law or in fact for the court's action in requiring, by its judgment, that the defendant delivered water to a point not more than 50 feet distant from the plaintiff's land, other than the fact that an offer to do this had been brought to the attention of the court. If there be error in this respect, in the court's judgment, it was invited by the defendant. The judgment is in accordance with the request made by the defendant and no prejudice appears. This was an equity case and no reason is assigned why the court should not have restrained the sale of the plaintiff's stock for the nonpayment of this assessment until the other order, invited by the defendant, was complied with.

Another point raised by the defendant is without merit and a further point is immaterial under the facts now existing.

The judgment is affirmed, each party to pay its own costs on appeal.

GRIFFIN and MARKS, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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